

DATE: December 28, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-10804

DECISION OF ADMINISTRATIVE JUDGE

CHRISTOPHER GRAHAM

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley , Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 44-year-old senior command and control employee of a federal contractor. His mother, two brothers and a sister are citizens and residents of the People's Republic of China (PRC.) Prior to immigrating to the United States, he worked for an urban planning institute controlled by the PRC government. He frequently traveled to the PRC until 2002, when the possibility of a security clearance developed. He failed to mitigate the security concerns under Guideline B (foreign influence.) 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. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1960), as amended, DOHA issued a Statement of Reasons (SOR) on August 21, 2006, detailing the basis for its decision - security concerns raised under Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing on August 31, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on September 26, 2006. Notice of Hearing was issued on October 13, 2006. I convened a hearing on October 31, 2006, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The government offered six exhibits, marked as exhibits 1-6. Applicant offered three exhibits, marked as exhibits A-C. I kept the record open until November 9, 2006, to allow Applicant to submit additional documentation. In a letter dated November 1, 2006, Applicant mailed to department counsel several documents collectively marked as exhibit D. In a memorandum dated November 13, 2006, the government indicated it had no objection to the exhibit. Exhibit D was admitted into evidence. DOHA received the hearing transcript (Tr.) on November 16, 2006.

FINDINGS OF FACT

Applicant admitted the allegations contained in SOR subparagraphs 1.b., 1.c., and 1.d., and denied the allegations in subparagraphs 1.a. and 1.e. The admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of

fact:

Applicant is a 44-year-old senior command and control employee of a federal contractor. (1) He immigrated to the U.S. from the Peoples' Republic of China (PRC) in 1989. (2) He never served in the PRC or U.S. military. (3) After coming to the U.S., he earned master's degrees in international community economic development and in computer science. (4) He became a U.S. citizen on March 28, 2002. (5) He and his wife were married in the PRC in 1986, and are now legally separated. (6) He has two teenage daughters who live with him. (7) He has no financial interests outside the U.S. (8) He is an adjunct faculty member at a university. (9)

Applicant's mother, two brothers and a sister are citizens and residents of the PRC. (10) Another sister is a citizen and resident of the Netherlands. (11) He channels most communications to his mother and siblings through this sister. (12) He and his siblings entered into a written agreement for the support of their mother. (13) None of them worked for the PRC government. (14) His father retired on a pension from the government controlled railroad, but is now deceased. (15) He attended a PRC university. (16) He worked for the PRC government at an urban planning academy from September 1985 through October 1987, designing plans for a tourist beach area. (17)

He traveled to the PRC on seven occasions between 1997 and May 2002. (18) These trips were for summer vacation because he could stay with family, it was cheaper than a U.S. vacation, and his only major expense was airfare. (19) He also traveled to the PRC in the spring of 2006 when his father died. (20) Since 2002, he has vacationed in the U.S. and in London. (21) These trips to the PRC stopped after he became a U.S. citizen and the possibility of a security clearance was discussed. (22) He has a U.S. passport, and his PRC passport was invalidated because a corner was cut off and it was stamped "cancelled" by the PRC embassy. (23)

The PRC is a very populous country, is economically powerful, and is an important trading partner of the United States. It is run by the Communist Party which controls all aspects of the PRC government. It has strong military forces, and has its own foreign-policy. Although there has been some cooperation, there has been much more conflict with the United States in the past. The PRC has an extremely large army, a sophisticated defense establishment, and space capability. The PRC has launched satellites, has ballistic missiles, has nuclear arms, and nuclear bombs. Its diplomatic and military dispute with the Republic of China (Taiwan), foreshadows a possible military conflict, which the United States opposes as a resolution of the conflict. (24) The PRC has an abysmal human rights record, which includes arbitrary killings; detention or incarceration without notice in mental facilities; torture; arbitrary arrest, detention or exile; no right to a public, fair trial; a politically controlled judiciary; lack of due process; restrictions on free speech, on religious freedom, on freedom of travel, on freedom of assembly; and no rights of privacy - family, home or correspondence. (25)

The PRC engages in espionage against the United States through an extensive network of businesses, personnel, and specific programs designed to acquire advanced U.S. military technology. One approach is to covertly conduct espionage by personnel from government ministries, commissions, institutes, and military industries, independently of the PRC intelligence services. This is believed to be the major method of PRC intelligence activity in the United States. It also tries to identify ethnic Chinese in the United States who have access to sensitive information, and sometimes is able to enlist their cooperation in illegal technology information transfers. (26)

There is no evidence that the PRC considers Chinese-Americans to be more vulnerable to approach than any other group. It is likely the PRC has adopted its distinctive ethnic-targeting intelligence strategy because it is much more capable of mounting effective approaches against individuals of ethnic Chinese ancestry than those of any other background. Also, the selling point in a normal PRC recruitment operation is not an appeal to ethnicity *per se*, but to whatever feelings of obligation the targeted individual may have towards the PRC, family members in the PRC, old friends in the PRC, etc. The crux of the PRC's approach is not to try to exploit a perceived vulnerability but to appeal to an individual's desire to help the PRC out in some way. Whatever the reason, ethnic targeting to arouse feelings of

(27)

obligation is the single most distinctive feature of the PRC intelligence operations.

POLICIES

"No one has a 'right' to a security clearance."⁽²⁸⁾ 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."⁽²⁹⁾ The President 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 with the national interest to do so."⁽³⁰⁾ Each security clearance decision "must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy."⁽³¹⁾

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽³²⁾

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. 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: nature and seriousness of the conduct and surrounding circumstances; frequency and recency of the conduct; age of the Applicant; motivation of the applicant, and the extent to which the conduct was negligent, wilful, voluntary, or undertaken with knowledge of the consequences involved; absence or presence of rehabilitation; and probability that the circumstances or conduct will continue or recur in the future. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant.⁽³³⁾ It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

The government established its case under Guideline B. Applicant admitted that he had numerous immediate family members living in the PRC. In addition, common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service. Here, based on the record as a whole, Applicant has close family ties to the PRC, as evidenced by his mother, sister and brothers and their families who are citizens of and residents in the PRC. The strength of the ties is also demonstrated by Applicant traveling to the PRC for family visits seven times between 1997 and 2002. He stopped traveling to the PRC once the issue of a security clearance became apparent. Since 2002, he has less frequent telephone and internet contact with family members. Instead he channels most of his communications through his sister in the Netherlands. These circumstances raise a security concern under Foreign Influence Disqualifying Condition (FI DC) E2.A2.1.2.1. (*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*) which is applicable.

I reviewed the mitigating conditions under Guideline B. Foreign Influence Mitigating Condition (FI MC) E2.A2.1.3.1. provides (*A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States*) requires Applicant to establish: (1) that the individuals in question are not "agents of a foreign power," and (2) that they are not in a position to be exploited by a foreign power in a way that could force the applicant to choose between the person(s) involved and the United States.⁽³⁴⁾

Applicant's brothers, sister, and mother do not meet the definition of "agent of a foreign power" under 50 U.S.C. § 438(6) and 50 U.S.C. § 1801(b). Similarly, they would not be considered as an "agent of a foreign power" under the more expansive definition adopted by the Appeal Board. The available evidence indicates they have no ties to or economic dependence upon the PRC government.

The second prong of the test is whether the relatives in question are "in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States." ⁽³⁵⁾ The federal statute, 50 U.S.C. § 1801(a), defines "foreign power" to include: a foreign government; a faction of a foreign nation; an entity openly acknowledged by a foreign government to be controlled by that foreign government; a group engaged in international terrorism; a foreign-based political organization; or an entity directed and controlled by a foreign government. The focus is not the country or its people, but its rulers and the nature of the government they impose. The PRC is hostile to the U.S. and is ruled by a communist government with a poor record of human rights. Applicant is also the type of target favored by persons conducting intelligence gathering on behalf of the PRC. With this history it is not difficult to envision a scenario in which Applicant's siblings could be subjected to some or all of these arbitrary denials of basic human rights in an effort to put pressure on Applicant to divulge classified information. The PRC is actively pursuing industrial and military intelligence in this country. Given these circumstances - which are clearly beyond Applicant's control - the presence of Applicant's siblings and mother in the PRC places them at risk of being brought under control or used as a hostage by a PRC intelligence or security service. The mere fact that they live in the PRC means they are in a position where there is a potential for them to be exploited in a way that could force Applicant to choose between loyalty to his family members and the interests of the U.S. Accordingly, Applicant is unable to successfully mitigate the security concern.

Foreign Influence Mitigating Condition FI MC E2.A2.1.3.5. (*foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities*) applies, since Applicant's financial interests are all in the U.S. FI MC E2.A2.1.3.3 (*Contact and correspondence with foreign citizens are casual and infrequent*) does not apply, because Applicant's immediate family members are considered to be non-casual. He has a history of travel to China to visit his family, and is part of a family agreement to provide support for his mother. While that is commendable, it demonstrates that his family contact is not casual.

Whole Person Concept

Guideline E2.2.1. The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for as security clearance. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

E2.2.1.1. The nature, extent, and seriousness of the conduct;

E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation;

E2.2.1.3. The frequency and recency of the conduct;

E2.2.1.4. The individual's age and maturity at the time of the conduct;

E2.2.1.5. The voluntariness of participation;

E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes;

E2.2.1.7. The motivation for the conduct;

E2.2.1.8. The potential for pressure, coercion, exploitation, or duress; and

E2.2.1.9. The likelihood of continuation or recurrence.

The "whole person" concept - not the potentially disqualifying or mitigating conditions - is the heart of the analysis of whether an applicant is eligible for a security clearance. ⁽³⁶⁾

Indeed, the Appeal Board has repeatedly held that an administrative judge may find in favor of an applicant where no

specific mitigating conditions apply. [\(37\)](#)

In assessing whether an applicant is a security risk because of his or her relatives or associates in a foreign country, it is necessary to consider all relevant factors. As noted above, ¶¶ E2.2.1. of the Directive specifically requires each administrative judge to consider all the facts and circumstances, including the "whole person" concept, when evaluating each individual case. To ignore such evidence would establish a virtual *per se* rule against granting clearances to any person with ties to persons in a foreign country, contrary to the clear terms of the Directive. "Although the position of an applicant's foreign family members is significant and may preclude the favorable application of FI MC E2.A2.1.3.1., the totality of an applicant's conduct and circumstances (including the realistic potential for exploitation) may still warrant a favorable application of the relevant general factors." [\(38\)](#)

One of the "whole person" factors which must be considered is "the potential for pressure, coercion, exploitation, or duress." [\(39\)](#)

In that regard, an important factor for consideration is the character of any foreign power in question, including the government and entities controlled by the government, within the relevant foreign country. This factor is not determinative; it is merely one of many factors which must be considered. Of course, nothing in Guideline B suggests it is limited to countries that are hostile to the United States. [\(40\)](#) The Appeal Board repeatedly warns against "reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B." [\(41\)](#)

It is well understood that "[the United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." [\(42\)](#)

Distinctions between friendly and unfriendly governments must be made with extreme caution. Relations between nations can shift, sometimes dramatically and unexpectedly. Moreover, even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, friendly nations have engaged in espionage against the United States, especially in economic, scientific, military, and technical fields. [\(43\)](#)

Nevertheless, the relationship between a foreign government and the U.S. may be relevant in determining whether a foreign government or an entity it controls is likely to attempt to exploit a resident or citizen to against the U.S. through the applicant. The nature of the foreign government might also relate to the question of whether the foreign government or an entity it controls would risk jeopardizing its relationship with the U.S. by exploiting or threatening its private citizens in order to force a U.S. citizen to betray this country. A hostile relationship is not determinative, but it may make it more likely that the PRC would attempt to exploit a U.S. citizen through his relatives or associates. [\(44\)](#)

Before coming to the U.S., Applicant worked for an urban planning institute, which is the type of entity that the PRC government prefers to use for intelligence gathering. He also is a person who is a likely target for intelligence operatives to approach to gather classified data for the PRC. Because of the PRC government's *modus operandi* in intelligence gathering, Applicant's situation raises grave security concerns.

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

FORMAL FINDINGS

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

DECISION

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

Christopher Graham

Administrative Judge

1. Government Exhibit 1 (*Security Clearance Application*, SF 86, dated March 19, 2003) at 1; Tr. at 36, 54.
2. Government Exhibit 1, *supra*, note 1, at 7.
3. Tr. at 39.
4. *Id.*
5. Government Exhibit 1, *supra*, note 1, at 1.
6. *Id.* at 5.
7. Tr. at 36-37.
8. *Id.* at 50.
9. Applicant's Exhibit A (*Binder of Miscellaneous Documents - Resume*), dated October 31, 2006) at 153.
10. Government Exhibit 1, *supra*, note 1, at 6-7.
11. *Id.* at 7; Tr. at 62.
12. Tr. at 18, 41.
13. Applicant's Exhibit A (Notebook of Documents Responding to the SOR, dated October 31, 2006) at 61; Tr. at 46.
14. Tr. at 63.
15. Applicant's Answer, dated August 31, 2006, at 1; Tr. at 61.
16. Tr. at 37.
17. *Id.* at 56-59, 66-67.
18. Government Exhibit 1, *supra*, note 1, at 8.

19. Tr. at 44.
20. Tr. at 61.
21. *Id.* at 45.
22. *Id.*
23. *Id.* at 51.
24. Government Exhibit 4 (U.S. State Department, *Background Note on China*, dated April 2006) at 1-24.
25. Government Exhibit 3 (U. S. State Department, *Country Reports on Human Rights Practices: China, 2005*,) at 1-11.
26. Government Exhibit 5 (U. S. House of Representatives report: US National Security and Military/Commercial Concerns with the People's Republic of China, dated January 3, 1999) at 1-57.
27. Government Exhibit 6 (*Intelligence Threat Handbook*, dated June 2004) at 21.
28. ⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
29. ⁰*Id.* at 527.
30. ⁰Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960).
31. ⁰Directive ¶6.2.
32. ⁰ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
33. ⁰*See* Exec. Or. 10865 § 7.
34. ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004).
35. Directive, ¶ E2. A2. 1.3.1.
36. Directive, ¶ E2.2.3.
37. ISCR Case No. 03-11448 at 3-4 (App. Bd. Aug. 10, 2004); ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004).
38. ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (footnotes omitted); *accord* ISCR Case No. 03-23259 at 3 (App. Bd. May 10, 2006).
39. Directive, ¶ E2.2.1.8.
40. *See* ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002); ISCR Case No. 00-0489 at 12 (App. Bd. Jan. 10, 2002).
- .
41. ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002).
42. ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).
43. ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).
44. ISCR Case No. 03-21423 at 7-10.

