

On March 12, 2007, this Administrative Judge issued a Decision in this case finding that it was clearly consistent with the national interest to grant the Applicant access to classified information. The Government appealed this Decision and, on October 15, 2007, the Appeal Board of the Defense Office of Hearings and Appeals (Appeal Board) remanded the Decision to this Administrative Judge stating that I “did not properly analyze Applicant’s case in light of the political conditions within the PRC [China],” and that my analysis did not “adequately address the security concerns raised by an Applicant’s foreign relatives.” Finally, the Remand Order stated that I should make “more complete factual findings and . . . analysis consistent with those findings.” (Appeal Board Decision at 2.)

FINDINGS OF FACT

The Applicant is 43, married and has a Master of Science degree. He is employed by a defense contractor, and he seeks to obtain a DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant may have foreign connections which potentially make him vulnerable to coercion, exploitation or pressure.

The Applicant was born in China in 1963. He emigrated from China in 1986 in order to continue his studies in the United States. The Applicant became a naturalized American citizen in July 1998. His wife was also born in China, and she became a naturalized American citizen in May 2004. They were married in 1993, and have one American born daughter. (Government Exhibit 1.) They have between \$1,500,000 and \$2,000,000 in assets in the United States. (Transcript at 50-51.)

The Applicant’s brother became an American citizen in December 1991. (Government Exhibit 1 at question 10, Applicant’s Exhibit C.) His mother became an American citizen in October 2005. (Answer at 1, Applicant’s Exhibit C.) His father is still a citizen of China, but resides with the Applicant and is a permanent resident of the United States. (Applicant’s Exhibit D.)

The Applicant’s mother in law and father in law are citizens of China and reside there. They are both retired and have a pension income from a non-governmental company in China. (Transcript at 43-44.) The Applicant does not talk to them that often, at most once or twice a year. (Transcript at 51-52.)

Since Applicant's mother in law and father in law are citizens and residents of China, it is important to consider the status of China at this time. China, 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 Chinese 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. China has an extremely large army, a sophisticated defense establishment, and space capability. China has launched satellites, has ballistic missiles, 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. China 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. However, I also note the following in Administrative Judge's Exhibit I(D) at 21, "There is no evidence that the PRC considers Chinese-Americans to be more vulnerable to approach than any other group."

Since becoming an American citizen, the Applicant and his family have traveled four times to China (2000, 2002, 2003 and 2005). All of these trips were for vacations. The first three occurred before the Applicant worked in the Defense sector. Before his last trip, he followed his company policy and filled out a "Pre-Departure Foreign Travel Form." (Applicant's Exhibit A.) In it, the Applicant stated that he was traveling to China and that his family would be meeting his in-laws. The Applicant also took the precaution of specifically asking his Facility Security Officer (FSO) if there were any security concerns connected to his visiting China. The FSO states, "I consulted with DSS [Defense Security Service] and was told that there were no restrictions on his travel to China, and that there shouldn't be a problem. Armed with this information [the Applicant] confidently made the trip." (Applicant's Exhibit E at 4.)

The Applicant testified about what he would do if he was approached by a foreign intelligence service. He stated, "If there was any threat that was caused by Chinese Government holding my parents-in-law as a threat for me to release secured - - classified information - - I will report directly to the authority of the FBI, and I believe that our Government will protect me from that." (Transcript at 38.)

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents

its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case will be set forth under CONCLUSIONS, below.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may have foreign connections or be subject to foreign influence that may lead to poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or

conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance. If such a case has been established, the burden then 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. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has foreign connections which could cause a security concern (Guideline B).

The Applicant, on the other hand, has successfully mitigated the Government's case. The Applicant's parents both live in the United States. His mother is an American citizen. The evidence shows that the Applicant's relationship with his in-laws in China is not terribly close. It is difficult to call any family relationship "casual and infrequent," but this one comes close. Finally, neither of his wife's parents in China is an agent of that government or, in my opinion, in a position to be exploited by the Chinese government. The possibility that the Applicant can be coerced by his in-laws is virtually nil.

Based on the evidence the Government has presented, the following Disqualifying Conditions arguably apply to this case: 7.(a) *Contact with a foreign family member . . . 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;* (b) *connections to a foreign person . . . 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 . . . by providing that information;* and (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.* I have also considered the information concerning the intelligence activities of the Chinese government provided by Department Counsel in Administrative Judge's Exhibit I and its attachments I(A) through I(D).

The Applicant has provided compelling evidence to show that the following Mitigating Conditions also apply to this particular case, given his particular background: 8(a) *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.;* and (b) *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.

The Applicant is a person who has shown over an extensive period of years his connections to the United States and his desire to be not only a good citizen, but a security aware citizen. It is to his benefit that the Applicant shows an appreciation of the possible activities of the Chinese government. This is shown by his affirmative acts to make sure that his travel to China in 2005 was appropriate. As has been stated earlier, his wife, daughter and mother are American citizens. The Applicant has extensive financial ties to the United States. Under the particular facts of this case, the Applicant has shown that he has deep and longstanding loyalties in the United States. Based on my analysis of the facts, including a consideration of the espionage activities of the Chinese government, I find that the Applicant “can be expected to resolve any conflict of interest in favor of the U.S. interest.”

“[A] Judge is not limited to Adjudicative Guidelines mitigating conditions when deciding whether an applicant has demonstrated extenuation or mitigation.”¹ The application of the Directive’s General Factors to the Applicant’s foreign connections, specifically relevant General Factor h, also justifies granting the Applicant a security clearance. The totality of this Applicant’s conduct and circumstances, as set forth at length above, including the virtually non-existent potential for exploitation, shows that he warrants a favorable finding under the whole person standard.

The record shows that the Applicant has been a patriotic American citizen for many years, and has substantial financial assets in the United States. Almost all of his immediate family are citizens of the United States (especially his wife and child). The Applicant is alert to the security concerns presented by his particular circumstances and the responsibilities incumbent upon him. The Applicant testified about the importance of his family in the United States, and his pride in being an American citizen and a member of the defense industry. Using the whole person standard, the Applicant has mitigated the security significance of his foreign connections and is eligible for a security clearance.²

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

FORMAL FINDINGS

¹ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006).

²“[Matters], such as evidence of an applicant’s personal loyalties, the nature and extent of an applicant’s family ties to the U.S. relative to his ties to a foreign country, his or her social ties within the U.S., and many others raised by the facts of a given case can properly be factored in to a judge’s evaluation of an applicant’s worthiness for a security clearance.” ISCR Case No. 04-11414 at 4 (App. Bd. Mar. 5, 2007). (Citations omitted.)

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: For the Applicant.

Subparagraph 1.c.: For the Applicant.

DECISION

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

Wilford H. Ross
Administrative Judge