

KEYWORD: Foreign Influence; Personal Conduct

DIGEST: Applicant is 64 years old, married with two adult children by his previous marriages. He is a scientist and businessman who seeks a security clearance. His wife is a PRC citizen living in the U.S. His mother and siblings are PRC citizens living in the PRC. Applicant has extensive personal and business contacts in the PRC, and has brought PRC citizens to work in his company. Applicant contacted high PRC officials and family members on at least two occasions in the past six years seeking favorable consideration of his requests. Applicant deliberately failed to disclose his PRC commercial connections on his security clearance application; nor did he disclose that his his younger brother and sister. Applicant has not mitigated the foreign influence and personal conduct security concerns. Clearance is denied.

CASENO: 02-02200.h1

DATE: 04/28/2006

DATE: April 28, 2006

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In re:

SSN:

Applicant for Security Clearance

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ISCR Case No. 02-02200

**DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

**APPEARANCES**

## **FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is 64 years old, married with two adult children by his previous marriages. He is a scientist and businessman who seeks a security clearance. His wife is a PRC citizen living in the U.S. His mother and siblings are PRC citizens living in the PRC. Applicant has extensive personal and business contacts in the PRC, and has brought PRC citizens to work in his company. Applicant contacted high PRC officials and family members on at least two occasions in the past six years seeking favorable consideration of his requests. Applicant deliberately failed to disclose his PRC commercial connections on his security clearance application; nor did he disclose that his his younger brother and sister. Applicant has not mitigated the foreign influence and personal conduct security concerns. Clearance is denied.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On March 1, 2005, DOHA issued a Statement of Reasons<sup>(1)</sup> (SOR) detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on March 30, 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on November 7, 2005. On December 15, 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. The Government moved to amend the SOR to add subparagraphs 1.u and 1.v, to delete subparagraph 1.h, and to add subparagraph 2.d. Applicant had no objection to these motions and they were granted. DOHA received the hearing transcript (Tr.) on January 5, 2006.

### **FINDINGS OF FACT**

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 64 years old, married, and has two children, now adults, one by each of his first two wives. His children and former wives live in the U.S. His current wife lives in the U.S. since 2002, and has a "green card" in the U.S., but is a citizen of the People's Republic of China (PRC). His wife went to the PRC in August 2005 and as of December 2005 was still there. Applicant's father is deceased, but his 93-year-old mother, two brothers (one older, one younger than Applicant), and one sister live and work in the PRC and are citizens of the PRC. Applicant's brother-in-law and sister-in-law are citizens of the PRC and work there. Applicant first came to the U.S. in 1980 to study and stayed until 1984. The PRC government paid his expenses during that time. He returned to the PRC in 1984, and then returned to the U.S. in 1987. He became a U.S. citizen in 1996. Applicant traveled to the PRC three times in 1999, and annually after 1999 to visit his family. In 2005, he traveled to the PRC from March 7 to 26 and then for three weeks in October. At the hearing he declared his intention to travel in January 2006 to the PRC to visit his mother. (Tr. 58, 71-89, 91, 97, 102, 103, 133, 134, 154; Exhibits 1-3, 12, G)

Applicant was a senior engineer and Ph.D. student at the Shanghai Technical Physics Institute in the PRC from 1971 to 1980. After his return to the PRC in 1984 from the U.S., he became a full professor at the Shanghai Jiao Tong University in the PRC from 1984 to 1987. Applicant is well-known in the scientific field in the PRC for his scientific work, and because he returned to the PRC in 1984 after his studies in the U.S. instead of seeking to remain in the U.S. Applicant also repaid the PRC the money it spent to send and support him to the U.S. while he studied here. Simultaneously, Applicant authored a book in 1981 on optical infrared engineering that is used as a textbook at the Shanghai Jiao Tong University. In 1992 he submitted an updated and corrected version of the book for publication in the PRC and eventual use at the same university. In the 1990s Applicant worked as an adjunct professor at a U.S. university. (Tr. 32, 95-102, 136; Exhibits 2, 3)

Applicant is the president and majority (75% of the stock) owner of a scientific technology company. Applicant discussed in 1999 possible business contracts and agreements with a person in Singapore who works for that country's government. In 2000 he discussed with the Taipei, Republic of China (ROC), and the Shanghai, PRC, fire departments the use in fire fighting of some technological equipment Applicant developed. Applicant obtained an export license from the U.S. Department of Commerce for the equipment to Shanghai in September 2000 and an export license to Taipei in November 2000. Those licenses were valid for two years. Applicant never exported any equipment to either city's fire department. Applicant also negotiated with a company in the PRC about producing traffic light casings to use with a lighting device he developed because the cost of production in the PRC was less than in the U.S., but no casings were ever made because Applicant did not trust the PRC not to steal his invention. Applicant had an oral agreement with the PRC company to produce the casings. (Tr. 15, 16, 36-40, 61, 63, 65-68, 104-109, 118; Exhibits 2, 3, 5, 7, 8, 20)

In addition to his other business connections and enterprises with companies and individuals in the PRC, Applicant was one of four people who formed a company to import optical instruments from the PRC into the U.S., but that company is no longer in existence. Applicant maintains contact with a former professional associate who is a PRC citizen currently employed by the Metallic Institute in Shanghai, PRC. Also, Applicant hired several PRC citizens between 1992 and 2001. Applicant hired in 1993 a person he met at the Shanghai Technical Institute in 1978. Applicant paid for

that person's airfare to the U.S. from the PRC. Applicant employed that person for 18 months until his return to the PRC. In December 2000 Applicant went to the PRC and asked that same person to return to work for him in the U.S., which that person did from December 2001 to early 2005 when he resigned to work for another company. In November 1999, Applicant hired another PRC citizen to work for him as an electrical engineer. Applicant paid for that person's airfare to the U.S. and for six months of rent. That person resigned from Applicant's company in May 2000. The next person Applicant hired from the PRC was a former student who worked from 1997 to 1999. The fourth person Applicant hired was recommended to him by a professor in the PRC whose name Applicant has now forgotten. That person came to the U.S. in 1999 and worked for six months, leaving to move to Canada. The fifth person Applicant hired from the PRC was someone he knew at his university. That person worked from 1992 to 1996. Applicant currently has six or seven employees in his company. (Tr. 115, 123-134; Exhibits 2, 3)

While living in the PRC, Applicant attended the same university and had classes with a man who later became president of the PRC in 1995. Applicant also met the president's son, whom he called in 2000 to obtain help in getting a museum exhibit of Chinese artifacts to Kentucky. An intermediary for the Governor of Kentucky asked for Applicant's help in obtaining the museum exhibit. Applicant also called the president's son in 2001 to obtain the release of the Navy airplane and crew that were forced to land in the PRC after an air accident with a PRC jet fighter. When Applicant made these two phone calls, the PRC president had retired from office by that time. Applicant attended a party in Shanghai in 2000 given by the PRC to honor the newly appointed PRC ambassador to the U.S. Applicant met this person in 1984 when Applicant worked at the Shanghai Jiao Tong University. Applicant also knew another high official in the PRC government and his son. (Tr. 14, 17, 51-57, 115, 119-122, 147-151; Exhibit 3)

Applicant is not the scientific director of a holding company located in the United Kingdom and the U.S. That company showed Applicant's picture on its website without his permission. He has never worked for that company. The company removed Applicant's picture after he complained to them about it. (Tr. 111; Exhibits 10, 11, 19, B)

Applicant deliberately did not list several material facts on his security clearance application (SCA) he executed on March 29, 2001. In response to Question 9 (Relatives and Associates), Applicant did not list his sister and younger brother. In his October 2001 statement to the Government investigator Applicant denied having a sister, yet he admitted at the hearing he had one. In response to Question 12 (Foreign Activities-Property) Applicant did not disclose his business connections and export licenses for the Taipei and Shanghai fire departments, his business discussions with the Singapore representative, nor the casing manufacturer with whom he had an oral agreement in 1999. Applicant did not disclose the optical import business he had, nor the textbook he published in the PRC, nor his personal relationships with the person at the Metallic Institute or any PRC university. His repeated hiring of PRC citizens to work in his company, with Applicant paying their travel costs, were not reported on the SCA. Question 14 on the SCA asked for "Foreign Activities-Contact with Foreign Government", and Applicant did not list his two contacts with the son of the former president of the PRC, and their past academic relationships, nor his acquaintanceship with the PRC ambassador with whom he attended a PRC university. Finally, Applicant did not list in response to Question 13 (Foreign Activities-Employment) his employment at two PRC universities from 1971 to 1980, and from 1984 to 1987, nor his receipt of payment for expenses from 1980 to 1984 from the PRC government. (Tr. 64, 96-102; Exhibits 1-3)

The PRC is a government in which the Chinese Communist Party is the only political party allowed. The PRC human rights record is poor, with serious abuses of fundamental human rights occurring, such a denial of free speech and press, fair and open trials, and other basic rights recognized by the international community. The PRC continues to modernize

its armed forces and acquire or develop advanced weapons. The PRC engages regularly in military, economic, and industrial espionage, including stealing nuclear weapons technology, missile design information, and commercial technology. The PRC also obtains commercial information through the use of front companies, buying dual-use technologies, and the direct collection of technology by non-intelligence agencies and individuals.(Exhibits 13-18)

Applicant is a respected scientist and well regarded by his neighbors and business colleagues.

In 2001 he won the Tibbetts Award from the U.S. Government for his scientific work. These associates and friends consider Applicant to be honest, truthful, and hard-working. (Exhibits C-E)

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry*

§ 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for

an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. ay 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*\*6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

*Guideline B: Foreign Influence: The Concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries are relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.* E2.A2.1.1

*Guideline E: Personal Conduct: The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.* E2.A5.1.1

## CONCLUSIONS

The Government established by substantial evidence and/or Applicant's admissions each of the allegations in the SOR as amended. There are Disqualifying Conditions (DC) and Mitigating Conditions (MC) applicable under each Guideline.

DC 1 (An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country. E2.A2.1.2.1), DC 2 (Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists. E2.A2.1.2.2), DC 3 (Associates who are connected with any foreign government. E2.A2.1.2.3), DC 4 (failing to report, where required, associations with foreign nationals. E2.A2.1.2.4), and DC 6 (Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government. E2.A2.1.2.6) apply here. Applicant's current wife is a PRC citizen and, as of the date of the hearing, had been back in the PRC for four months. Applicant's family members, his mother, brothers, and sister, and his wife's brother and sister, all are PRC citizens and residents. Applicant had business and personal friends who work for PRC universities, the Metallic Institute, and the person from Singapore, all of whom work for the PRC or Singaporean governments. None of this information was disclosed by Applicant on his 2001 SCA as it should have been. He has extensive contacts in the PRC, and goes there at least annually; none of these connections to the PRC are disclosed on the SCA. Of particular importance and concern is the ease with which Applicant called the son of the (by that time retired) PRC president to obtain special favors on the museum tour, and to influence a foreign policy decision involving the PRC and the U.S. in 2001. This conduct, business and political, make Applicant vulnerable to coercion by PRC authorities, because they were not disclosed to the U.S. Government on the SCA and the PRC may expect a quid pro quo for its favorable actions in response to Applicant's telephone calls. Applicant's hiring of five PRC nationals over the course of nine years on recommendations of two friends and colleagues of his in the PRC is also of serious concern. Applicant did not disclose this pattern of hiring staff from the PRC that allowed them to gain access to the U.S. on his SCA.

The burden of proof is on Applicant to show what, if any, MC apply. MC 1 is a two-pronged test, both prongs of which must be met for it to apply. Applicant has not shown his relatives and associates are not agents of a foreign power or in a position to be exploited by PRC authorities in a way to make Applicant choose between loyalty to them and the U.S. if he is granted a clearance for access to classified information. His contacts with foreign citizens, including his relatives, are not casual or infrequent. Therefore, no MC apply under this guideline.

Applicant also tried to explain by various nuances his contacts and contracts with PRC companies and individuals, particularly that his calls to the son of the retired PRC president were only private matters, not official involvement. These explanations are not persuasive. Considering all of the evidence, I conclude this security concern against Applicant.

Regarding the personal conduct security concern, DC 2 (The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, or similar form used to determine security

clearance eligibility or trustworthiness. E2.A5.1.2.2), DC 3 (Deliberately providing false or misleading information concerning relevant and material matters to an investigator or other official representative in connection with a personnel security or trustworthiness determination. E2.A5.1.2.3), and DC 4 (Personal conduct that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail. E2.A5.1.2.4) apply. Applicant did not disclose a significant amount of foreign business information as the SCA on Questions 12 to 14 required. In fact, he disclosed nothing about his extensive PRC contacts, oral agreements, or contracts, however he chooses to describe them. His explanations of the distinctions obviously are attempts to minimize his commercial connections to the PRC, and are not persuasive.

Furthermore, Applicant did not truthfully disclose all his siblings on the SCA. Applicant did not disclose his younger brother and his sister, even denying in his October 2001 statement to the Government investigator that he had a sister. In his August 2001 statement he declared he has no other relatives in China than his one brother and his mother. Both statements are obviously false when compared to his testimony at the hearing.

Applicant's falsifications on his SCA are of such a magnitude covering all his PRC contacts that they are clearly deliberate. He did not even fully disclose his family members. His explanations in each category, and particularly his justification for his calls to the son of the PRC president, are not persuasive. As he made each one at the hearing, his credibility diminished in a geometric fashion. Therefore, considering all the evidence, even Applicant's three favorable character references, I conclude this security concern against Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant



Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Withdrawn by motion

Subparagraph 1.i: Against Applicant

Subparagraph 1.j: Against Applicant

Subparagraph 1.k: Against Applicant

Subparagraph 1.l: Against Applicant

Subparagraph 1.m: Against Applicant

Subparagraph 1.n: Against Applicant

Subparagraph 1.o: Against Applicant

Subparagraph 1.p: Against Applicant

Subparagraph 1.q: Against Applicant

Subparagraph 1.r: Against Applicant

Subparagraph 1.s: Against Applicant

Subparagraph 1.t: Against Applicant

Subparagraph 1.u: Against Applicant

Subparagraph 1.v: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

## **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue a security clearance for Applicant. Clearance is denied.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).