

KEYWORD: Foreign Influence

DIGEST: Applicant has successfully mitigated the foreign influence security concern, as the record evidence demonstrates that her connections to China are rather minimal or pro forma or both when compared to her significant family, professional, and financial connections to the U.S. Clearance is granted.

CASENO: 06-13601.h1

DATE: 05/31/2007

DATE: May 31, 2007

In re:)
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 -----) ISCR Case No. 06-13601
 SSN: -----)
)
 Applicant for Security Clearance)
)
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**DECISION OF ADMINISTRATIVE JUDGE
ROBERT J. TUIDER**

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Paul A. Murphy, Esq.

SYNOPSIS

Applicant has successfully mitigated the foreign influence security concern, as the record evidence demonstrates that her connections to China are rather minimal or pro forma or both when compared to her significant family, professional, and financial connections to the U.S. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On June 30, 2006, DOHA issued a Statement of Reasons (SOR)¹ detailing the basis for its decision—security concerns raised under Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing on July 26, 2007, and elected to have a hearing before an administrative judge.

Department Counsel indicated he was ready to proceed on November 30, 2006, and the case was assigned to me on December 15, 2006. DOHA issued a notice of hearing on January 11, 2007, scheduling the hearing for January 23, 2007. Applicant appeared with counsel and the hearing took place as scheduled.

The government offered one document that was marked as Government Exhibit (GE) 1, and was admitted into the record without objection. Applicant submitted two documents that were marked as Applicant Exhibits (AE) A and B, and were admitted into the record without objection. DOHA received the transcript on February 7, 2007.

PROCEDURAL RULING

At the hearing, Department Counsel asked me to take administrative notice of Exhibits (Ex.) I to IV, U.S. Department of State, *Background Note: China*, April 2006; U.S. Department of State, *China (includes Tibet, Hong Kong, and Macau)*, Country Reports on Human Rights Practices - 2005, March 8, 2006; U.S. House of Representatives, *Report of the Select Committee On U.S. National Security And Military/Commercial Concerns With The People's Republic Of China*, 1999; and Interagency OPSEC Support Staff (IOSS), *Intelligence Threat Handbook* (2004), respectively.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. *See* ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings is to notice facts that are either well known or taken from government reports. *See* Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for

¹Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.

administrative notice). Applicant did not object to my consideration of Exs. I to IV for purposes of administrative notice. Tr. 10-12.

FINDINGS OF FACT

In her Answer to the SOR, Applicant admitted the factual allegations except SOR ¶ 1.d., with explanations. Her admissions are incorporated into my findings, and after a thorough review of the record, I make the following findings of fact:

Applicant is a 43-year-old married woman. She was born and raised in the People's Republic of China (PRC), and at age 17 left home to pursue higher education and never returned home, but did stay in the PRC. She attended a university in the PRC and was awarded a bachelor of science degree with a major in architectural design in September 1986.

In May 1995, at age 31, Applicant came to the U.S. on a training visa and worked as a manager for a software company. Tr. 53. Shortly after arriving in the U.S., she met her future husband, who is also a native of the PRC, and married him in September 1999. Applicant became a naturalized U.S. citizen in November 2003. Her husband also became a naturalized U.S. citizen. Applicant and her husband have two minor U.S. born children, a six-year-old daughter and a three-year-old son.

From June 1998 to August 1999, she participated in an applied developer internship at a vocational school and was awarded a certificate. After being awarded her certificate, she worked in the high technology industry until she began her current position as a database analyst for a defense contractor in October 2004. She is a first time applicant for a security clearance.

Applicant's parents are resident citizens of the PRC (SOR ¶ 1.a.). Her mother is 72 years old and her father is 77 years old. Tr. 22, GE 1. Both of her parents are hearing impaired which makes any communication by telephone difficult, if not impossible. Her parents do not have access to e-mail. Applicant does not exchange letters with her parents. Tr. 23, 35. Her father retired from the post office approximately 25 years ago and is in very poor health. Tr. 39. Her mother is a retired librarian and is also in poor health. Tr. 41. Neither of her parents were or are involved in political activities in the PRC, nor are they agents in any capacity of the PRC government. The last time she spoke to a parent was in February 2006 and was unable to have a meaningful conversation because of their hearing problems. Tr. 43.

Applicant has a 50-year-old sister and a 47-year-old sister who are resident citizens of the PRC (SOR ¶ 1.b.). She has not seen her older sister in 20 years and has no idea what she does for a living. She last spoke to her by telephone approximately two years ago to discuss her parents' health situation. She described her relationship with her 47-year-old sister as the same as with her older sister, i.e. virtually no contact whatsoever. Tr. 24-25. Applicant also has a 37-year-old brother who is a resident citizen of the PRC (SOR ¶ 1.c.). She does not know this brother, does not know his profession, nor does she know how to get in touch with him. Tr. 26. Applicant has a 45-year-old

brother living in the U.S. employed as a biologist (SOR ¶ 1.d.). He holds a “green card” and has a pending application for U.S. citizenship. Applicant’s contact with her brother living in the U.S. is limited to an occasional visit over a holiday. Tr. 48-51. Applicant is not close with any of her siblings. Tr. 57-58.

From April 14, 2002 to May 1, 2002, Applicant visited the PRC for the first and only time since she arrived in the U.S. While there she had a chance encounter with one of her former college classmates. This classmate organized a small group of former classmates for an impromptu luncheon (SOR ¶ 1.e.). The only place Applicant went in the PRC was Beijing where she visited the Great Wall and took in some authentic Chinese food. Applicant has no plans to travel to the PRC. Applicant did not see her parents or siblings during this visit to the PRC.

Applicant has no assets of any type in the PRC nor does she own any real or personal property in the PRC. Tr. 36. By contrast, Applicant and her husband own two homes in the U.S., conduct all of their banking in the U.S., volunteer at their local church and school, and have retirement accounts in the U.S. Their total net worth is \$662,000.00. Applicant regularly votes in the U.S. and exercises all rights of citizenship. Tr. 60-74.

Applicant stated she is a U.S. citizen first and that her loyalties are with the U.S. She further added that if she were contacted by a representative from the PRC, she would not provide any information and report such contact to proper authority. Tr. 28.

Applicant submitted two reference letters, both of whom were former co-workers. The collective sense of these letters is that Applicant is an individual of the highest character, who is trustworthy with a very strong work ethic. AE A and B.

As requested by Department Counsel, I took administrative notice or official notice of certain matters about the PRC and the nature of its government as described in Exhibits I through IV, which are summarized under subheading “PRC” of this decision. I have considered these matters in making my clearance decision.

PRC

PRC has an authoritarian, Communist government. PRC has a poor human rights record, suppresses political dissent, and practices arbitrary arrest and detention, forced confessions, torture, and other prisoner mistreatment.

PRC is a nuclear power with a large Army. PRC is geographically vast, and has a population of over one billion people. It has significant resources, and an economy that in recent years has expanded about 10% per year. PRC aggressively competes with the United States in many areas. PRC’s competitive relationship with the United States exacerbates the risk posed by Applicant’s PRC connections.

PRC actively collects military, economic and proprietary, industrial information about the United States because of the following circumstances: (1) its position as a global superpower; (2) its military, political, and economic investments in the Pacific Rim and Asia; (3) its leading role in development of advanced technology that PRC desires for economic growth; and (4) PRC considers

the large number of Americans of Chinese ancestry as intelligence targets. PRC's active intelligence gathering programs focus on sensitive and protected U.S. technologies.

POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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.² The government has the burden of proving controverted facts.³ The burden of proof is something less than a preponderance of the evidence.⁴ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against her.⁵ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁶

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

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

⁴*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁵ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, ¶ E3.1.15.

⁶ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, E3.1.15.

As noted by the Court in *Egan*, “it should be obvious that no one has a right to a security clearance”⁷ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁸ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁹ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.¹⁰ 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.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security clearance process is the fair-minded, commonsense assessment of a person’s life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the “whole person” concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration relevant circumstances, and applying sound judgment, mature thinking and careful analysis.

CONCLUSIONS

Guideline B - Foreign Influence

Under Guideline B for foreign influence, a security concern may exist when an individual’s immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation, are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure. Common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service.

Here, based on the record evidence as a whole, the government initially established its case under Guideline B. Applicant has family ties to the PRC through her parents and siblings. In addition, her trip to the PRC in 2002 is further evidence of connections to the PRC. Taken together, these circumstances raise a security concern under Foreign Influence Disqualifying Condition (FIDC) E2.A2.1.2.1. *An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in a foreign country.* The remaining DCs do not apply based on the facts and circumstances here.

⁷*Egan*, 484 U.S. at 528.

⁸*Id.*

⁹*Id.*; Directive, ¶ E2.2.2.

¹⁰Executive Order No. 10865 § 7.

I have reviewed all the mitigating conditions under Guideline B, and conclude that Foreign Influence Mitigating Condition (FI MC) E2.A2.1.3.1. *A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(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);* and FIMC E2.A2.1.3.3. *Contact and correspondence with foreign citizens are casual and infrequent.*

The evidence shows Applicant's immediate family members are not agents of the PRC government or in positions that would raise a security concern for the Applicant. To the contrary, her parents are elderly, retired, hearing impaired, and in poor health and clearly outside the scope of employment or positions that would target them for intelligence gathering. Applicant's relationship with her remaining siblings has become so removed throughout the years that she does not know what any of them do for a living.

Since Applicant left the PRC 11 years ago, she has fully vested her life in her work and family in the U.S. Her contact with her immediate family members can hardly be described as close. She has not seen either of her two sisters in the PRC in over 20 years, and last spoke to her older sister by telephone two years ago to discuss her parents' health situation. She does not know her brother who lives in the PRC or anything about him. She last attempted to speak to her parents by telephone in February 2006 and had a strained conversation at best given their hearing problems. Her communication with her biologist-brother living in the U.S. is limited to telephone calls on holidays.

When Applicant visited the PRC in 2002, she did not see any of her immediate family members which further demonstrates the distance that evolved between Applicant and her family members residing in the PRC. Her visit to the PRC was for recreation purposes and it was during her visit she had a chance encounter with a former classmate who arranged an impromptu "reunion."

The Appeal Board requires the whole person analysis address "evidence of an applicant's personal loyalties; the nature and extent of an applicant's family's ties to the U.S. relative to his [or her] ties to a foreign country; his or her ties social ties within the U.S.; and many others raised by the facts of a given case." ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

The analysis does not necessarily end with the formal mitigating conditions, as other matters under the whole-person concept may mitigate the security concern. Although the record shows Applicant has family ties to resident citizens of the PRC, these family ties are hardly close. Concerning Applicant, her last contact with her sisters in the PRC was by telephone two years ago and has had no contact with her brother in the PRC. Her contact with her aged parents was in February 2006 via a strained telephone call due to their hearing impairment. Her contact with her brother in the U.S. is limited to telephone calls around holidays. Her visit to the PRC in 2002 did not include a visit with any of her immediate family members and her contact with former classmates occurred only after she met a classmate by chance. Her relationships with her immediate family members in the PRC are distant due to the length of time she has lived in the U.S. since 1995 and geographic separation. And her life, both personally and professionally, is firmly rooted in the U.S. Applicant's ties or connections to the U.S. are strong. Since her arrival here, she can fairly be described as a model immigrant. After she completed her training, she has been gainfully employed

in computer-related positions and most recently as a database analyst. Moreover, her professional career and financial interests are clearly in the U.S. and that situation is unlikely to change.

When Applicant became a U.S. citizen, she swore allegiance to the U.S. Her spouse is also a naturalized citizen, and her two children are U.S. citizens by birth. Her ties to these family members are stronger than her ties to family members in the PRC. Her closest family members are her husband and children. They are U.S. citizens and live with her. Because her husband and children live in the U.S., they are not vulnerable to coercion or exploitation by a foreign power. The realistic possibility of pressure, coercion, exploitation or duress with regard to her husband and children are low. There is no evidence she has ever taken any action which could cause potential harm to the U.S. She testified credibly that she takes her loyalty to the U.S. very seriously. She is well regarded by her defense contractor employer and is considered loyal and trustworthy.

The record evidence demonstrates Applicant has all the indicators of a self-reliant, industrious, mature, responsible, and trustworthy individual. At this point in Applicant's life, her connections to the PRC are rather minimal or pro forma or both when compared to her significant family, professional, and financial connections to the U.S. After weighing the record evidence as a whole, I conclude Applicant has successfully mitigated the foreign influence security concern raised by her family ties to the PRC. Accordingly, Guideline B is decided for Applicant.

To conclude, Applicant has met her ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I have considered the whole person concept, the clearly consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1. - Guideline B: FOR APPLICANT

Subparagraphs a. - e.: For Applicant

DECISION

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

Robert J. Tuider
 Administrative Judge