



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 13-00485
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden Murphy, Esquire, Department Counsel
For Applicant: Pablo A. Nichols, Esquire

01/06/2014

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on November 6, 2008. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on June 5, 2013, 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; DOD 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* (AG), implemented on September 1, 2006.

Applicant received the SOR on June 10, 2013, and he answered it on June 20, 2013. Applicant requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on August 1, 2013, and I received the case assignment on August 26, 2013. DOHA issued a Notice of Hearing on September 16, 2013 for a hearing scheduled on October 9, 2013. Due to the Government shutdown, the hearing was cancelled. A second Notice of Hearing was issued on October 30, 2013, and I convened the hearing as scheduled on November 20, 2013. The Government offered exhibits (GE) marked as GE 1 through GE 4, which were received and admitted into evidence without objection. Applicant testified. He submitted exhibits (AE) marked as AE A through AE J, which were received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on December 3, 2013. I held the record open until December 12, 2013, for Applicant to submit additional matters. Applicant timely submitted AE K - AE M, which were received and admitted without objection. The record closed on December 12, 2013.

Request for Administrative Notice

Department Counsel submitted a request that I take administrative notice of certain facts relating to the People's Republic of China (PRC). The request was granted. The request and attached documents were not admitted into evidence, but were included in the record as Hearing Exhibit 1.¹ The facts administratively noticed are limited to matters of general knowledge and matters not subject to reasonable dispute, and are set out in the Findings of Fact below.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a and 1.b of the SOR. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶ 1.c of the SOR.² He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 71 years old, is the President and Chief Executive Officer of a company he and his brother formed (Company 1). Applicant is seeking a facility

¹Hearing Exhibit 1 - XV was not included with the documents submitted by Department Counsel for administrative notice.

²When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

clearance for this company. Company 1 held a facility clearance from 1990 until 2012. Because it did not have a pending or current requirement for access to classified information and no classified procurement was planned, Company 1 requested immediate termination of its facility clearance in February 2012. Company 1's facility security clearance was terminated on February 15, 2012. Applicant holds a security clearance and has since 1990.³

Applicant was born in the PRC. His father was the chief of police in a small town. In 1948, Applicant's family fled the PRC during the communist revolution because his father feared he would be executed. The family immigrated to Taiwan. Applicant grew up in Taiwan, where he graduated from college with a bachelor's degree. After college he served one year of mandatory military service in the Taiwanese military. In 1968, Applicant immigrated to the United States through his job. He obtained a masters of business administration degree from a major U.S. university.⁴

Applicant and his wife married in 1969. Applicant and his wife became United States citizens in 1979. They have two daughters, ages 38 and 35, who are United States citizens by birth and reside in the United States. They also have two grandchildren, who are citizens and residents of the United States.⁵

Applicant's parents are deceased. His sister is 72 years old and a widow. She is a citizen of Taiwan, and she lives in Taiwan part of the year and in the PRC part of the year. His sister has not worked. Her husband left her with sufficient income to provide for her living expenses. She does not know that Applicant holds a security clearance or that he is seeking a facility security clearance as he does not discuss his work or business with her. He talks with her one or two times a year, usually on her birthday and maybe on Christmas. He last visited her in 2010 in Taiwan, but not the PRC, and she last came to the United States in 2011. She has never worked for a foreign government nor does she have contacts with a foreign government.⁶

Applicant's brother is 65 years old. His brother was born in the PRC just prior to his parents' departure. His brother grew up in Taiwan and was educated in Taiwan. His brother also served one year of mandatory military service for the Taiwanese military many years ago. His brother immigrated to the United States and later became a U.S. citizen. Applicant's brother is currently living in Taiwan while caring for his wife, who is receiving medical treatment for leukemia. As will be explained *infra*, Applicant's brother has lived in Southeast Asia for some time and has spent time in the PRC. His brother

³GE 1; AE A; AE B; AE I; Tr. 69-71.

⁴GE 1; GE 2; Tr. 23-25.

⁵GE 1; Tr. 27.

⁶GE 1; GE 2; Tr. 41-44.

owns property in the United States. Applicant discusses business matters with his brother when necessary.⁷

In 1974, Applicant and his brother formed Company 1, their first business. Applicant continues to work for Company 1, which employs approximately 45 workers. As employees of this business, Applicant, his wife, and his brother have held security clearances. His wife and brother are not seeking a security clearance. As previously stated, Applicant is seeking a new facility security clearance for this business.⁸

In 1989, Applicant's brother formed Company 2, a global manufacturing company, and incorporated it outside the United States. By 2001, Company 2 had two manufacturing plants in an Asian country and one in the PRC. Because of the location of these plants, Applicant's brother began living overseas and traveling to the plant in the PRC. Applicant acquired a 45% equity interest, valued at approximately [redacted], in Company 2 in 2001. Company 2 has never been a DOD contractor.⁹

In 2010, a Southeast Asia company, not a PRC company, approached Company 2 about purchasing it. After two years of negotiations, Company 2 and the Southeast Asia company reached an agreement for the sale of Company 2 to the Southeast Asia company. The actual transfer of ownership occurred on June 25, 2013. The registration office for the country of incorporation for the new owners verified that Company 2 had one shareholder, the Southeast Asia company, and identified the Board of Directors. Applicant and his brother are not identified as members of the Board of Directors for Company 2.¹⁰

As a result of the sale of Company 2, Applicant no longer has any equity interest in the company. He also has no legal rights in Company 2. The Southeast Asia company has paid him more than [redacted] for his equity interest. The company still owes him about 15% of the purchase price of his equity shares. Applicant anticipates the money will be paid shortly. Applicant now has no foreign investments. He does not have foreign bank accounts nor does he own any foreign property. His property ownership is solely in the United States, and he has an estimated net worth of [redacted].¹¹

Applicant's brother works as a consultant for the Southeast Asia company. At this time, his brother is President and Executive Director of a subsidiary, which was formerly part of Company 2 and is now part of the Southeast Asia company. His brother agreed

⁷GE 1; GE 2; Tr. 44, 48.

⁸GE 1; Tr. 26, 28, 50, 70-71.

⁹GE 2; Tr. 35-37, 67, 74.

¹⁰GE 4; AE E- AE H; AE K; Tr. 37-40, 57-59, 72.

¹¹AE L; AE M; Tr. 40, 59-62, 65-66.

to work for two years in this position to help facilitate the transition to the new company. While working in this position, his brother will live overseas, but not in the PRC. It does not appear that his work will be in the PRC.¹²

Company 1 always received at least a satisfactory rating when its facility was audited for its clearance procedures. Company 1 has received awards and certificates of recognition for performance from industry or the Government. Two employees of Company 1 wrote letters of recommendation on behalf of Applicant. They have known him for many years. They praise his work ethic and work skills. Neither believe he would disclose classified information for any reason.¹³

At the hearing, Applicant stated that he would chose the United States over the PRC because he has lived two-thirds of his life in the United States. The United States is his country and home, which he must defend. He has no desire to live in the PRC, and he has no loyalty to the PRC. He would report any individual who sought classified information from him, including his siblings. He cannot be coerced by a foreign government, even if there are threats to his siblings.¹⁴

Administrative Notice

People's Republic of China

I take administrative notice of the following facts. The PRC is an authoritarian, communist party-led state. Human rights violations continue to be problematic. Concerns regarding the PRC's weapons development, theft of classified technology information between 1979 and 1999, and industrial espionage activities remain. The PRC continues to have active intelligence operations in the U.S., which seek to obtain military and industrial secrets through Americans of Chinese ancestry. On the other hand, the PRC supports the U.S.'s anti-terrorism position and activities. The U.S. and the PRC have developed joint trade agreements, resulting in the sale of goods to each other, and work together on environmental issues. The PCR enjoys a most favored nation status in trading with the U.S. The PRC has opened its doors to outside investment.

Policies

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

¹²AE M; Tr. 45-47.

¹³AE C; AE D; AE J.

¹⁴Tr. 52-55.

disqualifying conditions and mitigating conditions, which are 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 the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

A person who seeks access to classified information enters 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 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.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive 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 the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(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; 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.

Applicant's wife, children, and grandchildren are citizens and residents of the United States. Thus, no security concern is raised by these family members. Applicant's brother is a citizen of the United States, who resides and works in Southeast Asia, and who has worked in the PRC. His sister is a citizen of Taiwan, a part-time resident of Taiwan, and a part-time resident of the PRC. Applicant maintains a normal familial relationship with his sister in Taiwan. He talks with her by telephone once or twice a year. He talks with his brother on business matters when necessary, making his contacts with his brother more frequent. His family relationships are not *per se* a reason to deny Applicant a security clearance, but his contacts with his family members must be considered in deciding whether to grant Applicant a clearance. The Government must establish that these family relationships create a risk of foreign exploitation, inducement, manipulation, pressure, or coercion by terrorists or would create a potential conflict of interest between his obligations to protect sensitive information and his desire to help his family members.

In addition to his family contacts in Southeast Asia, Applicant invested in Company 2, which he and his brother started in 1989. By 2001, Company 2 operated a

manufacturing plant in the PRC. While Applicant is not involved in the day-to-day operations of Company 2, he owned a 45% equity interest, valued at [redacted], in the company, which had a substantial business, property, and financial interest in the PRC.

In determining if such a risk exists, I must look at Applicant's relationships and contacts with his family and Company 2, as well as the activities of the PRC Government. The risk that an applicant could be targeted for manipulation or induced into compromising classified information is real, not theoretical. Applicant's relationship and contacts with his family in Southeast Asia and the PRC raise a heightened risk and a security concern because the monitoring and surveillance activities of the PRC government intrude upon the privacy of its citizens and upon business operations. The PRC government actively engages in espionage activities in the United States and targets American-Chinese citizens by exploiting, manipulating, pressuring, or coercing them to obtain protected information.¹⁵

Under the guideline, the potentially conflicting loyalties must be weighed to determine if an applicant can be expected to resolve any conflict in favor of U.S. interests. In determining if Applicant's contacts in the PRC cause security concerns, I considered that the PRC and the United States have a relationship, which includes working together on international security issues and trade. There is evidence that the PRC targets U.S. citizens for protected information. The human rights issues in the PRC continue to be a concern. While none of these considerations by themselves dispose of the issue, they are all factors to be considered in determining Applicant's vulnerability to pressure or coercion because of his family in Southeast Asia and business in the PRC. Applicant's contacts with his family raise a heightened risk under AG ¶¶ 7(a) and (b) and his ownership interests in Company 2 raise a heightened risk of foreign influence or exploitation under AG ¶ 7(c).

The Foreign Influence guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 8(a) through ¶ 8(f), and the following are potentially applicable:

(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

¹⁵ The Government has not raised a concern about Taiwan.

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

Applicant's contacts with his sister are those which are made between family members. She is not involved in his business nor is she aware of his request for a security clearance. Their lives intertwine as family members not in business. She does not, and has not, worked for the PRC government nor is she involved in political activities. Applicant's relationship with his brother is more complex because they have developed businesses together and have worked together. His brother has lived overseas for many years to manage the operations of Company 2, which required frequent travel by him to the PRC.

In June 2013, after two years of negotiations, Applicant's brother sold Company 2 to a Southeast Asia company. Applicant has been paid most of the value of his equity interest in Company 2 and should receive the rest shortly. His brother works for the new owners to help the transition of Company 2 to the new owner. In his new position, Applicant's brother is not involved with the manufacturing plant in the PRC, which reduces his brother's risk to be exploited, manipulated, or coerced by the PRC.

Applicant left the PRC as a six-year-old child. He grew up in Taiwan, but came to the United States 45 years ago. He considers the United States his country and home, which he must defend. He has spent almost two-thirds of his life in the United States and very little of his life in the PRC. He lived in Taiwan, which considers itself a country separate from the PRC. Given his limited connections with the PRC, his statements that he would chose the interests of the United States over those of the PRC, even if the PRC threatened his siblings, and that he would report any individual who sought classified information from him, including his siblings, are credible. Applicant has mitigated the security concerns raised by his family contacts and equity ownership in Company 2.

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 an 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. Applicant was born in the PRC before the 1948 communist revolution. His family fled the PRC in 1948 out of fear for their safety. He grew up in Taiwan. He immigrated to the United States as a young college graduate in 1968. For the last 45 years, Applicant has lived and worked in the United States. He married and raised his family in the United States. He and his wife became U.S. citizens in 1979, and he considers the United States his country, which he must defend.

Applicant and his brother, also a U.S. citizen, formed two successful businesses, one of which continues to operate in the United States under Applicant's leadership. His brother managed and operated Company 2, a separate enterprise, which operated a manufacturing plant in the PRC. His brother recently sold Company 2 to a Southeast Asian company. With the sale of Company 2, Applicant is divested of his equity interest in the company. His brother will work in Southeast Asia for another 18 months to assist with the transfer of Company 2 to its new owner, but plans to return to the United States, where he owns property.

Applicant's personal contacts with the PRC are almost nonexistent, but his sister lives part-time in the PRC. She lives quietly, and she lacks any governmental or political connections in the PRC, which could raise a security concern. With the sale of Company 2, Applicant's brother will no longer need to travel to the PRC for business reasons. His brother has no other connections with the PRC except their sister. Company 2 did not perform work for the United States, The current business activities of Applicant's brother do not involve classified work for the United States, making it unlikely that he can be placed in a position to pressure or coerce Applicant into providing classified information. Applicant indicated he would report his brother to the proper authorities should his brother try to obtain classified information. Applicant's limited contacts with the PRC are insufficient to raise a security concern. (See AG ¶ 2(a)(1).)

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his family members under Guideline B.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARY E. HENRY
Administrative Judge