



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 06-23923
)
)
Applicant for Security Clearance)

Appearances

For Government: Jennifer Goldstein, Esquire, Department Counsel
For Applicant: *Pro Se*

January 16, 2008

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on November 23, 2005. On August 9, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline B for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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 acknowledged receipt of the SOR on August 28, 2007. He elected to have his case decided on the record in lieu of a hearing. Department Counsel submitted the Government's written case on October 15, 2007. Applicant received a complete file of relevant material (FORM) on October 22, 2007, and was provided an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's

case.¹ Applicant did not submit additional information by November 30, 2007. The case was assigned to me on January 9, 2008.² Based upon a review of the case file, eligibility for access to classified information is denied.

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to People's Republic of China (PRC). The request and the attached source documents were included in the record as attachments. (I-VII) The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his Answer to the SOR, dated August 28, 2007, Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, 1.c, 1.d, 1.e, and 1.f of the SOR.³ He did not submit additional information to support his request for eligibility for a security clearance.

Applicant is a 41-year-old employee of a defense contractor. He was born and raised in China, and emigrated to the U.S. in 1997. Applicant became a naturalized U.S. citizen on March 25, 2005. He submitted a security clearance application on November 23, 2005.⁴

Applicant received a bachelor of science degree in computer science from a U.S. university. After receiving his degree, he worked as a research associate for another university. Currently, he is employed as an engineer for a contractor. He has been in his current position since March 2000.⁵

He was married in China in 1991. His wife is a citizen of China, but resides in the U.S. with Applicant and their son, a U.S. citizen. Applicant's mother, father, brothers, and mother-in-law are citizens and residents of China.⁶

Applicant's brother is a professor at a university in China. The university is no longer a state entity. His parents are retired. The company they retired from has no

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

²The case was originally assigned to another judge. It was transferred due to caseload considerations.

³Item 2 (Applicant's Answer to SOR, dated August 28, 2007).

⁴Item 5 (Application for Security Clearance, dated November 23, 2005).

⁵*Id.*

⁶Item 4 (Answer to Interrogatories, dated January 11, 2007).

connections with the government. None of his relatives have ever been employed by the government.⁷

Applicant has traveled to China at least six times since 1999. His latest trip was in August 2006 to visit his family. He has weekly contact with his mother and father and monthly contact with his brothers.

I take administrative notice of the following facts. China (PRC) is an authoritarian state whose power is centralized in the Chinese Communist Party. In foreign relations, China and the U.S. have been rivals since the Cold War, with particular disagreement on the status of Taiwan, and China has continued to resist what it considers to be superpower dominance by the U.S., despite improving economic relations. The United States is a primary intelligence target of China because of the U.S. 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. China uses legal and illegal means, including espionage, to obtain military related systems and technologies from the U.S. China has a poor human rights record and its citizens lack freedom to peacefully express opposition to the political system or to freely change those in charge of the government. There are many high profile cases involving monitoring, harassment, detention, arrest, and imprisonment of journalists, writers, activists, and defense lawyers, many of whom were seeking to exercise their rights under the law. There is a lack of due process and new restrictions on lawyers that further limits the progress toward the rule of law. There are right restrictions on freedom to practice religion and freedom to travel. According to the U.S. State Department, the government of China engages in serious human rights abuses including, extrajudicial killings, torture, coerced confessions of prisoners, and forced labor.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available,

⁷*Id.*

reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 6:

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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 7(a), a “contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or a resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion” may create a security concern. Similarly under AG ¶ 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 raise security concerns. Applicant’s wife is a citizen of China. His mother, father and two brothers are citizens and residents of China. Applicant and his wife have visited their family on numerous occasions since 1999. The latest trip was last year. China is a country whose human rights record is dismal and the potential for abuse is high. Applicant’s familial relationship with citizens and residents of China creates a heightened risk of potential exploitation, inducement, manipulation, pressure or coercion. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from foreign influence. Under AG ¶ 8(a), the disqualifying condition may be mitigated where “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.” Applicant and his wife have been married since 1991 and have a child. Although his wife maintains her residency in the U.S., she has emotional ties with her family in China. Applicant’s family is in China. He and his wife visit their family frequently. Applicant and his wife keep in touch with their family by telephone. Applicant is a naturalized U.S. citizen, however, there is a heightened risk due to his wife’s status and his family ties to China. Unfortunately, China is a country that causes concern in the area of potential exploitation and coercion which makes Applicant vulnerable. His contact with his family cannot be construed as minimal. This creates a potential conflict of interest. The evidence does not raise this potentially mitigating condition.

Under AG ¶ 8(b), it may be mitigating where “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.” As noted above, Applicant has longstanding, close ties with his family. There is no record evidence to indicate deep loyalty to the U.S. I find this potentially mitigating condition is not a factor for consideration in this case.

Evidence that “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” is potentially mitigating under AG ¶ 8(c). Applicant traveled to China numerous times to visit his family. He also contacts them on a regular basis. I conclude this potentially mitigating condition does not apply.

After a review of the remaining mitigating conditions, I find that none of them apply in this case.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant’s eligibility for a security clearance by considering the totality of the Applicant’s conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 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 ¶ 2©, the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense 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 was born and raised in China. He married his wife in 1991. She is living in the U.S. but is a citizen of China. Applicant received his undergraduate degree in computer science from an American university in 1998. He became a naturalized citizen in 2005. He is married to a Chinese citizen and all his family reside in China. He and his wife have close ties to their relatives in China. They have traveled at least six times since 1999 to visit their family. They communicate with them on a regular basis. The familial ties are close and the practices exercised by China create a heightened security risk. I am persuaded by the totality of the evidence that it is not clearly consistent with the interests of national security to grant Applicant a security clearance. In reaching my decision, I considered the evidence as a whole, including the appropriate factors and guidelines.

Overall, the record evidence leaves me with questions and doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from foreign influence.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	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.

NOREEN A. LYNCH
Administrative Judge