



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



In the matter of:)	
)	
)	ISCR Case No. 12-04799
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

04/29/2013

Decision

WHITE, David M., Administrative Judge:

Applicant was born and raised in the People’s Republic of China (PRC). His mother, father, brother, and in-laws are resident citizens there and he visits annually. His father and brother are members of the Chinese Communist Party. He is a loyal and dedicated son, and an outstanding employee, but failed to mitigate resulting security concerns. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Applicant submitted a security clearance application (SF 86) on September 9, 2009. On September 11, 2012, the Department of Defense issued a Statement of Reasons (SOR) to Applicant, detailing 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 for Determining Eligibility for Access to Classified Information* effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing (AR) on October 6, 2012, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on November 9, 2012, and the case was assigned to me on November 28, 2012. DOHA issued a Notice of Hearing on December 10, 2012, setting the case for January 22, 2013. Due to the need to briefly continue an unrelated case originally scheduled for the same date, DOHA issued an Amended Notice of Hearing on January 8, 2013, and I convened the hearing, as rescheduled, on January 24, 2013. The Government offered exhibits (GE) 1 through 3, which were admitted without objection. The Government also offered a request that I take administrative notice of facts concerning the PRC, and documents in support of that request. Applicant disputed the likelihood of inferences that could be drawn from the facts in the administrative notice request, but had no objection to the accuracy of those facts during or after the hearing, and I granted the request. Applicant offered exhibits (AE) A and B, which were admitted without objection by Department Counsel, and Applicant testified on his own behalf. His office manager also testified for him. On January 25, 2013, Applicant submitted additional evidence to which Department Counsel did not object. This evidence was marked AE C and admitted. DOHA received the transcript of the hearing (Tr.) on February 6, 2013.

Findings of Fact

Applicant admitted the truth of all the factual allegations in the SOR, with extensive explanations.¹ Applicant's admissions, including those contained in his two affidavits to an investigator from the Office of Personnel Management (OPM),² are incorporated in the following findings.

Applicant is a 58-year-old employee of a defense contractor, where he has worked as a software engineer since August 2009. He has never held a security clearance and has no military service. He completed a bachelor's degree and worked for several years for the government as a natural resources research assistant in China, where he was born and raised. In the late 1980s, he moved to the United States with a student visa and scholarship. He completed two master's degrees in Geography and Computer Science at different universities. Due to his disgust with the corruption of the Chinese government, and his absence of hope for reform after the 1989 Tiananmen Square massacre, he decided not to return to live in China. Applicant and his wife, who were married in China before immigrating and have no children, became naturalized U.S. citizens in 1999. She worked for the government as a secretary and a teacher in China during the late 1970s and early 1980s before she came to the United States to join her husband.³

¹AR; AE A.

²GE 2 and GE 3.

³GE 1; GE 2; AR.

Applicant's elderly parents and his wife's elderly parents are citizens and residents of the PRC. They worked for the Chinese government in non-defense-related jobs, and have been retired and living off of Chinese government pensions for many years. Both of Applicant's parents are ill, and he consolidates his vacation and holiday time from work to visit China to help with their care for an extended visit once per year. During such visits, he and his wife also visit her family. His brother, who is also a resident citizen of China, takes care of their parents during the rest of the year. Applicant regularly sends his brother money to help care for their parents, and honors the Chinese cultural tradition that children should care for and protect their elderly parents to the best of their ability. He communicates regularly with his brother about their parent's well being. His brother is a mechanical engineer and works for a foreign-owned private company in China. Applicant's wife has also sent substantial sums to her parents.⁴

Applicant's father and brother are members of the Chinese Communist Party. His father joined during the 1940s in order to oppose the Japanese occupation and what he subsequently viewed as corruption in the Nationalist government. Applicant's brother joined the party in order to provide better opportunities for professional advancement, which is also why his father maintained his membership. Applicant says that he did not join the Communist Party because he viewed it as a corrupt organization and he preferred the freedom and opportunities available in the United States. He said his father and brother do not care that he is not a communist and have not tried to convince him to become one.⁵

Applicant's wife worked as an accountant until about 2006 when they moved across country for Applicant's employment. At that time, she opened a business selling plumbing supplies and clamps manufactured by a Chinese company that was run by her cousin. He has since retired. She also helps the Chinese company find U.S. suppliers as needed. The business is an LLC (limited liability corporation) of which Applicant and his wife are members, but his only involvement is to help her with the physical handling and shipping of some of the merchandise at her request. She runs the business out of their home, primarily by internet sales. It provides a very small portion of their family income. The company formerly had one contract employee, who was a U.S. citizen living in China, but she has since quit and returned to live in the United States. In 2010, Applicant and his wife closed two accounts in Chinese banks that they opened in 2005 with balances totaling about \$120,000. His wife opened another small account in her own name so they could manage funds during their annual visits. They have no other assets or business connections in China.⁶

Applicant acknowledges that the PRC government engages in espionage activity against the United States using Chinese nationals, and has taken steps to avoid coming

⁴AR; AE A; AE B; GE 1; GE 2; GE 3; Tr. 55, 58, 72-73, 90-93.

⁵AR; AE A; AE B; GE 2; Tr. 69-71, 73-76, 97-98.

⁶AR; AE B; GE 2; GE 3; Tr. 76, 94-95.

to their notice. He is careful to obey all laws and regulations while in China, has received extensive foreign travel briefings from a DoD counterintelligence specialist, and does not communicate with his employer from China. He also avoids Chinese-American associations and organizations that could provide a recruiting environment for the PRC government. He has not told family members or friends in China where he works or that he is applying for a clearance.⁷

Applicant's supervisor testified that he is extremely reliable, conscientious, trustworthy, and sensitive to security procedures. Once, when Applicant was the only employee present, he signed for a package containing Confidential information that was mistakenly given to him by a delivery company. Immediately upon noticing the classification marking on the exterior of the package, he reported the incident to his facility security officer, who determined that the mistake had not resulted in any compromise.⁸

I took administrative notice of the facts set forth in the Government's request concerning the People's Republic of China, which are incorporated herein by reference.⁹ Of particular significance are the aggressive economic and military expansion; poor human rights situation; endemic corruption; and the highly active perpetration of economic, industrial, technical, and military espionage against U.S. and other western interests.

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 (DCs) and mitigating conditions (MCs), which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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.

⁷AE A; AE B; GE 2; Tr. 54-58, 77-81.

⁸GE 3; Tr. 52-64, 99.

⁹The request and supporting documentation were not marked as separate exhibits, but are included in the case file for reference purposes. A copy of each of these documents was provided to Applicant before his hearing.

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 the national security.” 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the 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.

Analysis

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding 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 conditions that could raise a security concern and may be disqualifying. The SOR allegations and substantial evidence in this case established four DCs under this guideline:

- (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;
- (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;
- (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; and
- (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.

China exerts significant intelligence collection efforts that operate contrary to U.S. interests in protecting classified and sensitive information. Accordingly, family and business connections there have significant potential to generate heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion under AG ¶¶ 7(a), (d), and (e), than would similar connections in many other countries.

Applicant's mother, father, and brother, with whom he maintains regular communication and close familial relationships, are resident citizens of China. His father and brother remain members of the governing and, according to Applicant's own words, corrupt Chinese Communist Party that is responsible for the heightened risk. Applicant shares living quarters with his wife, whose mother, father, and siblings are also resident Chinese citizens. She also operates a business that exclusively markets Chinese products manufactured by the company of which her cousin was in charge. Applicant has an entirely legitimate, serious interest in the welfare of her family members and business connections, as well as his own family in China.

These facts meet the Government's burden of production by raising all four of the aforementioned disqualifying conditions. Applicant's contacts, relationships, and connections with China, through his and his wife's relatives and business interests there, shift a heavy burden to him to prove mitigation under applicable Appeal Board precedent.

AG ¶ 8 provides conditions that could mitigate security concerns. Those with potential application in mitigating AG ¶¶ 7 (a), (b), (d), and (e) security concerns are:

(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;

(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; and

(f) the value or routine nature of the foreign business, financial, or property interest is such that they are unlikely to result in a conflict and could not be used to effectively influence, manipulate, or pressure the individual.

Applicant did not demonstrate that it is unlikely he could be placed in a position of having to choose between the interests of a foreign individual or government and those of the U.S. due to his strong and continuing family ties and regular visits to them. His communication and contact with his Chinese family members since he came to the U.S. are neither casual nor infrequent. However, the evidence did not establish any ongoing connection to China arising from his or his wife's employment there before they immigrated to the United States in the late 1980s. Accordingly, he failed to establish the mitigating conditions set forth in AG ¶¶ 8(a) and (c), except with respect to that employment.

The evidence also fails to establish significant mitigation under AG ¶ 8(b). Applicant has substantial assets in the United States, but also provides significant financial support to his Chinese family members and in-laws. His sense of loyalty and obligation to them is commendable and speaks to his good character, but also illustrates the potential for conflict to which his access to classified information would expose him. He has not endured life-threatening conditions in support of U.S. national interests, which would sufficiently demonstrate deep or longstanding U.S. relationships and loyalties under applicable Appeal Board precedent.

Finally, although his wife's business ties to the Chinese manufacturing company have the potential to support a conflict of interest and could be used for manipulation or pressure, their work involves plumbing supplies and clamps, while Applicant works in

computer programming. Her cousin is retired, and the business does not significantly affect their family income. Accordingly, mitigation of security concerns arising from her business was demonstrated under AG ¶ 8(f).

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant's conduct and loyalty to the United States are not in question here. He is a mature and experienced individual, who has acted responsibly and provided valuable service to his employer in support of U.S. military operations. However, the inherent potential for pressure, coercion, exploitation, or duress from the presence of Applicant's and his wife's family members in China remains unmitigated. Placing Applicant in a position wherein it is foreseeable that he could be forced to choose between the security interests of the United States and the interests of his or his wife's family is the harm to be avoided under the President's guidelines and Appeal Board precedent. Applicant failed to show that such potential is diminished to any reasonable extent. In fact, his commendable activities to avoid drawing attention to himself and his position working for a defense contractor demonstrate his awareness of this potential. His loyal and dedicated service in support of American military interests is highly commendable, but does not justify placing him or his relatives at risk of exploitation due to his access to classified information.

Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. He failed to meet his burden to mitigate the security concerns arising from foreign influence considerations.

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:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge