



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-01252
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Candace Le'i, Department Counsel
For Applicant: *Pro Se*

February 9, 2009

Decision

TESTAN, Joseph, Administrative Judge:

On April 16, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to applicant detailing the security concerns under Guideline B. The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on May 21, 2007, and requested an Administrative Determination by an Administrative Judge (AJ). Department Counsel issued a File of Relevant Material (FORM) on July 11, 2007. Applicant filed a response to the FORM on November 13, 2008. The case was assigned to me on December 8, 2008. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 43 year old employee of a defense contractor who was born and raised in the United States.

Applicant married a citizen of the People's Republic of China (PRC) in the PRC in December 2004. The spouse subsequently obtained an immigrant visa and permanent U.S. resident card and moved to the United States, although exactly when she moved here is not clear from the record. She currently resides with applicant and their son who, although born in the PRC, is a U.S. citizen. According to applicant, his wife intends to become a U.S. citizen. In response to the FORM, applicant stated he and his wife "never considered living in China because we love the United States and want our children to enjoy the same civil liberties and safe living conditions that we enjoy."

Applicant traveled to the PRC in August and December 2004, and May and September 2005.

Applicant's parents-in-law, and sister-in-law and her husband, are citizens and residents of the PRC. The sister-in-law's husband is employed by the PRC government. According to applicant, he and the husband have no contact. Applicant's wife has a close friend who is a citizen and resident of the PRC. Applicant's wife talks to her parents and friend through email and occasional phone calls.

In his response to the FORM, applicant stated he "was brought up in a family and community that taught us to love our country and my allegiance to the USA has never swayed nor could it, regardless of familial ties or outside influence. In fact, my travels outside of this country only help to reinforce my beliefs that we live in the greatest country in the world and that our freedoms are worth protecting and safe-guarding at all costs."

The Government provided six official United States publications with the FORM that describe the economic, political and intelligence activities of the PRC. The Government requested that these documents be admitted into evidence. I have admitted the documents into evidence, and I take administrative notice of the following facts found therein:

The PRC, which has a population of over 1.3 billion people, is ruled by an authoritarian government dominated by the Chinese Communist Party. The PRC continues to have a poor human rights record. Reported abuses have included arbitrary and lengthy incommunicado detention, forced confessions, torture, and mistreatment of prisoners.

PRC authorities monitor telephone communications, facsimile transmissions, email, text messaging, and Internet communications.

The Intelligence Threat Handbook identifies PRC intelligence activities toward the United States as follows: "The United States is a primary intelligence target of China

because of the United States role as a global superpower; its substantial military, political, and economic presence in the Pacific Rim and Asia; its role as a developer of advanced technology that China requires for economic growth; and the large number of Americans of Chinese ancestry, who are considered prime intelligence targets by the PRC.”¹

Out of all the foreign intelligence agencies that continuously attempt to penetrate United States agencies, the PRC’s is one of the most aggressive. Officials from United States consider the PRC’s espionage and industrial theft activities as the leading threat to the security of United States technology.

In recent years the United States has convicted and sentenced a number of individuals for espionage and illegally exporting critical technology to the PRC.²

Policies

The President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information.” (*Department of the Navy v. Egan*, 484 U.S. 518,527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (Exec. Ord. 10865, Section 2.)

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, Paragraph E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, Paragraph E3. 1.15.) An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).) “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” (Directive, Paragraph E2.2.2.)

¹ Interagency OPSEC Support Staff, Intelligence Threat Handbook.

² 2006 Report to Congress, U.S. - China Economic and Security Review Commission.

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information.

Analysis

Guideline B, Foreign Influence

The security concern relating to the Foreign Influence guideline is set forth in Paragraph 6 of the AG, and is as follows:

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 U.S. 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.

Paragraph 7 describes conditions that could raise a security concern and may be disqualifying. Under Paragraph 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” may be disqualifying. Under Paragraph 7.b., “connections to a foreign person, group, government, or country that create a potential conflict of interest between 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” may be disqualifying. Under Paragraph 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” may be disqualifying. Lastly, under Paragraph 7.i., “conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country” may be disqualifying.

Applicant's wife is a PRC citizen. His parents-in-law, and sister-in-law and her husband, (who is employed by the PRC government) are citizens and residents of the PRC. There is a presumption that an applicant has ties of affection for, or obligation to, immediate family members. Applicant failed to rebut this presumption. These relationships raise concerns under the first three disqualifying conditions. In addition, applicant has visited the PRC at least four times. Applicant's presence in the PRC made him potentially vulnerable to exploitation, pressure, or coercion by the PRC government. These facts raise concerns under the fourth disqualifying condition.

Paragraph 8 sets forth conditions that could mitigate security concerns. Under Paragraph 8.a., it is potentially mitigating if an applicant can demonstrate that “the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.” Under Paragraph 8.b., it is potentially mitigating if an applicant can demonstrate “there is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.” Lastly, under Paragraph 8.c., it is potentially mitigating if an applicant can demonstrate that the “contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.”

None of the foregoing mitigating conditions is applicable. Applicant’s relationship with his spouse and in-laws is one of obligation and affection, raising the concern that it creates a risk for foreign influence or exploitation. Applicant failed to provide sufficient credible evidence that it is unlikely he would be placed in a position of having to choose between the interests of the PRC and the interests of the United States, or that he is not vulnerable to a conflict of interest.

“Whole Person” Analysis

Under the whole person concept, the AJ must evaluate an applicant’s security eligibility by considering the totality of the applicant’s conduct and all the circumstances. An AJ should consider the nine adjudicative process factors listed at AG Paragraph 2(a): “(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 conduct; (5) extent to which 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.” Under AG Paragraph 2c, the ultimate determination of whether to grant a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant married a citizen of the PRC in the PRC in 2004. Although applicant has stated his wife intends to become a United States citizen, at the present time she is still a PRC citizen. Applicant’s spouse’s parents and sister, as well as the sister’s husband (an employee of the PRC government), are citizens and residents of the PRC. Applicant’s spouse communicates with them and friends through email and occasional

phone calls. These contacts, as well as applicant's four trips to the PRC, raise legitimate security concerns. The targeting of United States citizens by PRC intelligence is not a theoretical threat, as evidenced by the numerous prosecutions of United States citizens for passing sensitive and classified information and technology to the PRC.

Applicant may very well have been able to overcome the Government's evidence and establish that it is clearly consistent with the national interest for him to have a security clearance if he had been able to clear up some basic matters, such as (1) has his spouse actually applied for United States citizenship, and if so, what is the current status of her application, (2) what is the exact relationship he and his spouse have with her parents and sister, (3) has he or his wife traveled to the PRC since 2005, and (4) do they intend to travel there. Unfortunately, by requesting a decision without a hearing, and then failing to offer documentary evidence that cleared up these and other issues, I have no choice but to conclude applicant failed to rebut the Government's case under Guideline B.

There is nothing in the record that suggests applicant is anything but a loyal American citizen. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Therefore, nothing in this decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied concern as to applicant's allegiance, loyalty, or patriotism.

Formal Findings

Formal findings for or against applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraphs 1.a through 1.d:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

JOSEPH TESTAN
Administrative Judge