



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



In the matter of:)	
)	
)	ISCR Case No. 07-12674
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie R. Edmunds, Esquire, Department Counsel
For Applicant: Pro Se

May 22, 2008

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigation Processing (E-QIP) to update his security clearance on May 11, 2007. On January 30, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns for Applicant under Guideline B, Foreign Influence, and Guideline L, Outside Activities. 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 acknowledged receipt of the SOR on February 7, 2008. He answered the SOR in writing February 8, 2008, admitting all factual allegations in the SOR, but denied that the factual allegations create a security concern. He requested a hearing, and DOHA received the request on February 13, 2008. Department Counsel was prepared to proceed on February 26, 2008, and the case was assigned to me on February 27, 2008. DOHA issued a notice of hearing on March 6, 2008, and I

convened the hearing as scheduled on April 8, 2008. The government offered three exhibits, marked Government Exhibits (Gov. Ex.) 1-3, which were received without objection. Applicant submitted eight exhibits, marked Applicant Exhibits (App.Ex.) A through H, which were received without objection. Applicant and one other witness testified on Applicant's behalf. DOHA received the transcript of the hearing (Tr.) on April 17, 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 Peoples Republic of China (PRC) and Thailand. (Tr. 11-14) The request and the attached supporting documents were not admitted into evidence but were included in the record as Hearing Exhibits I-III. Applicant had no objection to the request for administrative notice and the attached documents. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant admitted all the factual allegations in the SOR with explanation but denied the security concerns raised by the factual allegations. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 63 years old, and he has been a senior field representative for a defense contractor in support of the United States Army for two years. Applicant received a bachelor's in music and a master's degree in education from United States universities. He served on active duty in the Army for three years, and then taught school in a public high school for ten years. He subsequently worked for the United States Army as a civilian educational specialist for 26 years retiring in 2006. He has worked with various Army schools as an adviser for education programs. (Tr. 28-44; Government Exhibit 1, Security Clearance Application, E-QIP, dated May 11, 2007; Applicant Exhibit A, Background information, undated) Applicant has continuously held a security clearance since 1981. (Applicant Exhibit D, Statement of Security Clearance, dated January 21, 1982) Applicant is highly regarded by his present and former employers. He presented Letters of Appreciation and Commendation for his service as an Army civilian. (Applicant Exhibit C, Letters, dated December 15, 1986, June 3, 1988, February 16, 1988, May 31, 1994, and December 16, 1986) He is also highly regarded by his defense contractor employer. Applicant has always informed his supervisors about his business activities in and trips to the PRC. (Applicant Exhibit F, Four Letters, dated April 4, 2008, and March 17, 2008) Applicant has also received training on combating terrorism. (Applicant Exhibit E, Memorandum, dated August 23, 2005)

Applicant was married three times to United States citizens. The marriages ended in divorce, the last in 1999. In 1999, Applicant met his present wife, a Chinese citizen living in China, over the internet. After their internet introduction, Applicant traveled to China in 1999 to meet his new wife and her family. He stayed in hotels but visited his future wife and her family for social events. He spent a few hours each day with her family. Applicant returned to the United States and his future wife joined him in the United States in August 2000. They were married in the United States in September 2000. Applicant does not speak Chinese and his wife's family does not speak English. Applicant communicates with his wife's family in the PRC through his wife. Applicant admits he traveled to the PRC in March 2002, May 2001, June 2004, October 2005, November 2006, and January 2007. His wife accompanied him on the trips he made after they married in September 2000. Applicant and his wife plan to travel to the PRC in August 2008 to visit family and see the Olympics. (Tr. 14-16; Government Exhibit 1, Security Clearance Application (e-QIP) dated May 11, 2007)

Applicant's wife testified that she was born and raised in the PRC. She received a bachelor's degree in electrical engineering from a PRC university and worked for over ten years as an electrical engineer for a PRC company. She then worked for about four years for the PRC Trade ministry buying and selling items for use by businesses in the PRC. Just prior to meeting Applicant and coming to the United States, Applicant's wife and a friend opened a restaurant. She is a citizen of the PRC but now a resident of the United States. When she arrived in the United States with her new husband in 2000, she started taking English language and other courses at a local community college. She became proficient enough in English that she applied for United States citizenship in May 2008. (Tr. 22-25; Applicant Exhibit H, postal receipt, dated May 4, 2008)

Her father passed away in 2004. He previously served for over 42 years in the PRC Army as a medical officer, retiring about 27 years ago. He then went to work for a hospital. Applicant met some PRC government officials on his visits to PRC because of the military connections of his father-in-law. (Tr. 28-29)

Applicant's wife's mother is 76 years old, a retired school teacher, and a resident and citizen of the PRC. Her mother resides with Applicant's wife's sister, and receives some retirement and medical benefits from the PRC government. Applicant and his wife provide her mother with about \$1,200 a year in monetary support. Applicant's wife talks to her mother by telephone about once a month, and stays with her and her sister on her visits to the PRC. (Tr. 26-28)

Applicant's wife's sister is 44 years old, an accountant for a lighting supplier, not married, and lives with her mother. Applicant's wife talks to her sister about once a month when she calls her mother. Applicant's wife does not e-mail her sister. Her sister has never visited the United States. (Tr. 29-30)

Applicant's wife's brother is 41 years old, married, and a department director for licensing for the Beijing city government. Applicant's wife does not speak to her brother

on the telephone and does not e-mail him. She does see him on her visits to the PRC. (Tr. 30-32)

Applicant testified that he formed a business relationship with the United States patent holder and manufacturer of a piece of equipment for water treatment. He became one of the manufacturer's sales representatives for the equipment. After he and his wife married, they saw a lucrative market for the equipment in the PRC. He sought and received some assistance from the United States State Department foreign commerce service. They assisted in arranging visits and appointments. Applicant and his wife entered a business relationship with two individuals in the PRC to assist and represent him to sell the water treatment devices. He made about two or three trips to the PRC meeting with his representatives and demonstrating the equipment for them and potential customers. Some of the potential customers could have been government representatives. His wife served as his translator. Applicant also made some business arrangements with a representative to sell the equipment in Thailand. For each piece of equipment sold, Applicant would receive a 5 percent commission and the representatives 10 percent. However, he has not sold any equipment to any entity in China or Thailand. He has not been to Thailand since 2004 for business or any other reason. His business arrangements in the PRC were basically over in 2006. He is willing to travel to Thailand or the PRC if there is an opportunity for a lucrative sale of the equipment. However, Applicant does not foresee any business from his attempts to sell the water treatment equipment outside the United States. He has sold some equipment to businesses in the United States. (Tr. 44-50)

Applicant kept his supervisors informed of his travels to the PRC and his business activities. He informed his security manager that he has a foreign born wife. When he met his wife and married her in 2000, he was employed by the Army. He informed his Army supervisors of his trips to the PRC. He also informed them of his business activities. (Tr. 50-52; Applicant Exhibit F, Letters, dated October 29, 2004)

China, also known as the People's Republic of China, is hostile to the United States, and has interests inimical to those of the U.S. China is ruled by a totalitarian government that depends on the suppression of its people. The government has a poor record of human rights that features, among other things, repression of political and religious dissenters. There have been some improvements in relations between PRC and the United States. While the United States looks forward to a constructive and broad-based relationship with China, a message reiterated by President Bush when he met with PRC President Hu in April 2006, there are areas of potential disagreement.

China is known to engage in espionage against the U.S., both economically, militarily, and otherwise. The United States is a primary intelligence target of PRC because of the United States role as a global superpower; its substantial military, political, and economic presence in Asia and the Pacific Rim; its role as a developer of advanced technology that China requires for economic growth; and the large number of Americans of Chinese ancestry who are considered prime intelligence targets by the PRC. The intelligence practice of the PRC is different from the Soviet and western

concept of the use of recruited agents. The western approach is to recruit agents for a specific intelligence target. The PRC intelligence philosophy is to try to recruit agents before there is a specific need, and recruit as many as possible. The crux of the PRC approach is not to try to exploit a perceived vulnerability but to appeal to an individual's desire to help China out in some ways. A large portion of the PRC intelligence collection efforts against common targets is conducted directly by PRC students, delegations, and commercial enterprises. They also believe if large numbers of PRC personnel leave China and settle permanently in the United States, some of them may some day find their way into positions of intelligence potential. When they are in position, these individuals will be approached on the basis of loyalty to their ancestral land, and some may be persuaded to cooperate, at least on a limited basis. (Court Exhibit 1, Government Request for Administrative Notice, Intelligence Threat Handbook, at 17-24)

Chinese security personnel place foreign visitors under surveillance and subject them to search without their knowledge or consent. However, there is no information in intelligence documents that the PRC is targeting relatives of Chinese-Americans to gain access to classified, technical, or business information from their relatives in the United States. However in recent years, the PRC has been the subject of approximately half of the cases initiated by U.S. law enforcement agencies concerning the illegal diversion of technology from the United States. These cases involve people born and raised in the PRC who immigrated to the United States and became United States citizens. The PRC relies on recruitment and exploitation operations. The PRC attempts to recruit or at least "make friends with" as many Chinese-Americans as possible, apparently hoping that at least some will perceive an obligation to help China, (Court Exhibit 1, Request for Administrative Notice, attached State Department and Intelligence Service documents)

Thailand is a constitutional monarchy. The democratically elected prime minister was overthrown by a peaceful military coup in 2006. The military regime abolished the parliament, declared martial law, and limited civil liberties. Thailand has an open market economy with significant foreign investments. The United States has significant trade with Thailand being its largest export market and second largest supplier. There had been good relations between Thailand and the United States until the coup in September 2006. Since then, the United States has suspended several military exercises and operations with Thailand. The Department of State has criticized the Thai human rights record. The Thai constitution prohibits torture and arbitrary arrest and detention. However, since the September 2006 coup, there are reports of torture, and arbitrary arrest, detention, and disappearances. There is also a concern for increased terrorism in Southeast Asia, including Thailand. There are incidents of criminal and political violence by separatist and extremists groups generally focused on government interests but increasingly targeting public places and tourist areas. (Court Exhibit II)

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, these guidelines are applied 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

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 the U.S. interests, or is vulnerable to pressure or coercion by any foreign interests. 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 consideration as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism. (AG ¶ 6)

Applicant and his wife reside together in the United States, but his wife is still a citizen of the PRC. Applicant's wife has contact by telephone and visits with her mother, brother, and sister who are all citizens and residents of the PRC. Applicant sees his wife's family when he visits the PRC but otherwise has minimal contact with them because they do not share a common language. Applicant also has business contacts in the PRC and Thailand. His business interests and his wife's family contacts raise security concerns under Foreign Influence Disqualifying Conditions AG ¶ 7(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); AG ¶ 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); and AG ¶ 7(d) (sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion).

Under the old adjudicative guidelines, a disqualifying condition based on foreign family members could not be mitigated unless an applicant could establish that the family members were not "in a position to be exploited." The Appeal Board consistently applied this mitigating condition narrowly, holding that its underlying premise was that an applicant should not be placed in a position where he is forced to make a choice between the interest of the family member and the interest of the United States. (See, ISCR Case No. 03-17620, App. Bd, Apr. 17, 2006; ISCR Case No. 03-24933, App. Bd. Jul. 28, 2005; ISCR Case No. 03-02382, App. Bd. Feb. 15, 2005; and ISCR Case No. 03-15205, App. Bd. Jan. 21, 2005). Thus, an administrative judge was not permitted to apply a balancing test to assess the extent of the security risk. Under the new guidelines, however, the potentially conflicting loyalties may be weighed to determine if an applicant can be expected to resolve any conflict in favor of the U.S. interest.

The nature of the country in which persons are located is an issue. There are some indications that China and the United States are working towards more friendly relations. There is no doubt that the PRC targets the United States for scientific,

intelligence, technical, and military information. While Thailand has been an ally of the United States, the military coup in September 2006 and the resulting government and terrorist activities raises concerns about Thai actions against United States citizens to gain trade and other protected information from the United States. Security concerns can be raised from countries both friendly and hostile to the United States. The United States has an interest to protect its classified information whether the person, organization, or country seeking the information has interests inimical to the United States. (ISCR Case No. 02-11570, App. Bd. May 19, 2004 at 5) Friendly countries can have disagreements with the United States over matters that are vital to the national security of the United States. Friendly countries have engaged in espionage against the United States while seeking economic, scientific, and technical information. (ISCR Case No. 00-0317, App. Bd. May 29, 2002) The nature of a nation's government, its relationship with the U.S., its human rights record, and its intelligence collection methods are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is dependent on or associated with the government, or the country is known to conduct intelligence operations against the U.S. Applicant has a heavy burden to establish that PRC and Thailand do not create a security concern.

I have considered Foreign Influence Mitigating Conditions AG ¶ 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 a foreign individual, group, organization, or government and the interest of the U.S.); AG ¶ 8(b) (there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and AG ¶ 8(c) (Contact or communication with foreign citizens is so casual or infrequent that there is little likelihood that it could created a risk for foreign influence or exploitation).

Applicant's contacts with the PRC are through his wife and her family. He does not have any relatives or family members in the PRC, but his wife does. Applicant's direct contacts with his wife's family are minimal since he does not speak their language and they do not speak his language. There is a rebuttable presumption that an applicant has ties of obligation to members of his spouse's family. (ISCR Case No. 01-03120 (App. Bd. February 20, 2002 at 8)) His wife's family in the PRC and her contacts with them are attributed to Applicant. Applicant's wife's talks to her mother and sister monthly and has visited yearly since she came to the United States with Applicant in 2000. Her contacts with them are not casual and are frequent so FI MC ¶ 8(c) does not apply.

Applicant's wife's mother is a retired school teacher and her sister an accountant for a private company. Her mother receives a pension through the PRC government.

The mother and sister are ordinary citizens leading normal lives in the PRC. Applicant's wife's brother is a mid-level bureaucrat for the Beijing city government. Even though Applicant's wife's father is deceased, he was a member of the PRC army for many years and she has contacts with officials because of his service. She is also a PRC citizen even though she resides now in the United States. The government documents used for administrative notice purposes show that the PRC approach to intelligence gathering is different than the western approach. The PRC does not normally target people, like Applicant's wife's family members, to pressure, or coerce Applicant to reveal information not in the United States interests. In balancing the nature of Applicant's contacts and visits with his wife's family and her contacts with her relatives in the PRC with the intelligence approach of the PRC, I determine that Applicant is not vulnerable to pressure or coercion by the PRC, merely because of the location of his wife's family in the PRC.

The PRC approach to intelligence gathering does seem to target individuals of Chinese ancestry in the United States. The administrative judge must again balance the nature of the loyalty of the individual to the United States against his loyalty to family in the PRC. In this case, Applicant has a strong sense of loyalty to the United States. He has worked for many years for the United States government and has held a security clearance for over 20 years. His contacts with the PRC are through his wife. This is balanced against his wife's connections to the PRC. His wife has been in the United States for only about eight years, but she has applied to be a United States citizen. In the PRC, she was an engineer and a business owner. She returns yearly to visit her family in the PRC, and talks to them monthly. Her father was a high ranking Army official for many years. Her brother is a government official of the capital of the PRC. She has strong ties of loyalty to the PRC. While her loyalty to the United States may be growing, her loyalty to the PRC is still strong. Applicant has not established that his wife's sense of loyalty or obligation to the PRC is outweighed by her growing loyalty to the United States.

A conflict of interest in this case is likely for Applicant through his wife. Applicant's wife could be approached or pressured by the PRC for information from her husband based on the PRC approach to intelligence gathering. I am satisfied of Applicant's loyalty to the United States. But the nature of his wife's loyalty is such that a conflict with his wife loyalty and obligation to the PRC can be expected which will place Applicant in a position to have to choose between his loyalty to his wife and her family and his loyalty to the United States. Applicant has not established that he can be expected to resolve any conflict of interest caused by his wife in favor of the United States interest. Accordingly, Applicant has not met his heavy burden to show that his wife and her contacts in the PRC are not a security concern for him. I conclude that FI MC AGs, ¶¶ 8(a) and (b), are not established.

Guideline L, Outside Activities

Involvement in certain types of outside employment or activities is of security concern if it poses a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information. (AG ¶ 36) Applicant's water treatment equipment business interests in China and Thailand raise Outside Activities Disqualifying Conditions (OA DC) ¶ 37(a) any employment or service, whether compensated or volunteer, with: (1) the government of a foreign country; (2) any foreign national, organization, or other entity; and (3) a representative of any foreign interest; and ¶ 37(b) (failure to report or fully disclose an outside activity when this is required).

Applicant's outside activities are based on his role of serving as a sales or manufacturer's representative in the PRC and Thailand for a United States manufacturer of water treatment equipment. He has engaged the services of representatives in the PRC and Thailand to generate business for him and the manufacturer. Applicant has been unsuccessful in generating business during the four to six years of his endeavors. He has, however, generated business in the United States. Applicant kept his supervisors informed of all of his foreign contacts and activities. Applicant has not received compensation from a foreign country or entity. He represents a United States manufacturer and not a foreign business. He reported all of his activities to his supervisors. I conclude that the Outside Activities disqualifying conditions have not been established.

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) 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 common sense 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. Applicant has strong ties to his wife who has strong ties to her family in the PRC. Applicant has strong loyalties to the United States, which is offset by his wife's ties of loyalty to the PRC. His outside business activities in the PRC and Thailand do not cause a security concern because they are with a United States manufacturer and have not been successful. Overall, on balance the record evidence leaves me with questions or doubts as to Applicant's

eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from foreign influence.

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:	For Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline L:	FOR APPLICANT
Subparagraph 2.a:	For 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.

THOMAS M. CREAN
Administrative Judge