

KEYWORD: Foreign Influence

DIGEST: Applicant emigrated from China to the United States in 1989 and became a U.S. citizen in 2001. He does maintain a relatively close relationship with his younger brother, who is a citizen resident of China and maintains a relationship to a lesser extent with his elderly parents and older brother, who are citizen residents of China. Applicant did not mitigate security concerns pertaining to foreign influence. Clearance is denied.

CASENO: 07-00094.h1

DATE: 07/18/2007

DATE: July 18, 2007

_____)	
In Re:)	
)	
-----)	ISCR Case No. 07-00094
SSN: -----)	
)	
Applicant for Security Clearance)	
_____)	

**DECISION OF ADMINISTRATIVE JUDGE
ROBERT J. TUIDER**

APPEARANCES

**FOR GOVERNMENT
Daniel F. Crowley, Esq., Department Counsel**

**FOR APPLICANT
Pro Se**

SYNOPSIS

Applicant emigrated from China to the United States in 1989 and became a U.S. citizen in 2001. He does maintain a relatively close relationship with his younger brother, who is a citizen resident of China and maintains a relationship to a lesser extent with his elderly parents and older brother, who are citizen residents of China. Applicant did not mitigate security concerns pertaining to foreign influence. Clearance is denied.

STATEMENT OF THE CASE

On January 26, 2006, Applicant submitted a Security Clearance Application (SF 86).¹ On February 22, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,² pursuant to Executive Order 10865, Safeguarding Classified Information Within Industry, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (Directive), dated January 2, 1992, as amended, modified and revised.³

The SOR alleges security concerns under Guidelines B (Foreign Influence). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer notarized on March 12, 2007, Applicant responded to the SOR allegations, and elected to have his case decided at a hearing.⁴ On April 5, 2007, the case was assigned to me. His hearing was held on May 16, 2007. DOHA received the hearing transcript (Tr.) on May 25, 2007.

PROCEDURAL RULINGS

Administrative Notice

Department Counsel requested administrative notice of the facts in Exhibit (Ex.) 2 through 8. Tr. 9-11. Department Counsel also provided a supporting document (Ex. 1) to show the basis for the facts in Exs. 2 through 8. Applicant did not object to my taking administrative notice. Tr. 11.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No.

¹Government Exhibit (GE) 1 (Electronic Standard Form (SF) 86, Security Clearance Application).

²(Statement of Reasons (SOR), dated February 22, 2007).

³On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended, in which the SOR was issued on or after September 1, 2006. Applicant's case is resolved under the revised Adjudicative Guidelines.

⁴(Applicant's response to SOR, notarized on January 2, 2007, received at DOHA on January 4, 2007).

02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from government reports. See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). I took administrative notice of various facts derived from Exs. 2 through 8 as indicated under subheading “People’s Republic of China” of this decision.

FINDINGS OF FACT

As to the SOR’s factual allegations, Applicant admitted the allegations in SOR except ¶ 1.b.⁵ His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 53 years old.⁶ He received a bachelor of science degree majoring in information systems and a Ph.D in philosophy from a Chinese university. He was awarded a second Ph.D in ancient philosophy from a U.S. university in August 1994. He has no prior U.S. military service. He has never been married. He does not currently hold a security clearance. He has never been fired from a job, and he began his current employment with a government contractor as a software application engineer in November 2004. There is no derogatory information concerning his police or financial records. He has never used illegal drugs.

Applicant was born in China in 1954, and he moved to the United States in 1989. He became a U.S. citizen in January 2001. He was issued a U.S. passport in February 2003.

Applicant’s mother is approximately 81 years old, and she is a citizen resident of China. During her working life, she was a member of the Communist party and was employed by the Chinese opera as “kind of in charge of some parts of the opera.” Tr. 25. Applicant’s father is approximately 91 years old, and he is a citizen resident of China. During his working life, he was the deputy secretary of the communist party at a Chinese university where he was employed. Tr. 24-25. Both of his parents have been retired “before 1988, about 18 years ago.” Answer to SOR.

Applicant communicates with his parents by telephone approximately two or three times a year, usually around a Chinese holiday. Answer to SOR, Tr. 25. His parents have never visited the U.S.

⁵*Supra* n 4.

⁶GE 1, *supra* n. 1, at Sections 2 (date of birth), 10 (education), 11 (employment), 8 (spouse), 13/15 (relatives), 16 (military service), 22 (employment), 23 (police record), 24 (illegal drug use), and 27 (financial record), is the source for the facts in this paragraph, unless otherwise stated.

Applicant has two brothers, who are citizen residents of China. His older brother is employed as a mathematician and his younger brother owns a workout shop, “kind of gym.” Tr. 26. Neither brother is a member of the Communist party.

Applicant communicates with his older brother by telephone “about twice a year” and communicates with his younger brother by telephone “about 7 or 8 times a year.” Answer to SOR, Tr. 26-27.

Applicant has a Chinese-born sister who came to the U.S “in 1987 or 1988” and later became a U.S. citizen. Answer to SOR, Tr. 28. She is currently married to a U.S. citizen, and has a former husband she left behind in China. She and her first husband have an adult daughter and that daughter is attending a U.S. university. His sister has a medical degree, which she earned in China, but has never practiced medicine. His sister is not currently working. Applicant reports that he saw his sister one time in 1995 “for a few days” and communicates with her by telephone “only briefly and at most once a year.” Answer to SOR, Tr. 30-32. She goes back and forth to the PRC for lengthy visits and at hearing date was currently visiting the PRC. Tr. 32-33. She is not a member of the Communist party.

In 2005, Applicant visited the PRC for approximately two weeks and stayed with his younger brother. He reported his visit consisted of visiting his parents and brothers, sight seeing, and shopping. Answer to SOR, Tr. 27.

Applicant did not provide any character or reference statements nor did he call any witnesses on his behalf.

People’s Republic of China⁷

China has an authoritarian, Communist government. China has a poor human rights record, suppresses political dissent, and practices arbitrary arrest and detention, forced confessions, torture, and other prisoner mistreatment.

China is a nuclear power with a large Army. China is geographically vast, and has a population of over one billion people. It has significant resources, and an economy that in recent years has expanded about 10% per year. China aggressively competes with the United States in many areas. China’s competitive relationship with the United States exacerbates the risk posed by Applicant’s Chinese connections.

China actively collects military, economic and proprietary, industrial information about the United States because of the following circumstances: (1) its position as a global superpower; (2) its military, political, and economic investments in the Pacific Rim and Asia; (3) its leading role in development of advanced technology that China desires for economic growth; and (4) China considers the large number of Americans of Chinese ancestry as intelligence targets. China’s active intelligence gathering programs focus on sensitive and protected U.S. technologies.

⁷The contents of the PRC section are from Exs. 2 through 8.

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider the "Adjudicative Guidelines for Determining Eligibility For Access to Classified Information" (Guidelines). In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. Guideline ¶ 2. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge considers all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. Guideline ¶ 2(c).

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guideline ¶ 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) 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."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." Guideline ¶ 2(b). 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.

In the decision-making process, facts must be established by "substantial evidence."⁸ The Government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly

⁸ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Dir evidence in the active ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to present "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁹

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 under this Directive 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.

The scope of an administrative judge's decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. Executive Order 10865, § 7.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline ¶ 6 explains the Government's concern about "foreign contacts and interests" stating, "if the individual has divided loyalties or foreign financial interests, [he or she] 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."

⁹"The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

Guideline ¶ 7 indicates conditions that could raise a security concern and may be disqualifying in this case, including:

- (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;

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country, and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001). Applicant has infrequent contact with his parents and older brother. He has more frequent contact with his younger brother and maintains a relatively close relationship with him. These contacts whether out of affection or obligation with his immediate family members create a heightened risk of foreign pressure or attempted exploitation. His relationship with these immediate family members also creates a potential conflict of interest because it is sufficiently close to raise a security concern about his desire to help his parents and brothers by providing sensitive or classified information.

The Government produced substantial evidence of these two disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. As previously indicated, the burden of disproving a mitigating condition never shifts to the Government.

Three Foreign Influence Mitigating Conditions under Guideline ¶ 8 are potentially applicable to these disqualifying conditions:

- (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;

Guideline ¶ 8(a) does not apply to his relationships with his parents and brothers. His contacts with these immediate family members are not casual and infrequent. If he does not contact these family members out of affection, he certainly does so understandably out of obligation. Applicant could be placed in a position of having to choose between his parents and brothers and the interests of the United States.

Guideline ¶ 8(b) does not apply because Appellant has not demonstrated in the evidence he presented a sufficient relationship and loyalty to the U.S. that he can be expected to resolve any conflict of interest in favor of the U.S. interest. Although he lived in the United States since 1989, and became a U.S. citizen in 2001, he has not demonstrated that he has such deep and longstanding relationships and loyalties in the U.S. such that he can be expected to resolve any conflict of interest in favor of the U.S. interest. The only immediate family member he has in the U.S. is a sister with whom he has minimal contact. The facts presented by Applicant are insufficient to overcome the security concerns as discussed in the “whole person” analysis, *infra*.

Guideline ¶ 8(c) does not apply because of the regularity and consistency of his contact with immediate family members in China.

“Whole Person” Analysis

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under Directive ¶ E2.2.1. “Under the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant’s life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant’s security eligibility by considering the totality of an applicant’s conduct and circumstances.”¹⁰ The directive lists nine adjudicative process factors (APF) which are used for “whole person” analysis. Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation and behavior changes, etc., the eighth APF, “the potential for pressure, coercion, exploitation, or duress,” Directive ¶ E2.2.1.8, is the most relevant of the nine APFs to this adjudication.¹¹ In addition to the

¹⁰ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)); ISCR Case No.05-02833 at 2 (App. Bd. Mar. 19, 2007) (citing *Raffone v. Adams*, 468 F.2d 860 (2nd Cir. 1972) (taken together, separate events may have a significance that is missing when each event is viewed in isolation).

¹¹ See ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006) (stating that an analysis under the eighth APF apparently without discussion of the other APFs was sustainable); ISCR Case No. 03-10954 at 5 (App. Bd. Mar. 8, 2006) (sole APF mentioned is eighth APF); ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (remanding grant of clearance because Judge did not assess “the realistic potential for exploitation”), *but see* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 5, 2007) (rejecting contention that eighth APF is exclusive circumstance in whole person analysis in foreign influence cases).

eighth APF, other “[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.” Directive ¶ E2.2.1. Ultimately, the clearance decision is “an overall common sense determination.” Directive ¶ E2.2.3.

The Appeal Board requires the whole person analysis address “evidence of an applicant’s personal loyalties; the nature and extent of an applicant’s family’s ties to the U.S. relative to his [or her] ties to a foreign country; his or her social ties within the U.S.; and many others raised by the facts of a given case.” ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

Substantial mitigating evidence weighs towards grant of Applicant’s security clearance. Applicant has lived in the United States for 18 years, and he has been a naturalized citizen for four years. When he became a U.S. citizen, he swore allegiance to the United States. His sister is also a naturalized U.S. citizen. There is no evidence he has ever taken any action which could cause potential harm to the United States. Applicant does appear to take his loyalty to the United States very seriously, and he has worked diligently for a defense contractor for almost three years.

Five circumstances weigh against Applicant in the whole person analysis. First, China is a nuclear power and China’s government is a rival of the United States. China is an authoritarian, Communist state. More importantly for security purposes, China actively seeks classified and industrial/economic information. China may attempt to use his parents and brothers who live in China to obtain such information. Second, he had significant connections to China before he emigrated to the United States in 1989. He was born in China, and spent his formative years there. Third, his parents and two brothers are citizen residents of China and his parents were members of the Communist party. Although his contacts with his parents and older brother are minimal, he still maintains a sense of loyalty and obligation to them which continues. Fourth, he has frequent and non-casual contact with his younger brother as evidenced by his maintaining telephone contact with him seven to eight times per year. He visited China one time in 2005 for two weeks to visit his family since he arrived in the U.S. Individually, these contacts may appear minimal, but collectively they demonstrate a sense of obligation and a connection with family members in China. Fifth, he has no known ties with family members or persons with whom he maintains a close relationship with in the U.S.

Applicant has demonstrated that his younger sister is a U.S. citizen and not a citizen resident of the PRC. She does, however, maintain a close connection with China as evidenced by her frequent return visits.

“Because of the extreme sensitivity of security matters, there is a strong presumption against granting a security clearance. Whenever any doubt is raised . . . it is deemed best to err on the side of the government’s compelling interest in security by denying or revoking [a] clearance.” *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990). After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the

security concerns pertaining to foreign influence. This is a close case, but ultimately the evidence leaves me with doubts as to Applicant's security eligibility and suitability.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"¹² and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

FORMAL FINDINGS

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

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant, except for "and sister"
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant

DECISION

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

Robert J. Tuidor
Administrative Judge

¹²See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).