

KEYWORD: Foreign Influence

DIGEST: Applicant is a 33-year-old managing consultant employed by a federal government contractor. His grandmother and grandfather are citizens and residents of The Peoples Republic of China (PRC). His mother-in-law, father-in-law, and brother-in-law are citizens and residents of the PRC. He traveled to China in 2000, 2002, 2004, and 2005. He successfully mitigated the security concerns about foreign influence. Clearance is granted.

CASENO: 06-22761.h1

DATE: 07/20/2007

DATE: July 20, 2007

In re:)	
)	
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SSN: -----)	ISCR Case No. 06-22761
)	
Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
CHRISTOPHER GRAHAM**

APPEARANCES

FOR GOVERNMENT

J. Theodore Hammer, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 33-year-old managing consultant employed by a federal government contractor. His grandmother and grandfather are citizens and residents of The Peoples Republic of China (PRC). His mother-in-law, father-in-law, and brother-in-law are citizens and residents of the PRC. He traveled to China in 2000, 2002, 2004, and 2005. He successfully mitigated the security concerns about foreign influence. Clearance is granted.

STATEMENT OF THE CASE

On August 29, 2005, Applicant submitted a Security Clearance Application (SF 86).¹ The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, DOHA issued a Statement of Reasons (SOR) on January 30, 2007, detailing the basis for its decision – security concerns raised under Guideline B (Foreign Influence) of the Directive. The President issued revised adjudicative guidelines (Guidelines) on December 30, 2005. DoD implemented them on September 1, 2006. Pending official amendment/reissue of DoD Directive 5220.6, the Guidelines are to be used in all cases when the SOR is dated on or after September 1, 2006. Because the SOR was issued after September 1, 2006, DoD policy requires that this case proceed under the revised guidelines.

Applicant answered the SOR in writing on February 21, 2007, and elected to have a hearing before an administrative judge. DOHA assigned the case to me on April 4, 2007, and issued a Notice of Hearing on April 17, 2007. I convened a hearing on May 9, 2007, to consider whether it is clearly consistent with the national interest to grant or continue Applicant's security clearance. The government offered eight exhibits, marked as Exhibits 1-8. Applicant offered six exhibits, marked as Exhibits A-F. The government objected to Exhibit D, which was overruled. All other exhibits were admitted without objection. DOHA received the transcript (Tr.) on May 18, 2007.

FINDINGS OF FACT

Applicant admitted the allegations contained in the SOR. The admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 33-year-old managing consultant employed by a federal government contractor.² He is married and has two children.³ He has a master's degree in management information systems.⁴ He has no prior military service and this is his first application for a security clearance.⁵

Applicant came to the U.S. in 1991, at the age of 17. After high school and college, he worked for a number of companies as a consultant. Since 2002, he has worked on a number of government contracts. He and his wife own two homes, and have various investments, including

¹Government Exhibit 1 (Security Clearance Application (SF 86), dated August 29, 2005).

²Tr. at 10, 17.

³*Id.* at 11.

⁴*Id.* at 13.

⁵*Id.* at 15.

401(k), stock and brokerage accounts, and they own nothing in a foreign country. His parents, both physicians (M.D.), are residents of and citizens of the U.S.⁶ In addition to his parents, he has uncle's, cousins, and other relatives living in the United States who are all U.S. citizens.

Applicant's grandmother and grandfather are citizens and residents of The Peoples Republic of China (PRC). His grandfather was a college professor at a private university, and receives a pension from the university. His grandmother was a housewife.⁷ His grandparents are nearly 90 years old, have been retired for nearly 30 years, and both have major health problems. He talks to them two or three times a year to check on their health.

His mother-in-law, father-in-law, and brother-in-law are citizens and residents of the PRC. His father-in-law is a retired environmental scientist, who worked for a nonprofit institution.⁸ His mother-in-law is a patent attorney with offices in China and the U.S. His brother-in-law was educated in Canada and the United Kingdom, and now works for a financial brokerage in China.⁹

None of his family had any association with the Chinese government or Communist Party.¹⁰ Both of his parent's families suffered political and economic disadvantages during the Cultural Revolution from 1966 to 1976. His paternal grandparents were imprisoned, accused of spying for the United States, as well as giving anti-government forces scientific data, because both were engineers. His grandfather was not given his last chance to be with his mother when she died because he was in prison. His parents, and an aunt an uncle were forced to do heavy labor. His family lost valuables, assets, and their pride. His wife has told him similar stories. He believes it is extremely unlikely that any family member, on both sides, would collaborate with the Chinese government.¹¹ Applicant's family ties to the U.S. go back three generations. A grandfather worked as a translator for the U.S. Army during World War II. Another fought along side Chiang Kai-shek. A great-uncle was a noted nuclear physicist that worked for the U.S. government.¹²

Applicant traveled to China in 2000, 2002, 2004, and 2005.¹³ In 2000, he traveled to see his grandparents, the first trip to see them since emigrating to the U.S. The second, in 2002, was after he married and the trip was to visit his in-laws and his grandmother on his mother's side, who was having serious health problems. She helped raise him when he was young. In 2004, he and his wife took a leisurely trip to see southern China and also visit families. In 2005, he took his daughter to

⁶*Id.*

⁷*Id.* at 19-20.

⁸*Id.* at 20.

⁹*Id.* at 22-23.

¹⁰*Id.* at 25-30.

¹¹*Id.* at 32-33.

¹²*Id.* at 35-40.

¹³*Id.* at 18.

visit her great-grandparents. He felt it was important for them to see the next generation.¹⁴ He was never contacted by Chinese officials on any of his trips.

Applicant's co-worker testified that Applicant leads their area of portfolio management, and is doing a very good job of keeping clients happy. He believes Applicant is honest, trustworthy, and not vulnerable to foreign influence, and recommends him for a clearance.¹⁵

The PRC is a very populous country, 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.¹⁶ 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.¹⁷

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.¹⁸

There is evidence that the PRC considers Chinese-Americans to be more vulnerable to approach than any other group. It is likely the PRC has adopted its distinctive ethnic-targeting intelligence strategy because it is much more capable of mounting effective approaches against individuals of ethnic Chinese ancestry than those of any other background. Also, the selling point in a normal PRC recruitment operation is not an appeal to ethnicity *per se*, but to whatever feelings of obligation the targeted individual may have towards the PRC, family members in the PRC, old friends in the PRC, etc. The crux of the PRC's approach is not to try to exploit a perceived vulnerability but to appeal to an individual's desire to help the PRC out in some way. Whatever the

¹⁴*Id.* at 44-45.

¹⁵*Id.* at 123-130.

¹⁶Government Exhibit 2 (U.S. State Department, *Background Note on China*, dated January 2007) at 1-19.

¹⁷Government Exhibit 3 (U. S. State Department, *Country Reports on Human Rights Practices: China, 2006*,) at 1-11.

¹⁸Government Exhibit 4 (U. S. House of Representatives report: US National Security and Military/Commercial Concerns with the People's Republic of China, dated January 3, 1999) at 1-57.

reason, ethnic targeting to arouse feelings of obligation is the single most distinctive feature of the PRC intelligence operations.¹⁹

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider the "Adjudicative Guidelines for Determining Eligibility For Access to Classified Information" (Guidelines). In addition to brief introductory explanations for each guideline, the guidelines are divided into disqualifying conditions and mitigating conditions, which are used to determine an applicant's eligibility for access to classified information.

These guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process. Guidelines ¶ 2. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.²⁰

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guidelines ¶ 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."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security."²¹ 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.

¹⁹ Government Exhibit 7 (*Intelligence Threat Handbook*, dated June 2004) at 21.

²⁰ Guidelines ¶ 2(c).

²¹ Guidelines ¶ 2(b).

In the decision-making process, facts must be established by “substantial evidence.”²² The Government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, “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, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” The burden of disproving a mitigating condition never shifts to the government.²³

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive and the guidelines include, by necessity, consideration of the possible risk that an 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.

The scope of an administrative judge’s decision is limited. Nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism.²⁴

CONCLUSIONS

Guidelines ¶ 6. 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

²²“Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “Substantial evidence” is “more than a scintilla but less than a preponderance.” *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

²³*See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

²⁴Executive Order 10865, § 7.

to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Guidelines ¶ 7. Conditions that could raise a security concern and may be disqualifying include:

(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.

Guidelines ¶ 8. Conditions that could mitigate security concerns include:

(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 government established its case under Guideline B. Applicant admitted that his grandmother and grandfather are citizens and residents of The Peoples Republic of China (PRC), that his mother-in-law, father-in-law, and brother-in-law are citizens and residents of the PRC, and that he traveled to China in 2000, 2002, 2004, and 2005. In addition, 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 as a whole, Applicant has close family ties to the PRC, as evidenced by his parents and in-laws living in the PRC. The strength of the ties is also demonstrated by Applicant traveling to the PRC for family visits four times between 2000 and 2005.

Applicant's relatives living in China do not meet the definition of "agent of a foreign power" under 50 U.S.C. § 438(6) and 50 U.S.C. § 1801(b). Similarly, they would not be considered as an "agent of a foreign power" under the more expansive definition adopted by the Appeal Board. The available evidence indicates they have no ties to or economic dependence upon the PRC government.

The test is whether Applicant 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. The federal statute, 50 U.S.C. § 1801(a), defines "foreign power" to include: a foreign government; a faction of a foreign nation; an entity openly acknowledged by a foreign government to be controlled by that foreign government; a group engaged in international terrorism; a foreign-based political organization; or an entity directed and controlled by a foreign government. The focus is not the country or its people, but its rulers and the nature of the government they impose. The PRC is hostile to the U.S. and is ruled by a communist government with a poor record of human rights. Applicant is also the type of target favored by persons conducting intelligence gathering on behalf

of the PRC. With this history it is not difficult to envision a scenario in which Applicant's relatives could be subjected to some or all of these arbitrary denials of basic human rights in an effort to put pressure on Applicant to divulge classified information. The PRC is actively pursuing industrial and military intelligence in this country. Given these circumstances - which are clearly beyond Applicant's control - the presence of Applicant's family in the PRC places them at risk of being brought under control or used as a hostage by a PRC intelligence or security service. The mere fact that they live in the PRC means they are in a position where there is a potential for them to be exploited in a way that could force Applicant to choose between loyalty to his family members and the interests of the U.S. Accordingly, Applicant is unable to successfully mitigate the security concern using the Guidelines ¶ 8 (a) standard.

Under the mitigating condition of Guidelines ¶ 8 (b) there is no conflict of interest because Applicant has such deep and longstanding relationships and loyalties in the U.S., that he can be expected to resolve any conflict of interest in favor of the U.S. interest. He is a third generation of his family to become a U.S. citizen. He was educated in the U.S. Most of his family are U.S. citizens. He owns property here, and none in China. He has a 401(k) plan, stock investments, rental real estate in addition to his home. His immediate family members in China are for the most part elderly and in poor health. He has minimal contact with them. His contact with his grandparents is showing them the respect that they are entitled to, and inquiring about their health, and telling them about their great-grandchildren should not be misconstrued as somehow compromising his ability to keep classified information confidential.

Whole Person Concept

The “whole person” concept—not the potentially disqualifying or mitigating conditions—is the heart of the analysis of whether an applicant is eligible for a security clearance.²⁵ Indeed, the Appeal Board has repeatedly held that an administrative judge may find in favor of an applicant where no specific mitigating conditions apply.²⁶

In assessing whether an applicant is a security risk because of his or her relatives or associates in a foreign country, it is necessary to consider all relevant factors. The Directive specifically requires each administrative judge to consider all the facts and circumstances, including the “whole person” concept, when evaluating each individual case. To ignore such evidence would establish a virtual per se rule against granting clearances to any person with ties to persons in a foreign country, contrary to the clear terms of the Directive. Under the former Guidelines, the Appeal Board has held that “although the position of an applicant’s foreign family members is significant and may preclude the favorable application of FI MC E2.A2.1.3.1., the totality of an applicant’s conduct and circumstances (including the realistic potential for exploitation) may still warrant a favorable application of the relevant general factors.”²⁷

²⁵Directive, ¶ E2.2.3.

²⁶ISCR Case No. 03-11448 at 3-4 (App. Bd. Aug. 10, 2004); ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004).

²⁷ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (footnotes omitted); *accord* ISCR Case No. 03-23259 at 3 (App. Bd. May 10, 2006).

Applicant takes his duties seriously, and has demonstrated the self-discipline generally required for academic and career achievement. He exercises sound judgment. I find he is capable of maintaining, over a long period of time, a stable, loyal relationship with the U.S. government. He has shown an ability to cooperate, accommodate, and be part of his employer's team. I find the potential for pressure, coercion, exploitation, or duress does not constitute a security risk.²⁸

I had the opportunity to evaluate the demeanor of Applicant, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, listen to his testimony, and watch the interplay between himself and those around him. It is my impression Applicant's explanations are both consistent and sincere, and have the solid resonance of truth. Thus, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and refuted the Government's case in this regard

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline B:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant

DECISION

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

Christopher Graham
Administrative Judge

²⁸Directive, ¶ E2.2.1.8.