

KEYWORD: Foreign Influence; Personal Conduct

DIGEST: Applicant was born in the Peoples Republic of China (PRC) to parents of Chinese descent and emigrated to the U.S. in 1997. Since emigrating to the U.S., Applicant has earned an engineering degree from a reputable American university, become a naturalized U.S. citizen, and established himself as a reliable and trusted engineer with a U.S. defense contractor. Applicant's birth father, maternal grandparents, and maternal aunt are citizens of the PRC, reside in the PRC, and are presumably close to Applicant despite his occasional contacts with them. Each of his immediate family members remain in a position that could realistically make them vulnerable to coercion or pressure that could implicate Applicant and compel him to make decisions about competing loyalties. Applicant fails to mitigate potential risks to undue foreign influence concerns caused by the status of his father and other family members living in the PRC. Applicant successfully refuted allegations that he falsified his security clearance application by omitting prior possession and use of a Chinese passport. Clearance is denied.

CASENO: 06-22378.h1

DATE: 07/19/2007

DATE: July 19, 2007

In re:)	
)	
-----)	
SSN: -----)	ISCR Case No. 06-22378
)	
Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
ROGER C. WESLEY**

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Department Counsel

FOR APPLICANT

Timothy Pittman, Esq.

SYNOPSIS

Applicant was born in the Peoples Republic of China (PRC) to parents of Chinese descent and emigrated to the U.S. in 1997. Since emigrating to the U.S., Applicant has earned an engineering degree from a reputable American university, become a naturalized U.S. citizen, and established himself as a reliable and trusted engineer with a U.S. defense contractor. Applicant's birth father, maternal grandparents, and maternal aunt are citizens of the PRC, reside in the PRC, and are presumably close to Applicant despite his occasional contacts with them. Each of his immediate family members remain in a position that could realistically make them vulnerable to coercion or pressure that could implicate Applicant and compel him to make decisions about competing loyalties. Applicant fails to mitigate potential risks to undue foreign influence concerns caused by the status of his father and other family members living in the PRC. Applicant successfully refuted allegations that he falsified his security clearance application by omitting prior possession and use of a Chinese passport. Clearance is denied.

STATEMENT OF THE CASE

On November 3, 2006, 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 granted, continued, denied or revoked.

Applicant responded to the SOR on November 20, 2006, and requested a hearing. The case was assigned to me on May 14, 2007, and was scheduled for hearing on June 5, 2007. A hearing was convened on June 5, 2007, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of one exhibit; Applicant relied on two witnesses (including himself) and no exhibits. The transcript (R.T.) was received on June 14, 2007.

Besides its one exhibit, the Government requested administrative notice of seven documents: A U.S. Department of State Background Note on China (January 2007), a U.S. Department of State China report, entitled *Country Reports on Human Rights Practices-2005*; a U.S. House of Representatives Select Committee Report on U.S. National Security and Military/Commercial Concerns with China (January 1999); a National Counterintelligence Center Report to Congress on Foreign Economic Collection and Industrial Espionage (2005); a National Counterintelligence Center Report to Congress on Foreign Economic Collection and Industrial Espionage (2000); an Interagency OPSEC Support Staff (IOSS) Report, entitled *Intelligence Threat Handbook (Unclassified/For Official Use)* (June 2004); and U.S. Department of State, Bureau of Consular Affairs Report, entitled *Consular Affairs Information Sheet on China* (September 2006).

For good cause shown, administrative notice was granted with respect to the above-named background reports addressing the geopolitical situation in China. Administrative notice was extended to the documents themselves in accordance with the provisions of Rule 201 of F.R. Evi. Administrative notice was accorded the documents themselves, but the notice did not foreclose Applicant from challenging the accuracy and reliability of the information contained in the reports addressing China's current state.

PROCEDURAL ISSUES

After Department Counsel completed her opening statement, Applicant moved to amend the SOR to eliminate Guideline E as a security consideration. Applicant based his motion on Department Counsel's failure to raise a controverted fact issue in her opening statement regarding Applicant's omission of his prior possession and use of a Chinese passport in the security clearance application he completed in December 2004. Based on the Department Counsel's disclaiming any factual disagreement over Applicant's pleading response (specifically, he admitted the omission but without any intent to falsify), Applicant claimed a pleading admission by the Government which had the procedural effect of removing any factual issue from the case. After consideration of the arguments of counsel, Applicant's motion was denied. Applicant's renewed motion at the conclusion of the evidence was also denied.

Before the close of the hearing, Department Counsel requested leave to supplement the record with a copy of the Form of Relevant Materials (FORM), which triggered Applicant's supplemental response. For demonstrated good cause, Department Counsel was afforded three days to supplement the record with a copy of the FORM. Within the time permitted, Department Counsel furnished a copy of the FORM.

SUMMARY OF PLEADINGS

Under Guideline B, Applicant is alleged (a) to have a father, maternal grandparents, and a maternal aunt who are citizens and residents of China and (b) to have traveled to China in June 2000. Under Guideline E, Applicant is alleged to have omitted (i) his possession of a Chinese passport (one he possessed between 1996 and 2000, at least) and (ii) his use of his passport to travel to China in 2000.

For his answer to the SOR, Applicant admitted each of the allegations in the SOR. He denied any intention to falsify his 2004 SF-86. In explanation, Applicant claimed his parents separated in 1995, and his mother (who became a U.S. citizen in 2001) was awarded full custody of Applicant by the Chinese courts. Applicant claims to have had very limited contact with his birth father since immigrating from China, and very distant relationships with his maternal grandparents and maternal aunt. He claims no financial responsibility towards their upkeep and well being and undivided loyalty to the U.S. Applicant claims he has not traveled to China since his last trip in June 2000. And he claims his omission of his Chinese passport in his SF-86 was oversight, which he openly and fully explained when he was interviewed by OPM agents.

Applicant filed a supplemental response in June 2007. His response provides a detailed accounting of his life's history and addresses the various disqualifying and mitigating conditions in the Directive and their application to Applicant's situation.

FINDINGS OF FACT

_____Applicant is a 25-year old engineer for a defense contractor who seeks to obtain a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant's background

Applicant was born in the Peoples' Republic of China (PRC) in 1981 to parents of Chinese descent. He attended schools in China and became fully acclimated to Chinese culture and society. His parents legally separated in 1995, and his mother was granted full custody by a Chinese court the same year. The court cited incompatibility as the basis of the divorce and awarded child support to Applicant's mother. Control of household properties and savings was extended to Applicant's father.

While working as a translator for an oil service company in the PRC, Applicant's mother (L) became acquainted with a D (a U.S. citizen by birth and a retired Air Force service member), who worked for the same company (OGET), both in China and in the U.S. L was never involved in any politics or dissident movements while residing in the PRC (R.T., at 137-38). L's parents own some farm property that L could inherit when her grandparents expire (R.T., at 139).

L moved to the U.S. to be with D in 1994, and they married the following year (R.T., at 52-53). Applicant (who was 15 years of age at the time) joined his mother and stepfather in the U.S. in 1997 (R.T., at 55-56). For the ensuing four years, Applicant attended a local high school in the U.S., and graduated in 2000 with an excellent grade point average (R.T., at 58).

The company (OGET) that employed both L and D is wholly owned by the Chinese government and is legally treated as an incorporated arm of the Chinese government (R.T., at 153-55). Applicant's biological father (G) never served in the Chinese military or worked for intelligence services. Nor was G ever involved in any political or dissident movements or detained or imprisoned by the PRC government (R.T., at 144). During his working years, G was an electrician for OGEA. He has since retired from OGEA with an adequate pension. Applicant described OGEA as a sister company of OGET and intertwined in some kind of company relationship (R.T., at 147-48). Both OGEA and OGET are related to one another and inferentially owned by the PRC (R.T., at 156).

In 2001, L became a U.S. citizen. Applicant applied for U.S. citizenship in 2002 and became U.S. citizen in June 2003 (*see* ex. 1; R.T., at 123-24). He has never formally renounced his Chinese citizenship and must be presumed to retain dual citizenship with the U.S. and China.

Since emigrating to the U.S., Applicant has maintained occasional contacts with his biological father. He speaks to his father and maternal/paternal grandparents once or twice a year by telephone, but never discusses his work (R.T., at 106-09). None of his grandparents have had any known connections with the PRC government (R.T., at 135-36).

Applicant traveled to China in 2000 to vacation following his high school graduation and to visit his family. He entered and exited the country using his Chinese passport (R.T., at 113-14, 125),

which his mother destroyed after he became a U.S. citizen (R.T., at 126). While in China, he saw his father, grandparents, and maternal aunt (R.T., at 132-33). His trip to China in 2000 was his first return to his birth country since his emigration to the U.S. in 1997 (R.T., at 114), and he has not since returned to China. Nor has he been in contact with his maternal aunt since he saw her in 2000 (R.T., at 110-11).

Country status of the PRC

While not a country acclaimed to be hostile to US persons and interests, the PRC maintains a relationship that is more competitive than cooperative. The PRC has an authoritarian government under the control of the Chinese Communist Party (*see*, U.S. Dept. of State, Background Note on China (January 2007)). Geopolitically, the PRC and the U.S. have been rivals since the Cold War, with particular disagreement over the status of Taiwan. China has continued to resist what it considers to be superpower dominance by the U.S., despite improving economic relations.

The PRC is known to use its intelligence services to gather information about the U.S. and to obtain advanced technologies (*see* Interagency OPSEC Support Staff (IOSS) Report, entitled *Intelligence Threat Handbook* (Unclassified/For Official Use) (June 2004)). The PRC actively and aggressively monitors international communications satellites from maintained intercept facilities, in addition to collecting information on U.S. military operations and exercises, both legal and illegal (*see* U.S. House of Representatives Select Committee Report on U.S. National Security and Military/Commercial Concerns with China (January 1999)). Examples of PRC economic espionage are cited in the National Counterintelligence Center Report to Congress on Foreign Economic Collection and Industrial Espionage (2005). Most of the examples of illegally exported technology to the PRC involve high tech equipment and devices used in missile and aircraft guidance systems, highly sensitive weapons parts, infrared cameras and missile microchips.

Established in 1949, the PRC, with over 1.3 billion people, is the world's most populous country (*see* U.S. Dept. of State, Background Note on China (January 2007)). Today it continues to undergo rapid economic and social change. Political power, however, remains centralized in the Chinese Communist Party with little indication of any change in the foreseeable future. To be sure, the PRC has never been known for a positive human rights record among Western nations and international human rights groups. Part of this can be explained in terms of the PRC's lack of any cognizable tradition for respect for developing democracies and the rule of law (*see* U.S. Department of State China report, entitled *Country Reports on Human Rights Practices-2005*).

Examples of human rights abuses are many and are carefully covered in the U.S. Department of State China report, entitled *Country Reports on Human Rights Practices-2005*. PRC security personnel, for example, are known to place foreign government officials, journalists, and business people, with access to advance proprietary technology, under surveillance. Hotel rooms and personal computing devices for these categories are sometimes searched. *See id.*

Applicant's SF-86 omission

Asked to complete an SF-86 in December 2004, Applicant answered **no** to question 15, which asked him whether in the past seven years he had ever had an active passport issued by a

foreign government (*see ex. 1*). Applicant attributes the omission to an oversight and cites his acknowledged trip to the PRC in 2000 as corroborative proof his passport omission was inadvertent (R.T., at 117-21). He claims that since he was not a U.S. citizen when he traveled to the PRC in 2000, he could only have used his Chinese passport. Applicant cites to all of the information he provided about himself and his family as further proof his passport omission was an honest mistake.

Applicant's claimed failure to list his PRC passport due to oversight reflects a plausible explanation and is accepted after considering all of the circumstances surrounding his SF-86 omission. Questioned about his Chinese passport by an OPM investigator in 2006, Applicant promptly acknowledged his previous possession and use of the passport (R.T., at 128-29).

Applicant's character references

Applicant is well regarded by his supervisor who has worked with him since his employment in 2004 (R.T., at 81-83). His supervisor assured that Applicant had never been known to mishandle classified information (R.T., at 86). Applicant has received good performance evaluations and has never been disciplined.

POLICIES

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Foreign Influence

The Concern: 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.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant was born in the PRC to parents of Chinese descent and immigrated to the U.S. in 1995. He became U.S. citizen in 2003 and is a highly regarded engineer for a U.S. defense contractor. Security issues of concern to the Government focus on members of Applicant's immediate family (his birth father, his maternal and paternal grandparents, and his maternal aunt) who are citizens and residents of the PRC, a country known to engage in economic data collection in the U.S. Of security concern, too, is Applicant's omission of his Chinese passport in his SF-86.

Foreign influence concerns

Government urges security concerns over risks that Applicant's immediate family members that reside in the PRC might be subject to undue foreign influence by PRC authorities to access classified information in Applicant's possession or control. Because Applicant's immediate family members are citizens of and reside in the PRC, they present potential security risks covered by Disqualifying Condition (DC) 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) of the Adjudication Guidelines for foreign influence.

The citizenship/residence status of Applicant's immediate family members residing in the PRC pose some potential concerns for Applicant because of the risks of undue foreign influence that could compromise classified information under Applicant's possession and/or control. DC 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*) has possible application due to the presence of Applicant's immediate family members in the PRC.

From what is known from the accounts of Applicant and his stepfather, neither Applicant nor L have any (a) current financial or political affiliations with the PRC's government, (b) history of being subjected to any coercion or influence, or (c) apparent exposure to coercion or influence. Because the companies who employed G and L (*i.e.*, OGET and OGEA) for so many years are interconnected and inferentially owned by the PRG, it is difficult to discount risks of G's being exploited by the PRC to enlist Applicant's cooperation in furnishing sensitive economic data. Applicant has not broken his contacts with his father and other immediate family members residing in China; even though his contacts have been limited in recent years.

Mitigation is difficult to find, given the history and current political and security conditions extant in the PRC, and Applicant's relationships with his immediate members in the PRC. The PRC's political and security conditions certainly do not permit the application of MC 8(a) (*the nature of the relationships with foreign persons, the country in which these persons are located, or the persons or activities of these 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 a foreign individual, group, organization, or government and the interests of the U.S.*). Applicant's relationships with his father and other family members residing in the PRC also preclude application of any of the other mitigating conditions in the guideline for foreign influence.

The PRC is a country that in the past has targeted the U.S. for economic and proprietary data collection, and lacks any demonstrated history of human rights protections and respect for the rule of law by most published accounts. While the PRC still continues to maintain strong diplomatic interests with the U.S., and has shown its capacity to be helpful in strategic efforts to suppress nuclear arms threats in the region, it remains an authoritarian regime with a persistent history of aggressive targeting of the U.S. with active intelligence gathering programs..

The revised Adjudicative Guidelines governing collateral clearances still do not dictate *per se* results or mandate particular outcomes for applicants with relatives who are citizens/residents of foreign countries in general. But they do place major emphasis on the status of the foreign country of concern.

As for security concerns associated with the presence of Applicant's immediate family members in the PRC, realistic risks of a hostage situation or undue foreign influence brought in the hopes of eliciting either classified information or economic or proprietary data out of Applicant is

still very present, notwithstanding Applicant's becoming a U.S. citizen and committing himself to protecting classified information. *See* ISCR Case No. 01-10128, at 4-5 (Appeal Bd. Dec. January 6, 2005) (citing, *inter alia*, the lack of record evidence that the applicant's family members were not in a position to be exploited by the PRC government).

Furthermore, Applicant's demonstrated commitments to the U.S. and the trustworthiness he has enlisted from his employer and stepfather must be counterbalanced by an overall appraisal of all of the considerations affecting Applicant's security clearance worthiness in light of the geopolitical realities that govern PRC-U.S. relations and the potential for exploitation of Applicant's immediate family members residing in the PRC. Piecemeal analysis has, of course, been consistently rejected by the Appeal Board when assessing security risks associated with an applicant's having family members in a foreign country. *See* ISCR Case No. 01-22693 (September 22, 2003).

Overall, potential security concerns attributable to Applicant's immediate family members (*viz.*, his birth father, paternal and maternal grandparents, and maternal aunt) are insufficiently mitigated at this time. Based on the geopolitical status of the PRC, Applicant's family ties, and the past decisional analysis of the Appeal Board), too much uncertainty exists to permit safe predictive judgments about Applicant's ability to withstand risks of undue influence attributable to his familial relationships in the PRC. Unfavorable conclusions warrant with respect to the allegations covered by Guideline B.

Security clearance application omission

Security concerns over Applicant's judgment, reliability and trustworthiness are raised under the personal conduct guideline, too, as the result of his omission of his past possession and use of a Chinese passport in the SF-86 application he completed in December 2004. By omitting the passport he possessed and used before he became a U.S. citizen, Applicant failed to furnish materially important background information about his foreign passport possession/use that was needed for the Government to properly process and evaluate his security clearance application.

Applicant's SF-86 omission is attributable to an oversight and not the result of any manifest intent to mislead. Applicant's explanations, considering both the circumstances surrounding the furnished information at the time and Applicant's overall reputation for honesty and trustworthiness, enable him to convincingly refute the falsification allegations. Considering all of the evidence produced in this record, favorable conclusions warrant with respect to the personal conduct guideline allegations that Appellant knowingly and wilfully omitted his prior possession and use of a foreign passport when completing his security clearance application.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in E2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, I make the following separate FORMAL FINDINGS with respect to Applicant's eligibility for a security clearance.

GUIDELINE B (FOREIGN INFLUENCE): AGAINST APPLICANT

 Sub-para. 1.a: AGAINST APPLICANT

 Sub-para. 1.b: AGAINST APPLICANT

 Sub-para. 1.c: AGAINST APPLICANT

GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT

 Sub-para. 2.a: FOR APPLICANT

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance.

Roger C. Wesley
Administrative Judge