



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



In the matter of:	)	
	)	
	)	ISCR Case No. 12-04780
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Tovah Minster, Esq., Department Counsel  
For Applicant: Christopher Graham, Esq.

09/10/2013

**Remand Decision**

CURRY, Marc E., Administrative Judge:

Applicant failed to mitigate the security concerns generated by his family members who are citizens and relatives of the People’s Republic of China (PRC). Clearance is denied.

**Statement of the Case**

On January 23, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline B, foreign influence. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines (AG).

Applicant answered the SOR on March 12, 2013, admitting all of the allegations except subparagraph 1.f, and requesting a hearing. On March 29, 2013, the case was assigned to me. On April 22, 2013, the Defense Office of Hearings and Appeals (DOHA)

issued a notice of hearing scheduling the case for April 26, 2013. I held the hearing as scheduled and considered two Government exhibits (GE), marked as GE 1 and 2, and eleven Applicant exhibits (AE), marked as AE A through K. Also, I took administrative notice of facts regarding the PRC, encapsulated in 17 hearing exhibits (HE I-XVII), as requested by Department Counsel. The transcript was received on May 6, 2013.

On June 17, 2013, I issued a decision determining that Applicant mitigated all of the security clearance concerns except those involving his relatives whom are PRC citizens and relatives, as listed in SOR subparagraph 1.b. Consequently, I concluded that it was not clearly consistent with the national interest to grant or continue Applicant's security clearance.

Applicant appealed, contending that the decision contained several factual errors regarding his educational background, the period of time that he worked with former colleagues when he lived in the PRC, the last date he visited the PRC, the frequency of e-mail communication with his brothers, and the year his wife emigrated from the PRC to the United States. (Appeal Board Decision at 3) Applicant also contended that I misapplied the Guideline B mitigating issues.

On August 21, 2013, the DOHA Appeal Board concurred with Applicant as to the first issue, and ordered that the case be remanded to me to revise the findings of fact with the following corrected facts:

1. Applicant earned a bachelor's degree in physics and optics, a master's degree in physics laser, and a doctorate in physics and optics;<sup>1</sup>
2. Applicant stays in touch with four former colleagues from a company in PRC where he worked from 1996 to 1998;<sup>2</sup>
3. Applicant last visited the PRC in June 2008;<sup>3</sup>
4. Applicant's wife immigrated to the United States from the PRC in 1999;<sup>4</sup> and,
5. Applicant e-mails his brothers living in PRC once or twice per year.<sup>5</sup>

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<sup>1</sup>Tr. 33-35.

<sup>2</sup>Tr. 29-30, 53-54; AE F.

<sup>3</sup>Tr. 53.

<sup>4</sup>Tr. 66.

<sup>5</sup>Answer at 2.

The Board concluded that it was premature to address the legal issue of mitigation, also raised by Applicant on appeal, until I issued a decision with the revised facts. After a correction of the identified errors and a reconsideration of the record as a whole, I issue the following Remand Decision.

### **Revised Findings of Fact**

Applicant is a 47-year-old married man with one child, age 15. Applicant was born and raised in the PRC. Also, he received most of his education in the PRC, earning a bachelor's degree in physics and optics in 1987 and a master's degree in physics laser in 1990 before immigrating to the United States to pursue a doctorate in 1998.

After obtaining a master's degree, Applicant began working for a privately owned cable company in the PRC. He left there in 1996 and began working for a multinational telecommunications company, incorporated in Germany. The office in China was structured as a joint venture between the German owners and the PRC government. Applicant worked primarily in sales for this company. (Tr. 36)

By 1998, Applicant had become disenchanted with his job. He realized that he enjoyed the technical aspects of telecommunications rather than sales. Consequently, he decided to immigrate to the United States and continue his education. Following his immigration to the United States, he was admitted into a doctorate program on a full scholarship. He successfully earned his doctorate in 2001 in physics and optics. Over the next ten years, Applicant worked for various companies before beginning with his current employer in June 2011. (GE 2 at 6; Tr. 30-41) Over the years, he has published 17 technical papers and holds four U.S. patents. (AE B at 1)

Applicant is highly respected on the job. According to Applicant's supervisor, he has tremendous expertise in laser and fiber optic technology. (Tr. 22)

Applicant has been a naturalized U.S. citizen since November 2009. His wife immigrated to the United States in 1999 and his daughter immigrated here one year later. (Answer at 2) Both family members are lawful U.S. permanent residents, and have applied for citizenship. (AE A; Tr. 45)

Applicant is involved in his community. He donates money annually to charity and volunteers at his daughter's high school, judging science fairs and helping with other extracurricular activities. (Answer at 5)

Applicant's wife is a bookkeeper. She helps low-income people file their income taxes. She is heavily involved in her community. In 2006, she received a certificate of special recognition from her state governor for her "tireless volunteer efforts in helping to leverage over \$15 million for [State] families" through a federal government program. (AE J at 3) Also that year, the U.S. Congressional delegation from her state awarded her a Certificate of Special Recognition for her volunteer efforts. (AE J at 2)

Applicant's parents are citizens and residents of the PRC. They are retired farmers. Applicant talks to them approximately once per week. They are in their seventies, and they are in poor health. (Tr. 47, 49; GE 2 at 9)

Applicant has three brothers (B1-B3) who are citizens and residents of the PRC. B1 is a high school physics teacher. B2 is a civil engineer who works in the PRC's railroad construction industry, and B3 is a computer science professor at a public university. (GE 2 at 9) Applicant talks to his brothers approximately once every three months, and e-mails them approximately once or twice per year. (Tr. 51)

In 2007, Applicant purchased an \$18,000 house for his parents. (Answer at 3) It is currently worth approximately \$30,000. Applicant transferred ownership of the house to his father in March 2013. (Answer at 3, 17) The fair market value of Applicant's home in the United States is approximately \$283,000. (Answer at 4) He has equity in his home of approximately \$200,000, and has \$150,000 invested in his retirement account. (Answer at 4, 22)

Applicant provided between \$1,000 and \$2,500 of annual financial support to his parents. It is unclear from the record when he began providing this support. Now that he is aware of the potential security implications of providing financial support to his parents, Applicant has no intention to support them financially in the future. His brothers will assume this responsibility. (Tr. 51)

Applicant has visited the PRC three times since immigrating to the United States. Most recently, he travelled there in June 2008. He has not seen any of his relatives and acquaintances since then. (Tr. 53)

Applicant has four paternal aunts who are citizens and residents of the PRC. He talks to them approximately twice per year on holidays. He never knew them that well when he lived in the PRC, and does not know their first names. (Answer at 3)

Applicant's parents-in-law are citizens and residents of the PRC. His father-in-law worked as a construction engineer for a state-owned utility company before retiring 15 years ago. The company has privatized since Applicant's father-in-law retired. (Answer at 8) Applicant's mother-in-law is a physician. She has been retired for 15 years. (Answer at 8) Applicant talks to his parents-in-law approximately once per month. (Tr. 52)

Applicant has a brother-in-law who is a citizen and resident of the PRC. He communicates with him through e-mails once or twice per year. (Answer at 2; Tr. 50)

Applicant stays in touch with four of his colleagues from the company where he worked from 1996 to 1998. All of them have either retired or left the company. Two are living in the United States and are permanent residents. Applicant has not seen three of them since 1998, and has not seen the remaining former coworker in six years. He communicates with them approximately once or twice per year via phone or e-mail. (Answer at 3)

## **Administrative Notice**

The PRC is a totalitarian state that routinely violates human rights. (*See generally* HE I). It is the most aggressive conductor of espionage against the United States in the world, and its intelligence collection efforts are growing in scale, intensity, and sophistication. (HE XI at 3) Chinese state-sponsored actors continuously attempt to exploit U.S. government, military, industrial, and nongovernmental computer systems. (HE VII at 14) PRC security personnel may sometimes place foreign visitors to the PRC under surveillance (HE XIII at 5)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied together with the factors listed in the adjudicative process. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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. . . ." The applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

## **Analysis**

### **Guideline B, Foreign Influence**

Under this guideline, "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 the United States interests, or is vulnerable to pressure or coercion by any foreign interest." Moreover, "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 ¶ 6)

The PRC is a totalitarian country that competes with the United States for military, technological, and financial influence worldwide. To achieve its strategic objectives, the PRC aggressively conducts espionage against the United States government and U.S. businesses, and has a history of seeking to conduct espionage through the exploitation of persons with familial ties to the PRC. Consequently, Applicant’s relatives who are PRC citizens and residents, and his wife and daughter, who are PRC citizens living with him, generate the application of the following disqualifying conditions:

- (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or a resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;
- (b) connections to a foreign person, 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.

Applicant no longer owns a home in the PRC. When he did, its value was minimal compared to the value of his financial holdings in the United States. AG ¶ 7(e), a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation,” does not apply. I resolve SOR subparagraph 1.d in Applicant’s favor.

Applicant no longer provides financial support for his parents. I resolve SOR subparagraph 1.e in his favor.

One of the companies for whom Applicant worked in the 1990s was a multinational founded in Germany that expanded to the PRC as a joint venture with the PRC government. The other company where Applicant worked before immigrating to the United States was state-run when Applicant worked there, but has since privatized. Consequently, Applicant’s past employment while living in the PRC does not generate a security concern. I resolve SOR subparagraph 1.f in Applicant’s favor.

As for the remaining SOR allegations, the following mitigating conditions are potentially applicable under AG ¶ 8:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(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's contacts with his former friends and coworkers and his contacts with his aunts in the PRC are sufficiently infrequent to trigger the application of AG ¶ 8(c). I resolve SOR subparagraph 1.c in Applicant's favor.

Applicant's wife's application for U.S. citizenship is pending. Since immigrating to the United States in 1999, she has been a pillar of her community, earning special recognition from Congress and her state governor for her volunteer efforts. Applicant is similarly involved in their community, volunteering with his daughter's school and donating money to several charities annually. Although it is not inconceivable that the PRC may attempt to exploit Applicant through his wife and children, their residence in the United States, integration into the community, and involvement with charitable activities is sufficient to trigger the application of AG ¶ 8(b). I resolve SOR subparagraph 1.a in Applicant's favor.

Conversely, Applicant's parents, brothers, and parents-in-law remain in the PRC. Therefore, its capacity to coerce, intimidate, or threaten these relatives is not limited by geography. Since immigrating to the United States, Applicant has cultivated a sterling career and has integrated himself into the local community by giving to charity and volunteering at his daughter's school. Given the aggressive and multifaceted nature of the PRC's espionage activities against the United States, specifically their history of exploiting family relationships for classified or sensitive information, I cannot conclude that Applicant's stellar career and ties to the community are enough to trigger the application of AG ¶ 8(a) or AG ¶ 8(b).

Applicant talks to his brothers once every three months and e-mails them once or twice per year. Although these contacts are casual and infrequent, I am unable to conclude that there is little likelihood that these limited contacts minimize the risk of foreign inducement or exploitation given the nature of the PRC. AG ¶ 8(c) is inapplicable.

## **Whole-Person Concept**

Under the whole-person concept, the 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) the 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.

Applicant is a talented and accomplished engineer who is highly respected on the job. He lives a typical American life, spending his spare time volunteering at his daughter's school-related functions. In sum, Applicant is a naturalized U.S. citizen who is thoroughly assimilated into U.S. culture.

Unfortunately, foreign influence analyses are based on more than one's cultural integration into the U.S. culture, and must consider the nature of the foreign country and its relationship with the United States. The PRC's history of conducting espionage against the United States creates a heavy burden of proof for Applicant that he was unable to carry because of his ties to his relatives who are PRC citizens and residents.

## **Formal Findings**

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

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraphs 1.c-1.f:	For Applicant
Subparagraph 1.g-1.h:	For Applicant



## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARC E. CURRY  
Administrative Judge