



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
-----)	ISCR Case No. 06-23453
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: *Pro Se*

January 9, 2008

Remand Decision

GRAHAM, Christopher, Administrative Judge:

On September 27, 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 an Amended Statement of Reasons (SOR) on December 19, 2006, detailing the basis for its decision – security concerns raised under Guideline B (Foreign Influence) of the Directive. The President issued revised adjudicative guidelines (AG) on December 30, 2005. DoD implemented them on September 1, 2006. Pending official amendment/reissue of DoD Directive 5220.6, the AG 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.

¹ Government Exhibit 1 (Security Clearance Application, dated September 27, 2005).

Applicant answered the SOR in writing on December 29, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on February 23, 2007, and a Notice of Hearing was issued on March 6, 2007. I convened a hearing on March 30, 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 no exhibits. All exhibits were admitted without objection. DOHA received the transcript (Tr.) on April 11, 2007.

I issued a decision on July 18, 2007. The Applicant appealed. The Appeal Board remanded the case on November 14, 2007.

Appellate Issues

The Appeal Board determined that the facts cited in my decision were supported by substantial evidence.² It also found that my conclusions under Guideline B were potentially erroneous because I used language from prior Appeal Board decisions that were based on the previous adjudicative guidelines that have been replaced. Applicant's case is required to be adjudicated under the revised Adjudicative Guidelines (AG), which are effective for all statements of reasons (SOR) issued on or after September 1, 2006.

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 32-year-old software engineer employed by a defense contractor. (Tr. 11, 14). She is married with one child. (Tr. 12). She has a bachelor's degree in information systems, and anticipated being awarded a master's degree in computer science in December 2007. (Tr. 12). She has no prior military service and this is her first application for a security clearance. (Tr. 13). Applicant immigrated to the United States when she was ten years old. She became a citizen in 2000. (Tr. 19).

Applicant's mother lives in the United States, and her father is a citizen and resident of China. He resided in the United States from 1986 to 1993 or 1994. When her parents divorced, her father returned to China. (Tr. 14-15, 19). Her mother lives in the United States with Applicant's sister. Her mother has not become a citizen primarily because she speaks no English. (Tr. 16). Applicant talks with her father 3-4 times per year. Her grandfather lives in a nursing home in the United States. She keeps her father advised of her grandfather's condition. (Tr. 16). Her father is retired, and has never served in the military, or been employed by the Chinese government. (Tr. 29-30).

² ISCR Case No. 06-23435 at 2 (App. Bd. Nov. 14, 2007).

Applicant has substantial financial connections to the United States. She owns a home in the United States, and she has a U.S. 401(k). She also has a U.S. checking and savings account. She does not own property in China. (Tr. 19-23).

Applicant traveled to China in 2001, where she saw her father and visited several areas she had not seen before. (Tr. 18). Her Chinese passport expired in 1996 and has not been renewed. (Tr. 27).

Applicant's husband works for a defense contractor, but does not have a security clearance. (Tr. 23, 37). Her father-in-law and mother-in-law are Chinese citizens living with Applicant and her husband in the U.S. His father-in-law's entire family lives in the U.S. (Tr. 32). His mother-in-law has immediate family living in China. They have applied twice for citizenship but have been unable to master the language test. (Tr. 32). About once per month, her mother-in-law calls some of her relatives in China, using Applicant's home phone. (Tr. 37). Her father-in-law traveled to China in the last three years for a vacation. (Tr. 40-41).

Peoples Republic of China

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; and no rights of privacy - family, home or correspondence.³ China engages in espionage against the United States and is believed to have plans for a "cyber attack" on U.S. computer systems.⁴ "The PRC 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 or information transfers."⁵ The PRC has had success in obtaining classified defense information.⁶

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" (AG). 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.

³ Government Exhibit 3 (U. S. State Department, *Country Reports on Human Rights Practices: China, 2005*, dated March 8, 2006) at 1, 4-17.

⁴ Government Exhibit 9 (*Report of the Select Committee on U. S. National Security and Military/Commercial Concerns with the People's Republic of China, May 1999*,) at 19-21.

⁵ *Id.* at 21.

⁶ Government Exhibit 8 (*Annual Report to Congress on Foreign Economic Collection and Industrial Espionage for 2006*, at 15-16.

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. AG ¶ 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. AG ¶ 2(c).

Specifically, an administrative judge should consider the nine adjudicative process factors listed at AG ¶ 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." AG ¶ 2(b). 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.

In the decision-making process, facts must be established by "substantial evidence."⁷ 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.⁸

⁷"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).

⁸See 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

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. Executive Order 10865, § 7.

Analysis

AG ¶ 6 expresses the security concern involving foreign influence:

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.

AG ¶ 7 describes nine conditions that could raise a security concern and may be disqualifying; however, three conditions are potentially disqualifying in this case:

(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;

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).

(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; 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.

Although the term "family member" is not defined in AG ¶ 7(a), I conclude family member includes in-laws because Applicant has ties of affection for, or obligation to, her in-laws.⁹

Applicant's father lives in and is a resident of PRC. She has direct contact with her father 3-4 times per year. She also traveled to China in 2001 and visited her father.

Applicant's mother-in-law is a PRC citizen and lives with Applicant. Her mother-in-law communicates with her relatives, who live in PRC and who are citizens of PRC.

Applicant's relationships with her mother-in-law and her father "create a potential for conflict of interest" because Applicant may have a desire to help her father and her mother-in-law's family members by providing classified information. Because she shares living quarters with her mother-in-law there is a heightened risk of foreign inducement or pressure.

The mere possession of family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B.¹⁰ However, such ties do raise a *prima facie* security concern sufficient to require an applicant to present evidence of rebuttal, extenuation, or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for her. *Id.*

AG ¶ 8 lists six mitigating conditions, and three of them are potentially applicable in this case:

(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

⁹ See generally, e.g., ISCR Case No.02-31154 at 4, fn.4 (citing ISCR Case No. 01-03120 (App. Bd. Feb. 20, 2002) (App. Bd. Sept. 25, 2005).

¹⁰ Any cases cited in this decision that were issued prior to September 1, 2006, by the Appeal Board are based on the previous Guidelines. They are not being cited for their precedential value, and are not controlling, unless specifically stated. They are provided for their illustrative logic, and because they provide some support for my comments. See e.g., ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

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.;

(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; and

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

Applicant admitted that her father lived in China, and that her husband's parents lived with her. Based on the record as a whole, the government established its case under the AG. Applicant has close family ties to the PRC, as evidenced by her father, and her mother-in-law's relatives living in China. The strength of the ties is also demonstrated by Applicant traveling to the PRC to visit her father in 2001, and the phone calls she makes to him. Her mother-in-law frequently calls her relatives from Applicant's home phone. Her father-in-law made a recent trip to China. These circumstances raise security concerns under AG ¶¶ 7(a) 7(b), and 7(d).

AG ¶¶ 8(a) and 8(c) do not apply. Applicant did not establish "it is unlikely [she] will be placed in a position of having to choose between the interests of [her father or in-laws] and the interests of the U.S." Her frequent contacts and close relationships with her father and in-laws living in the PRC could potentially force her to choose between the United States and the PRC. She did not meet her burden of showing there is "little likelihood that [her relationships] could create a risk for foreign influence or exploitation."

AG ¶ 8(b) partially applies because Applicant has "such deep and longstanding relationships and loyalties in the U.S., [she] can be expected to resolve any conflict of interest in favor of the U.S. interest." She has been in the United States since 1986, and has been a citizen since 2000. She received her education in the U.S. She owns a U.S. home, has a U.S. checking account, a U.S. 401(k), savings account, and owns no property in the PRC. Although this mitigating condition is partially applicable, it is insufficient to fully overcome the foreign influence security concerns.

Whole Person Analysis

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative AGs related to the whole person concept under Directive ¶ E2.2.1. "Under the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant's life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant's security eligibility by considering the totality of an applicant's conduct and

circumstances.”¹¹ The directive lists nine adjudicative process factors (APF) which are used for “whole person” analysis. Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation and behavior changes, etc., the eighth APF, “the potential for pressure, coercion, exploitation, or duress,” Directive ¶ E2.2.1.8, is the most relevant of the nine APFs to this adjudication.¹² In addition to the eighth APF, other “[available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”³⁴ Directive ¶ E2.2.1. Ultimately, the clearance decision is “an overall common sense determination.” Directive ¶ E2.2.3. 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.”¹³

Substantial mitigating evidence weighs towards grant of Applicant’s security clearance. Applicant has lived in the United States for approximately 22 years and has been a U.S. citizen since 2000. Her husband, her child and her mother live in the United States. Her husband’s parents live with her. Her in-laws have applied for U.S. citizenship, but twice have failed the language test. Her husband’s father’s entire family lives in the U.S. Her ties to these family members are stronger than her ties to family members in the PRC. Her family living in the United States is not vulnerable to direct coercion or exploitation by a foreign power. The realistic possibility of pressure, coercion, exploitation or duress with regard to her husband and child are low. There is no evidence she has ever taken any action which could cause potential harm to the United States.

Three circumstances weigh against Applicant in the whole person analysis. First, the PRC is a nuclear power and PRC’s government is a rival of the United States. More importantly for security purposes, the PRC is actively seeking classified and industrial/economic information. The PRC may attempt to use her family living in the PRC or her mother-in-law’s relatives living in the PRC to pressure Applicant to obtain such information. Second, her father and her mother-in-law’s family live in the PRC and are PRC citizens. Her in-laws are citizens and residents in the PRC. Third, she has frequent and non-casual contact with her father who lives in the PRC. In the last seven

¹¹ ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)); ISCR Case No. 05-02833 at 2 (App. Bd. Mar. 19, 2007) (citing *Raffone v. Adams*, 468 F.2d 860 (2nd Cir. 1972) (taken together, separate events may have a significance that is missing when each event is viewed in isolation).

¹² See ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006) (stating that an analysis under the eighth APF apparently without discussion of the other APFs was sustainable); ISCR Case No. 03-10954 at 5 (App. Bd. Mar. 8, 2006) (sole APF mentioned is eighth APF); ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (remanding grant of clearance because Judge did not assess “the realistic potential for exploitation”), *but see* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 5, 2007) (rejecting contention that eighth APF is exclusive circumstance in whole person analysis in foreign influence cases).

¹³ ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

years, she visited the PRC. Her contacts with family members and in-laws are manifestations of her affection and regard for them.

“Because of the extreme sensitivity of security matters, there is a strong presumption against granting a security clearance. Whenever any doubt is raised . . . it is deemed best to err on the side of the government’s compelling interest in security by denying or revoking [a] clearance.”¹⁴ After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude she has not mitigated the security concerns pertaining to foreign influence. Ultimately, the evidence leaves me with doubts as to Applicant’s security eligibility and suitability.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors” and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the AGs.¹⁵ Applicant has not mitigated or overcome the government’s case. For the reasons stated, I conclude she is not eligible for access to classified information.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Conclusions

In light of all of the circumstances in this case, I again find that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Christopher Graham
Administrative Judge

¹⁴ *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990).

¹⁵ ³⁸ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).