



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



In the matter of:)
)
-----) ISCR Case No. 07-02653
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Carolyn H. Jeffreys, Esquire, Department Counsel
For Applicant: *Pro Se*

February 26, 2008

Decision

HOWE, Philip S., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on November 8, 2004. On September 18, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline B for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on October 1, 2007, and requested a hearing before an Administrative Judge. DOHA received the request on October 2, 2007. Department Counsel was prepared to proceed on November 20, 2007, and I received the case assignment on November 27, 2007. DOHA issued a notice of hearing on December 17, 2007, and I convened the hearing as scheduled on January 8, 2008. The government offered Exhibits (Ex.) 1 through 4, which were received without

objection. Applicant testified on his own behalf and submitted Exhibits A through F, without objection. DOHA received the transcript of the hearing (Tr.) on January 22, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the People's Republic of China (PRC) (Tr. 14) The request and the attached documents were admitted into evidence and included in the record as Exhibit 4. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his Answer to the SOR, dated October 1, 2007, Applicant admitted the factual allegations of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 49 years old, married with two children, and works for a defense contractor. He worked in this job for the past three years. He received an interim security clearance, which was removed when the SOR was issued. He obtained a Ph.D. in experimental physics from a U.S. university in 1996. He obtained his bachelor's degree in engineering at a PRC university. After graduating, he worked for a company in the PRC for three years before obtaining a scholarship to a U.S. university. He came to the United States in 1987, and became a U.S. citizen in 1999. Applicant's two children were born in the United States. His wife came to the United States from the PRC in 1990. (Tr. 21-24, 38, 62-67; Exhibits 1, 2)

Applicant has a younger sister and brother. The brother is a U.S. citizen living in another state from Applicant's residence. His sister lives in the PRC, and has one child. As children, they had a close relationship. Applicant's sister works as a technician. Applicant applied to have his sister and her daughter immigrate to the United States, but it will be at least four years before she can move here. Applicant calls his sister monthly to "keep up her spirits." Applicant's parents are deceased, his mother in 2000, and his father in November 2007. When alive, they worked as seismologists in the PRC. During the Cultural Revolution in the PRC in the 1960s, Applicant characterized them as "victims during cultural revolution." Applicant's father knew the Japanese and English languages, so he was labeled by the PRC government as "sub-class," someone not to be trusted by the PRC government. (Tr. 25, 27, 29, 34, 66-70, 75; Exhibits 1, 2, C)

Applicant traveled to the PRC in November 2007, for his father's funeral. He had not been there for about 16 years. At this funeral, he saw his uncle and his wife. He did not see or talk with any other relatives on that trip. When his mother died, he did not have a U.S. passport, and he had lost his PRC passport, which had already expired.

Applicant's wife and children went to the PRC for his mother's funeral. Following the death of his parents, Applicant does not foresee any travel to the PRC in the near future, because he does not think there will be any need for such travel. (Tr. 27, 34, 35)

Applicant's wife has two brothers and her parents still living in the PRC. One brother is scheduled to immigrate to Canada by the end of January 2008. He is an electrical engineer who works for a water company. He is going to Canada, in part, because he thinks there will be more water projects there for him to gain employment. The other brother works as a salesman for a medical products company in the PRC. Applicant's wife wants this brother to immigrate to the United States. Her parents are retired. She telephones them monthly, and speaks with her brothers every few months. The parents visited their daughter in the United States three times in the past 20 years, staying 30 days to 18 months during these visits. Applicant's wife became a U.S. citizen in September 2000. In 1998 and in 2000, Applicant's wife traveled to the PRC. The first trip was to visit her family. The second trip was to attend Applicant's mother's funeral. She has made two additional trips since 2000 for pleasure reasons. Applicant's wife is employed in the computer engineering business. Applicant speaks with his mother-in-law once or twice a year, and he does not talk with his brothers-in-law. (Tr. 28-32, 35-38; Exhibits 1, 3, B, D, E)

Applicant's children are enrolled in a martial arts school. Their instructor testified about the commitment Applicant has to his children. Two co-workers of Applicant testified about his good work ethic and adherence to security procedures at the employer's work site. His employee evaluation stated he had excellent laboratory skills. His site manager submitted a strong letter of recommendation for Applicant. (Tr. 39-62; Exhibits A, F)

I take administrative notice of the following facts. The PRC is a one-party Communist totalitarian state. It has an economy growing at 10% annually, and expanding military forces, including its naval forces. It engages in industrial and military espionage on a regular basis against the United States and other countries. The United States and the PRC have been rivals since 1948, when the Communists took control of mainland China, and the Nationalist government fled to the island of Taiwan. Taiwan remains an issue of contention between the two countries. The U.S. - China Economic and Security Review Commission's 2006 report to the U.S. Congress found the PRC has a large and aggressive intelligence gathering operation in the United States, particularly in the scientific and military fields. Additionally, the U.S. State Department reported the PRC has a poor human rights record, including but not limited to, suppressing political dissent, using arbitrary arrests, forced confessions, and mistreatment of prisoners as part of its operational methods to maintain control of its population. (Exhibit 4)

Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition

to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, the administrative judge applies the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to 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 the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

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

The security concern relating to the guideline for Foreign Influence is set out in AG ¶6:

Guideline B: The Concern: 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.

The guideline notes several conditions that could raise security concerns. Under AG ¶7(a) (contact with a foreign family member 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) and ¶7.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). Applicant speaks monthly with his sister, and infrequently with his wife's family. Applicant is trying to bring his sister and her daughter to the United States to live, but it will take at least four years to accomplish this move. This move is dependent upon the approvals of the PRC and U.S. governments, thereby creating a potential conflict of interest between Applicant's desire to help his sister and his obligation to protect classified information. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from foreign influence. I considered the mitigating conditions ¶8.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 the foreign individual and the interests of the U.S.), and ¶8.b (there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person 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. interests). Applicant's close ties of affection and family to his sister, and the historical record of PRC espionage, particularly in the scientific area, make it likely that Applicant could be placed in a situation where he would have to choose between his desire to have his sister live in the United States,

and the PRC's desire for classified information. Thus, I conclude that mitigating condition ¶8.a does not apply. Next, Applicant's sense of loyalty to his sister is great, not minimal, even though he has been a U.S. citizen for 18 years. It is not clear how Applicant might resolve any conflict of interest. AG ¶2.b states, "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." That requirement is applicable here. I conclude these potentially mitigating conditions do not apply.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's education, his U.S. citizenship, the immigration of his brother and wife to the United States, the birth of his children in the United States, making them native-born U.S. citizens, Applicant's work record, his presentation at the hearing, and his age and maturity. I also considered the potential for coercion by the PRC against someone who has a close relative in the PRC who wants to emigrate, and that the Applicant, if granted a clearance, would have access to classified information within the range of classified and proprietary material the PRC traditionally collects.

The result of this analysis is that I conclude the foreign influence security concern against Applicant. I also conclude the "whole person concept" against Applicant.

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

Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant

Conclusion

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

PHILIP S. HOWE
Administrative Judge