

DATE: October 31, 2007

In re:)
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 -----) ISCR Case No. 07-01172
 SSN: -----)
)
 Applicant for Security Clearance)
)
)

**DECISION OF ADMINISTRATIVE JUDGE
ARTHUR E. MARSHALL, JR.**

APPEARANCES

FOR GOVERNMENT

Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

_____ Applicant is a 53-year-old engineer working for a defense contractor. Married to a Chinese national and with in-laws who are residents and citizens of China, he introduced no evidence and presented scant argument mitigating foreign influence security concerns. Clearance is denied.

STATEMENT OF THE CASE

On June 7, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR). That SOR detailed reasons why, pursuant to Guideline B (Foreign Influence), it could not make the preliminary affirmative finding under the

Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. In his response, dated June 28, 2007, Applicant denied he “fit the profile detailed in Guideline B,” but admitted to two of the three sub-allegations contained in the SOR. He denied the third sub-allegation with an explanation. Additionally, he requested an administrative determination based on the written record.

The Government’s case was submitted on July 26, 2007, and a complete copy of the file of relevant material (FORM)¹ was provided to Applicant. He received a copy of the FORM on August 6, 2007, and was afforded the opportunity to file objections and submit evidence in refutation, extenuation, or mitigation. He submitted additional information in the form of a two-page document, dated August 24, 2007, and received on August 27, 2007. That submission was made part of the record without objection from the Government. I was assigned this case on October 5, 2007.

FINDINGS OF FACT

Applicant’s admissions to two of the three allegations set forth in the SOR are incorporated herein. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is a 53-year-old engineer. He served in the U.S. Navy from 1972 through 1978, when he was honorably discharged. From 1978 through 1982, he attended college. In May 1982, he received an Associate’s Degree in Science (Electronics). He has worked as an engineer since at least the mid-1980s. During most of his professional life, he has worked on sensitive military programs. At one point in his career, he held a higher security clearance than the one sought herein without incident. He has worked as an engineer for his current employer, a defense contractor, since October 2004.

In March 2003, Applicant met his future wife. She was an immigrant from the People’s Republic of China, a communist country, and had been in the U.S. as a registered alien since December 2001. She is not a communist and she holds no favorable feelings for that government. When they met in March 2003, she was in her early-30s and working in a Chinese restaurant in a small U.S. city. He was immediately attracted to her and returned to the restaurant several times just to see her. Although he spoke no Chinese and her English was limited, they were soon conversing as best they could when she was between customers. In June 2003, he asked her out on a date. They enjoyed each other’s company, and the two were engaged in November 2003. They were married on March 4, 2004. On September 26, 2005, she was granted permanent resident status. She intends to apply for citizenship as soon as she is eligible to do so in September 2008. In the interim, however, she remains a legal citizen of China.

¹ The Government submitted five items in support of its case.

The parents of Applicant's wife are deceased. She has an uncle and aunt who are citizens and residents of the United States. Remaining in China as citizens and residents are Applicant's brother-in-law and sister-in-law.²

Applicant's wife maintains telephonic contact with her family in China about once a week. These calls are made by cell phone or through telephone calling card. Additionally, Applicant and his wife visited his in-laws in China in the summer of 2006. He found them to be nice and he was well treated, but communication was limited because neither spoke the other's language. His brother in-law works for a state run newspaper and his sister-in-law works as a teacher at a government school. Neither has expressed any interest in Applicant's work.³ Although Applicant has extended an open invitation to his in-laws to visit the U.S., only the in-laws' daughters, ages seven and eight, have expressed any interest. Applicant believes they have not visited because "it is more difficult for them to leave China than it is for him to visit them in China."⁴

During a November 30, 2006, interview conducted as part of Applicant's background investigation for a security clearance, Applicant was asked a question "along the lines of . . . was [he] aware of any means where [he] could be blackmailed or coerced."⁵ The SOR alleges that in answering this question, Applicant "stated that [he was] concerned for [his] wife should the Chinese government discover [his] position [and that he] stated [he was] worried that the Chinese Government might order [his] wife to return to China."⁶

In response to the SOR, Applicant sought to put his comments during the interview within context and to clarify his meaning. He wrote that he answered that question by stating: "Hypothetically speaking' If the Chinese government knew who I was, [it] could threaten me with forcing my wife to [return] to China. I do not recall saying I was worried about it, nor do I wish to imply that. As I consider it [to be an] extremely low probability, as I am a very small fish in a very big pond, and I lead a very simple and quiet lifestyle."⁷ Applicant continued by stating: "I know the threat, and yes it is a concern. In that context, yes, 'I worry'; however I also know about earthquakes, that is also a concern. I worry about that to]sic], yet I live 30 miles from a major fault line."⁸ He concludes by stating he is not one to succumb to such a threat, that he understands the appropriate protocol should such a threat be made, and feels the issue boils down not to the possibility of her leaving the U.S., but to whether legal assistance in keeping her in the U.S. comes from the U.S. government or a privately retained attorney.⁹ He also does not feel he is necessarily vulnerable to

² The record is unclear, but it appears that Applicant's brother-in-law is the brother of Applicant's wife, and his sister-in-law is that brother's spouse.

³ *Id.*

⁴ Government Ex. 5 at 6 (Testimonies: Personal Subject Interview of November 30, 2006).

⁵ Government Ex. 3 at 1 (Applicant's Answer to the SOR, dated August 24, 2007).

⁶ Government Ex. 1 (Statement of Reasons or SOR) at 2.

⁷ Government Ex. 3, *supra*, note 5.

⁸ *Id.*

⁹ *Id.*

blackmail or coercion because his wife understands the sensitive nature of his work, and she knows not to talk to him about his work or to discuss it with others.

In response to the FORM, Applicant again concedes that he is unable to refute the facts that he married a Chinese national and that he has in-laws who are residents and citizens of China. He continues to argue that the interpretation of his interview answer that gives rise to SOR sub-allegation three, regarding his concerns and worries regarding potential actions by the Chinese Government, is inaccurate and illogical. He urges that he was simply being forthcoming and taking into consideration all potentialities. He concludes by stating: “If having married a Chinese national disqualifies me from having a clearance, I can understand that, its a bitter pill to swallow, but I can understand it, Being disqualified for answering a question knowledgeably and honestly, that I cannot understand. The logic behind it is flawed.”¹⁰

Finally, the U.S. Government urges heightened scrutiny in this matter because the country at issue is China. Among other considerations, it specifically cites to the fact the U.S. is a primary intelligence target for China and to the two countries’ long-standing rivalry. It further notes China’s poor record on human rights. As part of the FORM, the U.S. Government included both U.S. State Department advisories regarding China, as well as three additional documents regarding intelligence threats and assessments of U.S.-China economic and security reviews.¹¹

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person’s eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances; it must be based on its own merits, with consideration of the whole-person concept, and in light of the factors listed in the Directive. Specifically these factors are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual’s age and maturity at the time of the incident;(5) the extent to which the participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.¹² The government

¹⁰ Applicant’s Answer to the FORM, dated August 24, 2007, at 1.

¹¹ See FORM, attachments I-VI.

¹² ISCR Case No. 96-0277 at 2 (App Bd Jul 11, 1997).

has the burden of proving controverted facts.¹³ The burden of proof is something less than a preponderance of evidence.¹⁴ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.¹⁵ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁶

No one has a right to a security clearance¹⁷ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁸ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.¹⁹ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.²⁰ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline B - Foreign Influence. *The Concern.* Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in US interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Conditions pertaining to this adjudicative guideline (AG) that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

CONCLUSIONS

¹³ ISCR Case No. 97-0016 at 3 (App Bd Dec 31, 1997), Directive, Enclosure 3, ¶ E3.1.14.

¹⁴ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

¹⁵ ISCR Case No. 94-1075 at 3-4 (App Bd Aug 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

¹⁶ ISCR Case No. 93-1390 at 7-8 (App Bd Jan 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

¹⁷ *Egan*, 484 U.S. at 531.

¹⁸ *Id.*

¹⁹ *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

²⁰ Executive Order 10865 § 7.

Upon consideration of all the facts in evidence, and after application of all legal precepts, factors, and conditions, I find the following with respect to the allegations set forth in the SOR:

With respect to Guideline B (Foreign Influence), the Government has established its case. China is a country which poses a heightened risk with regard to information gathering. Applicant admits that his wife, with whom he presumably lives, is a legal citizen of China. He admits that she has immediate family members who are residing in, and citizens of, China. He also admits that these relatives, with whom she maintains regular contact, work for entities controlled by the Chinese government. Such ties to a foreign government raise genuine security concerns under Foreign Influence Disqualifying Condition (FIDC) AG 7(a) (*contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion*), AG 7(b) (*connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligations to protect sensitive information or technology and the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information*), and 7(d) (*sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion*).

When, as here, the Government's initial burden has been met and a disqualifying condition raised, the burden shifts to the Applicant to go forward with evidence in rebuttal, explanation, or mitigation which is sufficient to overcome or outweigh the Government's case. Here, Applicant does little to carry that burden with regard to his spouse and her relatives. Indeed, he is direct and forthright in his concession that his wife is currently a citizen of China. He is also forthright in his concession that his in-laws are residents and citizens of China, and his admission that they work for state-controlled entities. Further, based on his own depiction, the relationship between his wife and her kin in China is apparently close, given the frequency and regularity of their telephonic contact.

Moreover, Applicant concedes that the possibility exists that pressure could be exerted by China or someone associated with its government upon his spouse. Although his written submission indicate he would react appropriately to any such measures, he has failed to address the Government's showing that China poses a heightened risk, to what degree pressures could be exerted upon his in-laws, or that there is no conflict of interest between his loyalties to his family and the United States. By limiting his response to brief, written submissions, Applicant has failed to present evidence of refutation, extenuation, or mitigation to raise one of the Foreign Influence Mitigating Conditions (FI MC) available under AG 8(a)-(f) or otherwise overcome the case against him with regard to SOR allegations 1(a) and 1(b).²¹

Applicant is a mature man who is seemingly aware that his marriage to a citizen of China raises genuine concerns regarding security risks. Although he articulated a solid argument to explain his wording to an interviewer regarding "worries" and "concerns" regarding his wife's potential vulnerability to a specific form of foreign pressure, he made little to no argument refuting the

²¹ Regarding Applicant's wife's citizenship and the citizenship and residency of his in-laws. As for allegation 1(c), alleging Applicant has "concerns" and "worries" regarding his wife, Applicant has plausibly and logically clarified what his wording to the interviewer was meant to convey. Thus clarified, his statement provides scant independent grounds for denying a security clearance.

Government's case regarding his wife's overall vulnerability, his in-laws, or the risk posed by China. Moreover, his limited responses failed to raise any of the specific mitigating conditions available under the guideline for foreign influence. Consequently, Applicant failed to demonstrate that it is clearly consistent with the national interest to grant him a security clearance.²² Because any doubts must be resolved in favor of the national security, I find all the allegations, except 1.c of the SOR, in the Government's favor. Clearance is denied.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.2.5 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:	AGAINST THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Subparagraph 1.b:	Against the Applicant
Subparagraph 1.c:	For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is denied.

Arthur E. Marshall, Jr.
Administrative Judge

²² See, e.g., ISCR Case No. 99-0424, 2001 (App. Bd. Feb. 8, 2001), at 9, (*mere possession of family ties with persons in a foreign country is not, as a matter of law, automatically disqualifying under Guideline B. However, the possession of such ties does raise a prima facie security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant.*)(emphasis added)