

KEYWORD: Foreign Influence

DIGEST: Applicant is a 32-year-old software engineer employed by a federal contractor. Her father is a citizen and resident of China. Her husband's parents are Chinese citizens living with Applicant. Her mother-in-law calls her relatives in China from Applicant's phone. Applicant has regular contact with her father. She failed to mitigate the security concerns under Guideline B (foreign influence.) Clearance is denied.

CASENO: 06-23453.h1

DATE: 07/18/2007

DATE: July 18, 2007

In re:)	
)	
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SSN: -----)	ISCR Case No. 06-23453
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
CHRISTOPHER GRAHAM**

APPEARANCES

FOR GOVERNMENT

Caroline H. Jeffreys, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 32-year-old software engineer employed by a federal contractor. Her father is a citizen and resident of China. Her husband's parents are Chinese citizens living with Applicant. Her mother-in-law calls her relatives in China from Applicant's phone. Applicant has regular

contact with her father. She failed to mitigate the security concerns under Guideline B (foreign influence.) Clearance is denied.

STATEMENT OF THE CASE

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.

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.

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.² She is married with one child.³ She has a bachelor's degree in information systems, and expects to be awarded a master's degree in computer science in December 2007.⁴ She has no prior military service and this is her first application for a security clearance.⁵

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

²Tr. at 11, 14.

³*Id.* at 12.

⁴*Id.*

⁵*Id.* at 13.

Applicant's 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.⁶ Her mother lives in the U.S. with Applicant's sister, but she is not a citizen because she speaks no English.⁷ She talks with her father 3-4 times per year. His father (her grandfather) lives in a nursing home in the U.S. She keeps her father advised of her grandfather's condition.⁸ Her father is retired, and has never served in the military, or been employed by the Chinese government.⁹ Applicant immigrated to the U.S. when she was ten years old. She became a citizen in 2000.¹⁰ All of her family live in the U.S. except her father. She owns a home, has a 401(k), has a checking account, savings account, and owns no property in China.¹¹ Applicant traveled to China in 2001, where she saw her father and visited several areas she had not seen before.¹² Her Chinese passport expired in 1996 and has not been renewed.¹³

Applicant's husband works for a defense contractor, but does not have a security clearance.¹⁴ 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.¹⁵ 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.¹⁶ About once per month, her mother-in-law calls some of her relatives in China, using Applicant's home phone.¹⁷ Her father-in-law traveled to China in the last three years for a vacation.¹⁸

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.¹⁹ China

⁶*Id.* at 14-15, 17.

⁷*Id.* at 16.

⁸*Id.* at 25-26.

⁹*Id.* at 29-30.

¹⁰*Id.* at 19.

¹¹*Id.* at 19-23.

¹²*Id.* at 18.

¹³*Id.* at 27.

¹⁴*Id.* at 23, 37.

¹⁵*Id.* at 32.

¹⁶*Id.*

¹⁷*Id.* at 37.

¹⁸*Id.* at 40-41.

¹⁹Government Exhibit 3 (U. S. State Department, *Country Reports on Human Rights Practices: China, 2005*, dated March 8, 2006) at 1, 4-17.

engages in espionage against the United States and is believed to have plans for a “cyber attack” on U.S. computer systems.²⁰ “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.”²¹ The PRC has had success in obtaining classified defense information.²²

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.²³

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.”²⁴ 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.

²⁰Government 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.

²¹Id. at 21.

²²Government Exhibit 8 (*Annual Report to Congress on Foreign Economic Collection and Industrial Espionage for 2006,* at 15-16.

²³Guidelines ¶ 2(c).

²⁴Guidelines ¶ 2(b).

In the decision-making process, facts must be established by “substantial evidence.”²⁵ 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.²⁶

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.²⁷

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

²⁵“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).

²⁶*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).

²⁷Executive Order 10865, § 7.

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.

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; 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.

The term “immediate family members” has been defined to include a spouse, father, mother, sons, daughters, brothers, and sisters. Applicant’s father and her mother in law’s relatives live in and are citizens of China. This “could create the potential for foreign influence that could result in the compromise of classified information. The mere possession of family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B.”²⁸ 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.²⁹

Although the definition of family member does not include in-laws, the appeal board has opined that it includes a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person’s spouse. See 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)). Applicant’s mother-in-law has immediate family in China, with whom she has regular contact. In light of the Appeal Board’s decision, Applicant’s mother-in-law may also pose a security risk because of her family’s residence or citizenship or both.

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.;

(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

²⁸ISCR Case No. 99-0424, 2001 DOHA LEXIS at 33-34 (App. Bd. Feb. 8, 2001).

²⁹*Id.*

(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 them. Based on the record as a whole, the government established its case under the Guidelines. 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, 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 Guidelines ¶¶ 7(a) and (d).

I reviewed the mitigating conditions under Guidelines ¶ 8 and conclude none apply. It appears that none of the family members in PRC are agents of the PRC government or any other foreign power. The term "foreign power" includes political parties and entities controlled by the government.³⁰ But that does not end the analysis, as Applicant must show her family members in the PRC are not in positions to be exploited by the PRC government. Given China's human rights record, Applicant's family members could easily be exploited by the PRC government.

Under the previous guidelines, the Appeal Board interpreted similar language to ¶ 8 (a) as establishing an absolute standard; i.e., an applicant must affirmatively prove that there is *no possibility* that anyone might attempt to exploit or influence a foreign relative or acquaintance in the future. See ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (the mitigating condition "which does not apply because, as is well settled, it requires that Applicant demonstrate that his relatives are not in a position which could force Applicant to choose between his loyalty to them, and his loyalty to the United States."); ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2005).³¹

In deciding if an applicant has met her burden, it is proper to consider how the foreign country at issue is governed. 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. With this history it is not difficult to envision a scenario in which China exploits her father or her mother-in-law's family members, to put pressure

³⁰See 50 U.S.C. §1801 (a) (5) and (6).

³¹The Appeal Board has determined that contacts with relatives living in a foreign country must be both casual and infrequent. See ISCR Case No. 04-12500 at 4 (App. Bd. Oct. 26, 2006). Moreover, contacts with such family members are presumed to be "not casual." *Id.* In the analysis of countervailing evidence, it is legal error to give significant weight to any of the following facts or factors: applicant's ties to the United States (ISCR Case No. 02-13595 at 5 (App. Bd. May 10, 2005)); lack of prominence of relatives living in the foreign country (*Id.*); "family members' low-key and noncontroversial lifestyle, and the fact that the foreign country's government has not contacted them about Applicant" (ISCR Case No. 04-12500 at 4 (App. Bd. Oct. 26, 2006)); one relative living in foreign country is sufficient to negate FI MC 1 (ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006)); a foreign relative's fragile health (ISCR Case No. 02-29403 at 4 (App. Bd. Dec. 14, 2004)), advanced age (ISCR Case No. 02-00305 at 7 (App. Bd. Feb. 12, 2003)), financial independence (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)), or lack of financial dependency upon Applicant (ISCR Case No. 03-15205 at 4 (App. Bd. Jan 21, 2005)); foreign relatives spend part of each year in the U.S. (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the lack of any connection between the foreign relative and the foreign government in question (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the absence of any attempt at exploitation in the past (ISCR Case No. 03-15205 at 4 (App. Bd. Jan. 21, 2005)); a foreign country's friendly relationship with the U.S., its stable, democratic government, or its extensive foreign military agreements with the U.S. (ISCR Case No. 02-22461 at 5-6 (App. Bd. Oct. 27, 2005)).

on Applicant or her husband to force her to compromise classified information. We also know 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 father and her mother-in-law's relatives in the PRC places them at risk of being brought under control or used as a hostage by a PRC intelligence or security service. Unfortunately, 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 her family members and the interests of the U.S. Accordingly, Applicant is unable to successfully mitigate the security concern, and Guideline B is decided against her.

To conclude, Applicant has failed to meet her ultimate burden of persuasion to obtain a favorable clearance decision. But this decision should not be construed as an indictment of Applicant's loyalty and patriotism to the U.S., as those matters are not at issue. Instead, the clearly-consistent standard requires I resolve any doubt against Applicant, and her close family ties to the PRC create doubt about her security suitability. In reaching my decision, I have considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

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

DECISION

In light of all of the circumstances in this case, 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