

KEYWORD: Foreign Influence; Personal Conduct; Information Technology

DIGEST: Applicant, a 60 year old computer engineer, was born in the People’s Republic of China (PRC), came to the United States in 1968 and became a U. S. citizen in 1977. His wife and three children are also United States citizens. His father and three siblings are citizens and residents of Taiwan, and his father -in-law is a citizen and resident of the PRC. None of these family members are in a position to be exploited in a way that could force Applicant to choose between loyalty to them and his loyalty to the U. S. Applicant’s strong attachment to the U.S. and long history here make it unlikely that he would respond favorably to any efforts to act against U. S. interests. Additionally, Applicant knowingly violated his employer’s rules by using his company computer to access and download pornographic materials, causing Applicant to be terminated from his place of employment. This conduct occurred for a period of approximately one and one half weeks, almost five years ago, and there is little likelihood that it will occur in the future. Mitigation has been shown. Clearance is granted.

CASENO: 03-17071.h2

DATE: 01/19/2007

DATE: January 19, 2007

In Re:)	
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-----)	ISCR Case No. 03-17071
SSN: -----)	
)	
Applicant for Security Clearance)	
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**DECISION ON REMAND OF ADMINISTRATIVE JUDGE
MARTIN H. MOGUL**

APPEARANCES

FOR GOVERNMENT

Jennifer I. Goldstein, Esq., Department Counsel

FOR APPLICANT

Ellen J. Wang, Esq.

SYNOPSIS

_____Applicant, a 60 year old computer engineer, was born in the People's Republic of China (PRC), came to the United States in 1968 and became a U. S. citizen in 1977. His wife and three children are also United States citizens. His father and three siblings are citizens and residents of Taiwan, and his father -in-law is a citizen and resident of the PRC. Applicant's strong attachment to the U.S. and long history here make it unlikely that he would respond favorably to any efforts to act against U. S. interests. Additionally, Applicant knowingly violated his former employer's rules by using his company computer to access and download pornographic materials, causing Applicant to be terminated from his place of employment. This conduct occurred for a period of approximately one and one half weeks, almost five years ago, and there is little likelihood that it will occur in the future. Mitigation has been shown. Clearance is granted.

STATEMENT OF THE CASE

On December 20, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA 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 and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In a signed and sworn statement, dated January 21, 2005, Applicant responded in writing to the SOR allegations. He requested a clearance decision based on a hearing record.

On November 25, 2005, this case was assigned to this Administrative Judge to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on January 5, 2006, and the hearing was conducted on January 31, 2006.

At the hearing, Department Counsel offered nine documentary exhibits (Government Exhibits 1 through 9), and no witnesses were called. Applicant offered one documentary exhibit (Applicant's Exhibit A), and also submitted a Hearing Memorandum, and offered his testimony and that of his wife, son and daughter. The transcript (Tr) was received on February 13, 2006.

The Government appealed my original Decision, which was dated February 22, 2006. The Appeal Board has remanded that Decision and instructed me to consider all the record evidence, and make findings “concerning the PRC’s ‘well documented abuses of human rights in violation of internationally recognized norms,’ including ‘intolerance of dissent’ and inadequate ‘legal safeguards for basic freedoms.’” The Appeal Board also remanded because my Decision did not “make a finding concerning the Taiwanese government’s efforts at industrial espionage.” This has been done in this remand decision.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline B (Foreign Influence), Guideline E (Personal Conduct), and Guideline M (Misuse of Information Technology Systems) of the Directive. The SOR contains five allegations, 1.a. through 1.e., under Guideline B, two allegations, 2.a. and 2.b., under Guideline E, and one allegation, 3.a., under Guideline M. Applicant completely admitted SOR allegations 1.a., 1.b., 1.d., and 1.e. The admitted allegations are incorporated herein as Findings of Fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the documents and the live testimony, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant is a 60 year old software engineer, employed by a defense contractor, he seeks a DoD security clearance in connection with his employment in the defense sector. He first received a security clearance in 1986, and he retained it until the present time with a gap in 1991 during a brief period of unemployment.

Applicant was born in the PRC in 1945 and moved to Taiwan in 1949, where he received a Bachelor of Science Degree in 1968. He came to the United States in 1968, and became a naturalized United States citizen in 1977. He received a Ph.D. degree in mathematics from a United States university in 1972.

Applicant’s wife, to whom he has been married since 1971, was also born in PRC and moved to Taiwan in 1946 at the age of one year. She came to the United States in 1969 and became a United States citizen in 1977. Applicant and his wife have three adult children, a son and two daughters, all of whom were born in the United States. Applicant, his wife, and children are solely United States citizens.

Paragraph 1 (Guideline B - Foreign Influence)

Applicant’s father is a citizen and resident of Taiwan. He is 89 and has been retired for many years. He was a civil engineer and worked for a company, which was under the control of the Taiwanese Government. He received a lump sum payment for a pension from the company.

Applicant also has a brother and two sisters, who are citizens and residents of Taiwan. His brother is a retired colonel from the Taiwanese Air Force, who worked as a civil engineer. He now builds golf courses. Applicant's older sister is a retired school teacher. His younger sister is a retired banker. His brother and possibly his sister receive pensions from the Taiwanese Government.

Applicant e-mails pictures of his grandchild four or five times a year to his brother who then sends them to his father. Applicant receives pictures back approximately the same frequency. Applicant telephones his father approximately two times a year on birthdays and holidays. He only speaks to his brother and sisters if they are at his father's home when he calls.

Applicant's father-in-law resides in the PRC. Applicant never communicates with him by telephone, and he last saw him during his one trip to the PRC in 2001.

Applicant last traveled to Taiwan on two occasions in 2004, once to visit his ailing mother and the second time to attend her funeral. Previously, he traveled to Taiwan in 2000, twice in 1998, 1997, 1996, and twice in 1994, primarily to visit his parents. He has also traveled to many other countries for pleasure. He always follows the proper procedure of informing his company security office before his trip and debriefing after he returns.

Applicant does not have any current financial interest in Taiwan, nor does he does he anticipate inheriting any property there. He estimates that his home and other financial holdings in this country are worth \$2 million.

Current Status of Taiwan and the PRC

In writing my initial decision, I considered all of the evidence presented in the case regarding the current status of Taiwan and the PRC, and how it may affect Applicant and this case, although not all of it was discussed in the decision. It will be reviewed and discussed in more detail in this remand decision.

Taiwan has an elected democratic government. It has the 17th largest economy that is a leading producer of high-technology goods. It engages in industrial and economic espionage. Proprietary information technology is high on the Taiwanese list of targeted information to be acquired by their agents from foreign governments and businesses. There are 23 million Taiwanese citizens. Their per capita income in 2005 was \$15,000, cited by their president in a speech that he presented as economic progress under his administration. Although the United States now recognizes Taiwan as part of the PRC as "one-China" it continues to maintain strong unofficial relations with Taiwan (Exhibits 7 and 8).

The PRC, the most populous country in the world, is economically powerful, and is an important trading partner of the United States. It is run by the Communist Party which controls all aspects of the PRC government. It has strong military forces, and has its own foreign-policy. Although there has been some cooperation, there has been much more conflict with the United States

in the past. The PRC has an extremely large army, a sophisticated defense establishment, and space capability. The PRC has launched satellites, has ballistic missiles, has nuclear arms, and nuclear bombs. Its diplomatic and military dispute with the Republic of China (Taiwan), foreshadows a possible military conflict, which the United States opposes as a resolution of the conflict. The PRC has an abysmal human rights record, which includes arbitrary killings; detention or incarceration without notice in mental facilities; torture; arbitrary arrest, detention or exile; no right to a public, fair trial; a politically controlled judiciary; lack of due process; restrictions on free speech, on religious freedom, on freedom of travel, on freedom of assembly; and no rights of privacy - family, home or correspondence.

The PRC engages in espionage against the United States through an extensive network of businesses, personnel, and specific programs designed to acquire advanced U.S. military technology. One approach is to covertly conduct espionage by personnel from government ministries, commissions, institutes, and military industries, independently of the PRC intelligence services. This is believed to be the major method of PRC intelligence activity in the United States. It also tries to identify ethnic Chinese in the United States who have access to sensitive information, and sometimes is able to enlist their cooperation in illegal technology information transfers (Exhibits 6 and 8).

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.

On April 5, 2001, and May 1, 2001, to May 9, 2001, Applicant accessed sexually explicit web sites from his company owned computer and downloaded sexually explicit photographs onto a hard drive. This conduct was in direct violation of his employer's company policy as established in Exhibits 2 and 3. Applicant testified that, while he was not aware of the specific restrictions in Exhibits 2 and 3, he was aware that accessing pornographic documents on his company computer was not allowed. Applicant's contended that he stop accessing the sites before he was confronted, and no evidence has been introduced to contradict his claim.

Exhibit 4 is an Adverse Information Report from his former employer, dated July 25, 2001, which indicates that Applicant was terminated for cause on July 3, 2001. At the hearing, Applicant strongly asserted that he was not terminated, but rather given the opportunity to retire, which he claimed to have done. Applicant did concede, however, that he left his employment after 15 years, under less than favorable circumstances.

Paragraph 3 (Guideline M - Misuse of Technology Systems)

The Government alleges in this paragraph that Applicant is ineligible for clearance because of Applicant's noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems. This allegation is based on the fact discussed in Paragraph 2, above, where Applicant knowingly violated his employer's rules, procedures and guidelines, by using his

company computer to access and download pornographic materials.

Mitigation

Applicant submitted four letters of reference (Exhibit A). The first letter, dated January 23, 2006, is from a Senior Director of his former employer, who has known Applicant since 1969, and recruited him in 1986. Applicant worked for him in various capacities for 15 years. He stated that Applicant, “works hard and devotes extra hours to his work, most of which are uncompensated. He has met all of the program expectations in an outstanding manner.” He also added that Applicant, “establishes high standards for himself and earns respects (*sic*) from his teammates and customers.

He has integrity in the work he does and handles classified material carefully. I highly recommend him.”

The second letter, dated January 25, 2006, is from an individual who has known Applicant since 1981, when they were both college professors, and they subsequently worked together for many years at his previous place of employment. In his letter he commented that Applicant, “is a loyal American and a person of good moral character.”

The third letter, dated January 21, 2006, is from an individual who has been Applicant’s supervisor at his current place of employment since 2001. He described Applicant as a “dedicated employee with excellent work ethics. [Applicant] has adhered to all our project security guidelines and has a ‘spotless’ security record with no violations or infractions. . . . I find [Applicant] to be a fully trustworthy American who understands and complies with his security obligations.”

The final letter, dated January 24, 2006, is from a co-worker since 2001, who also strongly recommends Applicant as a trustworthy individual.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2).

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to Applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of Applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the *United States Supreme Court in Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to Guidelines B, E, and M:

(Guideline B -Foreign Influence)

Under Guideline B, a security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he is bound by affection, influence or obligation, are not citizens of the United States or may be subject to duress. Based on the evidence of record, the Government has established an initial reason to deny Applicant a security clearance because of Guideline B (Foreign Influence).

Applicant's father, his brother and two sisters are citizens and residents of Taiwan, and his father-in-law is a citizen and resident of the PRC. The citizenship and residency of Applicant's

family create the potential for foreign influence that could result in the compromise of classified information because it makes Applicant potentially vulnerable to coercion, exploitation, or pressure. The possession of such ties raises a security concern sufficient to require Applicant to present evidence in rebuttal, extenuation, or mitigation sufficient to meet his burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for him. This Applicant has done.

The evidence of Applicant's family members, who are citizens and residents of Taiwan and the PRC comes within Disqualifying Condition (DC) E2.A2.1.2.1, "immediate family members, or persons to whom the individual has close ties of affection or obligation, who are citizens of, or resident in, a foreign country."

I have also considered the two countries involved in this case in making my original decision and in this remand. Regarding Taiwan, there is a connection between Applicant and his family in Taiwan. While Taiwan's position is not as adversarial to the United States as the PRC, it is a country that practices industrial espionage. However, none of Applicant's family are agents of Taiwan, and there is no current connection between any of Applicant's family and Taiwan's government. Overall, the record evidence does not indicate that any of Taiwan's practices would cause Applicant to be less than totally loyal to the United States.

The PRC, with an interest inimical to the United States, must be scrutinized in great detail. However, the connection between Applicant's family in that country and Applicant is minimal. As discussed above, Applicant's only relative in the PRC is his father-in-law. Applicant's contact with him is extremely limited, as he never communicates with him by telephone, and he last saw him during his one trip to the PRC in 2001. While I certainly considered in my original decision and continue to understand that the PRC, which engages in human rights violations, could potentially place threats against Applicant's father-in-law in an attempt to coerce Applicant, the evidence strongly suggests that no such threat would cause Applicant to act in a way that would be contrary to the interest of the United States.

The primary factors in mitigation that I have considered include: Applicant's long history since coming to the United States in 1968 and becoming a United States citizen in 1977, his wife becoming a citizen a United States citizen in 1977, his devotion to his wife and his three children, who are also United States citizens; his limited contact with his family outside of the United States, his considerable net worth in the United States, Applicant's strong feelings concerning his devotion to this country, and finally the strong recommendations he received from co-workers and a supervisor. These extremely, strong factors in mitigation overcome the adverse considerations of Taiwan and the PRC.

Based on the nature of the overall record and the totality of the evidence, I have determined that his family in Taiwan and the PRC do not constitute an unacceptable security risk, and the Mitigating Condition (MC) E2.A2.1.3.1, "a determination that the immediate family member(s) . . . in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the

United States,” applies.

After considering all of the evidence of record on this issue, I conclude that the mitigating evidence substantially outweighs the evidence supporting the SOR, and even in the event pressure was exerted upon Applicant to compromise classified information, he would resist it and would report the incident to the proper authorities.

(Guideline E - Personal Conduct)

With respect to Guideline E, the evidence establishes that Applicant did exhibit conduct involving questionable judgment, and unwillingness to comply with rules and regulations, but I do not find that controlling.

In reviewing the Disqualifying Conditions (DC) under Guideline E, I conclude that DC E2.A5.1.2.5, a pattern of dishonesty or rule violations, applies because Applicant knowingly and wilfully violated his employer’s policy by accessing pornographic websites. However, in mitigation, this conduct occurred for a period of approximately one and one half weeks, almost five years ago, and based on Applicant’s testimony and the letter of reference from his current supervisor, I find that there is little likelihood that it will occur in the future. I resolve Guideline E for Applicant.

(Guideline M - Misuse of Technology Systems)

As to Guideline M, the evidence establishes that Applicant was noncompliant with rules procedures, guidelines or regulations pertaining to information technology systems, but again Applicant has overcome this conduct.

In reviewing the DCs under Guideline M, I conclude that DC E2.A13.1.2.1, illegal or unauthorized entry into any information technology system, and DC E2.A13.1.2.4., introduction of media into any information technology system without authorization, when specifically prohibited by rules, procedures, and guidelines, applies. However, I find that MC E2.A13.1.3.1., the misuse was not recent is applicable to this case. While MC E2.A13.1.3.4., the misuse was an isolated event, does not strictly apply here, the fact that there is only evidence of this conduct occurring for that brief period of time of a week and a half out of a 20 year career, does suggest that the brevity can be considered in mitigation. I resolve Guideline M for Applicant.

On balance, it is concluded that Applicant has overcome the Government's information opposing his request for a security clearance.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1, Guideline B: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2, Guideline E: For Applicant

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 3, Guideline M: For Applicant

Subparagraph 2.a.: For Applicant

DECISION

In light of all the circumstances and facts presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Martin H. Mogul
Administrative Judge