



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



In the matter of: )  
 )  
----- ) ISCR Case No. 07-15626  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Emilio Jaksetic, Esquire, Department Counsel  
For Applicant: Philip D. Cave, Esquire

September 12, 2008

**Decision**

HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline B (Foreign Influence) because of frequent, non-casual contacts with his mother, father-in-law and one brother, who live in the People’s Republic of China (PRC). Although his security clearance is denied; recommend he receive access to sensitive, unclassified information as necessary for his non-Department of Defense public trust position.

**Statement of the Case**

On June 7, 2004, Applicant submitted a Security Clearance Application (EPSQ 86).<sup>1</sup> On February 22, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,<sup>2</sup> pursuant to Executive Order 10865,

<sup>1</sup>There is no allegation of falsification of Applicant’s EPSQ 86.

<sup>2</sup>Statement of Reasons (SOR), dated February 22. 2008, is the source for the facts in the remainder of this paragraph unless stated otherwise.

*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 and modified.<sup>3</sup> The SOR alleges security concerns under Guideline 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.

On March 27, 2008, Applicant provided an exceptionally thorough response to the SOR allegations, and elected to have his case decided at a hearing. On May 22, 2008, Department Counsel indicated he was ready to proceed. On May 27, 2008, the case was assigned to an Administrative Judge. On June 10, 2008, the case was transferred to another Administrative Judge, and on July 18, 2008, the case was transferred to me.

The notice of hearing was issued on August 5, 2008, for a hearing which was held on August 27, 2008, in Arlington, Virginia. The transcript was received on September 4, 2008.

### **Procedural Rulings**

Department Counsel offered Government Exhibits (GE) 1 and 2 into evidence (Tr. 16). Applicant did not object, and they were admitted into evidence (Tr. 16, GE 1, 2). I admitted the SOR as GE 5, and the SOR response as GE 6 (Tr. 7-10). Applicant's SOR response has Tabs A through E, and subparts to the various tabs. I have retained Applicant's tab designations. Applicant offered Applicant's Exhibit (AE) A, a photocopy of his passport. Department Counsel did not object, and I admitted AE A into evidence (Tr. 94).

Department Counsel requested administrative notice of facts concerning the People's Republic of China (PRC) and provided supporting documents to show detail and context for those facts (Tr. 16-17; Ex. I to VI—listed in Request for Administrative Notice at 5). Applicant did not object to me taking administrative notice (Tr. 17). I agreed to take administrative notice of the facts in the Request for Administrative Notice, and asked Department Counsel to provide after the hearing any additional facts in Ex. I to VI to which he was seeking administrative notice (Tr. 17-18). Department Counsel declined to provide additional facts, but requested administrative notice of the entire exhibit, including attachments (Tr. 18). I overruled Department Counsel's request, and took administrative notice of the top five pages of GE 3 (Tr. 19).

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<sup>3</sup>On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines (AGs) are applicable to Applicant's case because his SOR was issued after Sep. 1, 2006.

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. 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). Exhibits I to VI are attached to GE 3 to ensure the administrative record is complete. See the PRC section of the Findings of Fact of this decision, *infra*, for the facts accepted by administrative notice.

### **Findings of Fact<sup>4</sup>**

As to the SOR's factual allegations, Applicant admitted most of the allegations in SOR ¶¶ 1.a to 1.j in his response to the SOR. He also provided explanations for all SOR allegations. 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 was born in 1951, in the PRC, and he moved to the United States as a 39-year old student in February 1991 (GE 2B at 2, 6, Tr. 77, 96-97, 120). He used all of his savings to come to the United States (Tr. 79). Applicant's wife and his son, Mr. T, moved to the United States six months later (GE2 B at 2-3, Tr. 98). He is now 57 years old and has spent about two thirds of his lifetime in PRC (Tr. 77). Applicant married in 1979 (Tr. 78, 97). When he arrived in the United States, it was on a student visa (Tr. 120). Then he received a work visa about two years later (Tr. 120-121). He received a green card in 1999 (Tr. 120). Applicant, his wife, and his son MT became naturalized U.S. citizens in 2005 (GE2 B at 2, Tr. 97). When Applicant received U.S. citizenship, he automatically lost his PRC citizenship (Tr. 71). Applicant was unhappy with the PRC government because he was taken from an excellent high school and forced under a Cultural Revolution policy to do agricultural work as a 14-year old (Tr. 58, 77). He worked on farms from 1968 to 1979 (Tr. 99). In the PRC he earned a bachelors degree in tourism management in 1990 (Tr. 99). He has never served in the PRC military (Tr. 100). He was never a member of the PRC communist party (Tr. 102). After he arrived in the United States, he earned two MBA degrees, one in accounting and one in information management (Tr. 81, 98). In the United States people have the freedom to choose their work and how they want to live (Tr. 58-59). Applicant loves the United States and would not jeopardize his U.S. opportunities to succeed and live in freedom (Tr. 59). Applicant and Mr. T are loyal to the United States (Tr. 60).

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<sup>4</sup> The facts in this decision do not specifically describe employment or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information. Unless stated otherwise, the source for the facts in this section is Applicant's SOR Response. Applicant provided a table, which included specific details regarding his contacts with family members living in the PRC. See GE 2 at I29 through I32 (Tr. 130-131).

MT was born in the PRC and moved to the United States when he was ten years old (GE2 B at 2-3, Tr. 54, 61). After leaving PRC as a boy, MT returned to PRC on about five occasions to visit relatives, family and friends (Tr. 61). MT's first trip in 1999 was with his parents and the last two were by himself (Tr. 62). MT's most recent trip to PRC was in January 2008 (Tr. 63).<sup>5</sup> MT stayed in PRC for about 10 days (Tr. 63). MT, who is now 26 years old, earned a bachelors degree and has begun classes at a U.S. university for his masters degree in computer science with applications towards medical research (GE2 B at 3, Tr. 53-54, 63). MT has cerebral palsy (Tr. 54-55). Shortly after MT arrived in the United States, MT's school district in the United States took the initiative and helped treat and accommodate his cerebral palsy, which would not have occurred in the PRC (Tr. 54-57). Applicant and MT were grateful to the United States because of the treatment for the cerebral palsy (Tr. 56). Each person in the United States is valued and prized as an individual, which is a positive attribute not present in the PRC (Tr. 57).

Applicant has been employed by a defense contractor for almost seven years, and is currently a Senior Information Technology Analyst (GE2 B at 3). His annual salary is \$93,000 with a 10% 401K plan (GE2 B at 4, Tr. 88). One of his strong assets is as a software designer (GE2 B at 4). His company has provided various training opportunities to Applicant (GE2 B at 4). He received eight awards including a company top-level Production Award and an agency certificate of appreciation (GE2 B at 4; D9). He has developed excellent relationships with managers, colleagues and customers (GE2 B at 4; D10).

Applicant's mother was born in 1918 (GE2 B at 6, D2). She is a citizen and resident of the PRC (SOR ¶ 1.a). Applicant telephones her approximately once a week (Tr. 117). His mother is retired from employment in a chemical factory and is in poor health (GE2 B at 2, 6, 7). She had a heart attack in 2000 and has kidney problems, high blood pressure, high cholesterol, and has difficulty walking (GE2 B at 7). In 2002 she had a pacemaker installed to regulate her heart rate (Tr. 89).

Applicant provides some financial remuneration to his mother (SOR ¶ 1.b). Over the last seven years, Applicant has given her about \$3,000 (GE2 B at 7, Tr. 89). He gave his mother \$415 as a gift for her 90<sup>th</sup> birthday (GE2 D1). He also gave her \$1,000 in 2002 to purchase furniture (Tr. 90). The funds were provided out of love, and because she requires financial "support" (Tr. 90-91). She owns a condo, and receives a pension (Tr. 91). Applicant's financial gifts are unnecessary for her to sustain herself.

Applicant's father is deceased (Tr. 110). Applicant's mother-in-law is also deceased (Tr. 110). Applicant's spouse does not provide support to her parents (Tr. 110).

Applicant's father-in-law is a citizen and resident of the PRC (SOR ¶ 1.c). His father-in-law is 87 years old and suffers from prostate cancer and diabetes (GE2 B at 7). He is also beginning to show signs of Alzheimer's disease (GE2 B at 7). He has

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<sup>5</sup> In addition to visiting family, Mr. T visited one of Applicant's middle school teachers, who remained a friend of Applicant's parents (Tr. 64).

been retired from a medicine factory for 25 years (GE2 B at 7). Each time Applicant visits China, he visits his father-in-law two or three times (GE2 B at 7). Applicant also telephones his father-in-law several times a year on his birthday and traditional Chinese holidays (GE2 B at 8). Applicant's brother-in-law takes care of his father-in-law (GE2 B at 7).

Applicant provides some financial assistance to his father-in-law (SOR ¶ 1.d). He and his spouse have given his father-in-law about \$2,000 over the last seven years (GE2 B at 8). He gave his father-in-law \$276 for his 87<sup>th</sup> birthday (GE2 D1). The money he provided over the last seven years is a gift, and is designed to improve his father-in-law's living conditions (GE2 B at 7). However, because of his father-in-law's pension, he is financially independent (GE2 B at 7, 8).

Applicant's brother, MJ, is 51 years old, and holds a U.S. green card (GE2 B at 8; Tr. 91). MJ is still a citizen of the PRC (Tr. 111). MJ owns a house in the United States, and his wife is a U.S. citizen (GE2 B at 8, 10; Tr. 91). They returned to the United States on March 21, 2008, and they intend to remain in the United States (GE2 B at 8; Tr. 91-92, 113-114). See SOR ¶ 1.e.

Applicant's brother, MZ, is 57 years old and runs a business with his wife in the PRC (GE2 B at 8). MZ does not have any connection to the PRC government (GE2 B at 8). Applicant occasionally meets with MZ when he visits MZ in PRC (GE2 B at 9). He telephones MZ usually once a month to check on his mother's health (GE2 B at 9, Tr. 118). See SOR ¶ 1.e.

Applicant's sister, HA, is 59 years old and lives in PRC (GE2 B at 9; Tr. 112-114). She retired from a factory job ten years ago (GE2 B at 9). HA is physically weak from breast cancer, and seldom leaves her home (GE2 B at 9). Applicant has a few conversations each year with HA (GE2 B at 9, Tr. 118-119). See SOR ¶ 1.f.

Applicant's sister, HI, is 56 years old and lives in PRC (GE2 B at 9). She retired five years ago from a post office job (GE2 B at 9; Tr. 112-114). Applicant communicates with HI 6-7 times each year by telephone for greetings and discussion of family affairs (GE2 B at 9, Tr. 118-119). See SOR ¶ 1.f.

Applicant has three sisters-in-law who are citizens and residents of the PRC (SOR ¶ 1.g; GE2 B at 10, Tr. 114-115). As indicated previously, one other sister-in-law is a U.S. citizen living in the United States (GE2 B at 10). The three sisters-in-law, ZY, ZM and HD are 66 years old, 60 years old, and 50 years old, respectively (GE2 B at 10). Applicant has not had any contact with ZY for 20 years (GE2 B at 10). ZM retired from her factory job more than 10 years ago, and Applicant visits ZM exclusively when he visits his father-in-law (GE2 B at 10). HD retired from her farm job, and is assisting MZ in his business (GE2 B at 10). Applicant has met HD a few times when he visits his mother (GE2 B at 10).

Applicant has four brothers-in-law who are citizens and residents of the PRC (SOR ¶ 1.h). All of his brothers-in-law are retired (GE2 B at 11, Tr. 116). Applicant and

his wife do not telephone his brothers-in-law (Tr. 119). However, they might visit them when they go to the PRC (Tr. 119).

Applicant does not currently have any financial assets in the PRC (GE2 B at 2). On April 8, 2007, Applicant opened a bank account in a bank located in the PRC (SOR ¶ 1.i) (Tr. 67, 107). He deposited 100,000 Yuan (40,000 Yuan from his mother and 60,000 Yuan (about \$8,900) from Applicant) when he opened the account (GE2 D1). Applicant received about \$600 in interest while the PRC account was open (GE2 D1, Tr. 69). On February 29, 2008, Applicant closed this bank account because he did not want to raise a security concern (GE2 D1, Tr. 69).

Applicant has financial assets in the United States totaling about \$600,000 (GE2 B at 3). He and his spouse purchased a house in 1999, where they currently reside, which is worth approximately \$500,000 (GE2 B at 3, Tr. 79, 88). He has a 401K account with a balance of \$163,000 (GE2 B at 3, Tr. 79, 88). He and his spouse have several other accounts (GE2 B at 3). He and his wife have life insurance policies for \$150,000 and \$100,000, respectively (GE2 B at 3, Tr. 79). When he retires, he anticipates receiving \$1,500 monthly from social security (GE2 B at 3). Applicant said if he moved back to PRC, he would not receive social security or Medicare benefits from the U.S. government (Tr. 80).<sup>6</sup>

Applicant traveled to PRC in November 1999, July 2000, October 2001, December 2002, March 2005, April 2006, April 2007, and February 2008 (SOR ¶ 1.j; GE2 B at 11; Tr. 92). He stayed in PRC on each occasion for two to three weeks (GE2 B at 12). He went to PRC in February 2008 to close his bank account, and the travel was reported to his company security officer (GE2 B at 12). He traveled to PRC to visit his mother. He explained, "In recent years, I have saved all my vacation days to visit mother because I realize every visit may be the last." (GE2 B at 12, Tr. 103-107). He also visited his father-in-law when he went to PRC (GE2 B at 12, Tr. 103-107). When he went to PRC he often visited other family members, such as his brothers, sisters and in-laws (Tr. 105-107). In the future, he plans to visit his mother in the PRC "if it's allowed" (Tr. 108-109). Under traditional Chinese culture, as oldest son, Applicant has a moral (but not a legal) obligation to ensure that his mother receives care and support (Tr. 109). Applicant has never been contacted by anyone interested in obtaining any special information about his employment (GE2 B at 12). If he was contacted for such information, he would report it to security officials (GE2 B at 12).

Applicant reiterated in his SOR response:

it is highly unlikely that I would jeopardize my relationships and loyalties in the U.S. because of my relationship with [his relative in PRC]. Just in case such conflict of interest emerges in the future, my deep and longstanding

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<sup>6</sup> Actually, Applicant would be able to receive Social Security benefits if he returned to PRC. See Social Security Online. Available at: <http://www.ssa.gov/pubs/10137.html#what>. However, he would not be able to receive his Medicare benefits overseas. See U.S. Department of State website. Available at [http://travel.state.gov/travel/living/living\\_1234.html#medicare](http://travel.state.gov/travel/living/living_1234.html#medicare).

relationships and loyalties to the United States will enable me to resolve it in favor of the U.S. interests.

(GE2 B at 8, 9, 10). Applicant traveled to PRC in February 2008 using his U.S. passport (Tr. 72, AE A). He received a briefing from his security officer before going to the PRC in 2008 (Tr. 131-132). Applicant turned in his Chinese passport (GE2 B at 6, Tr. 70-71). The company security officer observed the destruction of the PRC passport (Tr. 75-76). Applicant prefers the U.S. culture over that of the PRC (Tr. 81). His son, Mr. T, is Americanized and would not fit into PRC culture (Tr. 81). Freedom of speech, especially the right to dissent, is especially important to Applicant, and this right is notably absent in the PRC (Tr. 82). Moreover, Applicant was loyal to the United States because he was always well-treated by Americans, even when he was just a dishwasher, doing his first American job (Tr. 82-83). Americans, including police officers, and employers, have always been fair and kind to Applicant (Tr. 83-84). Americans show dignity and respect for others, and recognize and value his hard work (Tr. 85). The government spent tax dollars to provide medical assistance for his son, Mr. T, when Mr. T was a child, even though Applicant was a student and did not have health insurance (Tr. 85-86). Applicant is willing to support and protect American society and the United States (Tr. 85). Applicant has made the United States his adopted homeland (Tr. 87).

## **Recommendations**

A project manager for Applicant's employer, AA, has been employed by the contractor for ten years. AA has known Applicant in a professional, work environment for six years (Tr. 24, 29). AA has supervised and evaluated Applicant for the last five years (Tr. 25, 29-30). AA does not hold a security clearance (Tr. 31). Applicant obtains requirements and then designs and generates software to meet those requirements (Tr. 25). He has a very strong work ethic (Tr. 25). He interacts well with others (Tr. 25-26). He is an excellent communicator, and strives to meet users' needs (Tr. 26). He is very reliable, trustworthy, truthful and honest (Tr. 26, 28). He has a good reputation for integrity (Tr. 28). Applicant's current position does not require a clearance; however, he does have access to private, personal information (Tr. 27). He was cleared with a National Agency Check to work with sensitive, privacy-protected information (Tr. 31).<sup>7</sup> His current position requires him to be cleared to hold a "public trust" position (Tr. 33).

Applicant's colleague, BB, has worked for the same contractor as Applicant for six years. BB has known Applicant for eight years on a professional, work-related basis (Tr. 37-39, 44, 48). BB has supervised Applicant on some projects (Tr. 49). BB recommended that the contractor hire Applicant (Tr. 40). BB and Applicant are now peers or equals as employees (Tr. 49). BB has worked closely with Applicant and lauded his conscientiousness, reliability, honesty, integrity, loyalty and diligence (Tr. 41-42). BB described Applicant's relationship to the PRC and to the United States as follows, "he thinks of China as his mother and the United States as his mother-in-law, so the – he has an interest in both countries, but – the United States is now . . . his new

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<sup>7</sup>Applicant said he held a public trust clearance, which was suspended after he applied for a secret clearance. After six weeks he was reinstated to the company (Tr. 133-135).

mother” (Tr. 46, 49).<sup>8</sup> Applicant’s U.S. citizenship was a very exciting time for him and a great milestone (Tr. 46). Applicant socializes with other PRC immigrants in the office who have security clearance (Tr. 47). BB recommends approval of Applicant’s security clearance (Tr. 47).

### **People’s Republic of China**

China has powerful military forces, including strategic nuclear missiles. China is geographically vast, and has a population of over a 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. PRC’s competitive relationship with the United States exacerbates the risk posed by Applicant’s connections to family members living in the PRC.

In China reported human rights problems include suppression of political dissent, arbitrary arrest and detention, forced confessions, torture and mistreatment of prisoners. The PRC also monitors communications devices, such as telephone, telefax, and internet.

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 actively collects military, economic and proprietary, industrial information about the United States because of the following circumstances: (1) its position as a global power; (2) its military, political, and economic investments in the Pacific Rim and Asia; and (3) its leading role in development of advanced technology that China desires for economic growth. China’s active intelligence gathering programs focus on sensitive and protected U.S. technologies. “China’s espionage and industrial theft activities [are] the leading threat to the security of U.S. technology.” Department Counsel’s summary at 2.

### **Policies**

In an evaluation of an applicant’s security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative 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 adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process

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<sup>8</sup> Applicant explained that he adopted the United States as his homeland, but he wanted the PRC and United States to be friends, and did not want anything bad to happen between the two countries (Tr. 128-129). He wanted PRC to have a good reputation in the United States (Tr. 129).



provision in Section E2.2, Enclosure 2, of the Directive. 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 should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

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 the issuance of the clearance is "clearly consistent with the interests 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.

In the decision-making process, facts must be established by "substantial evidence."<sup>9</sup> The government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to the applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, "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, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." 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).<sup>10</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those 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

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<sup>9</sup> "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ 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 (4<sup>th</sup> Cir. 1994).

<sup>10</sup>"The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, [evaluates] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and [decides] whether Applicant [has] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

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. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance 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* Executive Order 12968 (Aug. 2, 1995), Section 3. Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. 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.

### **Analysis**

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:

#### **Foreign Influence**

AG ¶ 6 explains the security 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.

AG ¶ 7 indicates three conditions that could raise a security concern and may be disqualifying in this case:

(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; [and]

\* \* \*

(e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

Applicant traveled to PRC in November 1999, July 2000, October 2001, December 2002, March 2005, April 2006, April 2007, and February 2008. He frequently communicates with his mother, father-in-law, and brother (MZ), who are all residents and citizens of PRC. When he visits the PRC, he frequently visits these three family members who reside there. He has infrequent communications with other family members living in the PRC. From April 2007 to February 2008, he had a financial account in a PRC bank with the equivalent of several thousand dollars in this account. Over the last several years, he provided several thousand dollars in gifts to his mother, and several hundred dollars in gifts to his father-in-law.

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 frequent, non-casual 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).

The nature of a nation's government, its relationship with the United States, and its human rights record 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 associated with or dependent upon the government, or the country is known to conduct intelligence operations against the United States. The complicated, competitive relationship of PRC with the United States places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his relationship with his family in PRC does not pose a security risk and he is not in a position to be forced to choose between loyalty to the United States and his family members.<sup>11</sup> With

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<sup>11</sup> An applicant with relatives in Iran, for example, has a heavier burden to overcome than an applicant with relatives living in PRC. See ISCR Case No. 02-13595 at 3 (App. Bd. May 10, 2005) (stating an applicant has "a very heavy burden of persuasion to overcome the security concerns" when parents and siblings live in Iran). See *also* ISCR Case No. 04-11463 at 4 (App. Bd. Aug. 4, 2006) (articulating "very heavy burden" standard when an applicant has family members living in Iran); ISCR Case No. 06-17164 at 15 (A.J. Oct. 23, 2007) (listing 23 consecutive cases involving U.S. citizens with Iranian connections whose clearances were denied). The Appeal Board has articulated a "heightened risk" or "very heavy burden" because of the PRC's hostility to the United States. ISCR Case No. 06-24575 at 4 (App. Bd. Nov. 7, 2007) (articulating "very heavy burden" standard and reversing grant of clearance in case involving family members living in the PRC). For example in ISCR Case No. 07-02485 at 4-5 (App. Bd. May 9, 2008), the Appeal Board stated, "Given the PRC's interest in U.S. intelligence, Applicant's foreign relatives pose a real, rather than merely theoretical, risk that Applicant could be targeted for manipulation or induced into compromising classified information." In ISCR Case No. 07-02485 at 4-5

its mixed human rights record, and other political, economic and military rivalry with the United States, it is conceivable that PRC would target any citizen in an attempt to gather valuable information from the United States.

There is evidence that PRC intelligence operatives seek classified or economic information from U.S. businesses and/or government agencies, Applicant's connections to his mother, his father-in-law and his brother (MZ) create a potential conflict of interest because these relationships are sufficiently close to raise a security concern about his desire to help these three relatives living in the PRC by providing sensitive or classified information.

The Government produced substantial evidence of Applicant's contacts with his mother, his father-in-law and his brother (MZ), his relationships with them, and his travel to PRC in 1999 to 2007 to raise the issue of potential foreign pressure or attempted exploitation. Between April 2007 and February 2008, he had a substantial financial interest in an account in a bank located in the PRC, which could also subject the individual to heightened risk of foreign influence or exploitation. AG ¶¶ 7(a), 7(b) and 7(f) apply.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns including:

(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.;

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(App. Bd. May 9, 2008) the Appeal Board described what facts supported reversal of the Administrative Judge's decision to grant that Applicant with connections to PRC a clearance:

The fact that Applicant lives with a PRC citizen, her husband; that her husband maintains contact with his own father who is a citizen and resident of the PRC; that Applicant's brother is a citizen and resident of the PRC; that Applicant speaks with her brother over the telephone "several times a year;" that the PRC targets U.S. citizens of PRC ancestry for intelligence gathering purposes; and that the PRC monitors telephone and other communications of its citizens constitute significant record evidence of security significant foreign contacts and interest. As such, Applicant's evidence as to her good job performance and her ties to the U.S. are not sufficient to mitigate those concerns. It is not to question Applicant's patriotism to acknowledge that the record in her case raises the reasonable concern that she could be placed in a position of having to choose between her ties to the U.S. and her obligations to her foreign family members. The evidence which Applicant has provided is not sufficient to mitigate the Government's security concerns. The Board holds that the Judge's favorable decision is not sustainable on this record.

See also ADP Case No. 05-17812 (App. Bd. June 11, 2007); ISCR Case No. 05-10467 (App. Bd. May 8, 2007) (both reversing favorable clearance decisions for PRC-related Applicants); ISCR Case No. 06-23453 (App. Bd. Nov. 14, 2007); ISCR Case No. 06-21622 (App. Bd. Oct. 15, 2007) (both remanding favorable clearance decisions for PRC-related Applicants).

(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;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; [and]

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

AG ¶¶ 8(a), 8(b) and 8(c) apply with respect to some of Applicant's relatives because of his limited contacts with them. His brothers-in-law, his sisters-in-law, and his sisters, who are residents of PRC and citizens of PRC are not security concerns. Similarly his brother and sister-in-law who recently moved to the United States are not security concerns. "It is unlikely [he] will be placed in a position of having to choose between the interests of [these relatives] and the interests of the U.S." His infrequent contacts and not particularly close relationship with these relatives have a low potential of forcing him to choose between the United States and the PRC. He met his burden of showing there is "little likelihood that [his relationships with these relatives] could create a risk for foreign influence or exploitation." His contacts and communications with these relatives are so casual and infrequent as to not create a risk of foreign influence or exploitation.

There is no evidence that these relatives have been political activists, challenging the policies of the PRC Government. There is no evidence these relatives currently work for or have ever worked for the PRC Government or military or any news media. There is no evidence that terrorists or the PRC Government have approached or threatened Applicant or these relatives for any reason. There is no evidence that these family members living in PRC currently engage in activities which would bring attention to them or that they or other PRC elements are even aware of Applicant's work. As such, there is a reduced possibility that these relatives would be targets for coercion or exploitation. *But see* n. 11, *infra* (discussing limited weight that can be given to such information).

Applicant's deep relationship with the United States weighs against a security concern for these relationships. Applicant has "such deep and longstanding relationships and loyalties in the U.S., [he] can be expected to resolve any conflict of interest in favor of the U.S. interest." His spouse and son are U.S. citizens, and all reside in the United States. They have lived in the United States since 1991 and are fully inculcated with U.S. values. He attended U.S. schools for two MBAs. He worked for government contractors for seven years with great distinction.

AG ¶ 8(f) fully applies to the PRC bank account that was closed in February 2008. SOR ¶ 1.i is mitigated.

AG ¶¶ 8(a), 8(b) and 8(c) cannot be applied with respect to his mother, his father-in-law, or his brother (MZ). He provides financial gifts to his mother and his father-in-law. These gifts are one manifestation of the strong regard and emotional bond he has for these relatives. He recognizes that he has a moral responsibility to care for his mother because he is her eldest son. His brother (MZ) is the eldest brother located in the PRC and because of MZ's location assists Applicant in accomplishment of this familial responsibility. Although Applicant's close relationship with these family members is an important positive reflection of his character, the same close relationships raise security concerns for possible foreign influence.

Applicant deserves some credit because of the reduced possibility that the PRC will exploit his mother, his father-in-law or his brother (MZ) because of the low profile they have in PRC society. However, these factors are insufficient to mitigate security concerns because of his close relationship with them, his frequent contacts with them, and because of the nature of the PRC Government and its complicated, and sometimes contentious relationship to the United States. See ADP Case No. 05-17812 at 2, 3 n.2 (App. Bd. Jun. 11, 2007) (finding contacts with siblings in PRC "once every two or three months" not to be casual and infrequent); ISCR Case No. 04-12500 at 2, 4 (App. Bd. Oct. 26, 2006) (finding contacts with applicant's parents and sisters a total of about 20 times per year not casual and infrequent); ISCR Case No. 04-09541 at 2-3 (App. Bd. Sep. 26, 2006) (finding contacts with applicant's siblings once every four or five months not casual and infrequent).<sup>12</sup>

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<sup>12</sup>In ISCR Case No. 06-17838 at 4 (App. Bd. Jan. 28, 2008), the Appeal Board discussed the precedential value of the decisions predating the revision of the Adjudicative Guidelines indicated in n. 3, *supra*, and determined where the language of the Directive is unchanged or not substantively altered, the precedent remains valid. AG ¶ 8(c) apparently adopted the Appeal Board's interpretation of Foreign Influence Mitigating Condition 1 (FIMC 1) under the previous guidelines. The Appeal Board had determined that contacts with relatives living in a foreign country must be both casual and infrequent to apply FIMC 1. See ISCR Case No. 04-12500 at 4 (App. Bd. Oct. 26, 2006). Moreover, contacts with such family members are presumed to be "not casual." *Id.* In the analysis of countervailing evidence, it is legal error to give significant weight to any of the following facts or factors: applicant's ties to the United States (ISCR Case No. 02-13595 at 5 (App. Bd. May 10, 2005)); lack of prominence of relatives living in a foreign country (*Id.*); "family members' low-key and noncontroversial lifestyle, and the fact that the Iranian government has not contacted them about Applicant" (ISCR Case No. 04-12500 at 4 (App. Bd. Oct. 26, 2006)); one relative living in a foreign country may be sufficient to negate FIMC 1 (ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006)); a foreign relative's fragile health (ISCR Case No. 02-29403 at 4 (App. Bd. Dec. 14, 2004)), advanced age (ISCR Case No. 02-00305 at 7 (App. Bd. Feb. 12, 2003)), financial independence (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)), or lack of financial

## Whole Person Concept

In all adjudications, the protection of our national security is the paramount concern. The adjudicative process is a careful weighing of a number of variables in considering the “whole person” concept. It recognizes that we should view a person by the totality of his or her acts, omissions, and motivations as well as various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances and applying sound judgment, mature thinking, and careful analysis. Under the whole person concept, the Administrative Judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1:

- (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 voluntariness of participation;
- (6) the presence or absence of rehabilitation and other pertinent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under Directive ¶ E2.2.3, “The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration” of the guidelines and the whole person concept.

A Guideline B decision concerning PRC must take into consideration the geopolitical situation in PRC, as well as the dangers existing in PRC.<sup>13</sup> PRC is a known collector of U.S. intelligence and sensitive economic information. In ISCR Case No. 06-24575 at 4 (App. Bd. Nov. 9, 2007), the Appeal Board reversed an administrative judge's decision to grant a PRC Applicant's clearance because he gave too much weight to the Applicant's “strong ties to the U.S.” and determined there was insufficient evidentiary support for the conclusion that he “can be trusted to resolve any conflict of interest . . . in favor of the U.S.” The Applicant in ISCR Case No. 06-24575 said he

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dependency upon applicant (ISCR Case No. 03-15205 at 4 (App. Bd. Jan 21, 2005)); foreign relatives spend part of each year in the U.S. (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the lack of any connection between the foreign relative and the foreign government in question (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the absence of any attempt at exploitation in the past (ISCR Case No. 03-15205 at 4 (App. Bd. Jan. 21, 2005)); a foreign country's friendly relationship with the U.S., its stable, democratic government, or its extensive foreign military agreements with the United States (ISCR Case No. 02-22461 at 5-6 (App. Bd. Oct. 27, 2005)) and an applicant's “refusal to travel to Iran” and “meticulous work habits and practice of strictly following the rules relating to his work” (ISCR Case No. 03-15205 at 3 (App. Bd. Jan. 21, 2005)). Notwithstanding the Appeal Board's position, I conclude that many of these attributes are pertinent to the analysis in this case under the whole person concept.

<sup>13</sup> See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).

would not act against the U.S. if faced with the choice. However, the Appeal Board gives such promises little weight in their *de novo* review of the evidence,<sup>14</sup> stating:

An Applicant's stated intention as to what he would do in the future is of relatively little weight, given the record in this case. See ISCR Case No. 03-09053 at (App. Bd. Mar. 29, 2006) ("An applicant's stated intention about what he or she might do in the future under some hypothetical set of circumstances is merely a statement of intention that is not entitled to much weight, unless there is record evidence that the applicant has acted in a similar manner in the past under similar circumstances.")

*Id.* at 4. See also ISCR Case No. 07-00029 at 4 (App. Bd. Dec. 7, 2007) (criticizing the administrative judge's reliance on PRC-Applicant's promise to choose the U.S. over PRC should a conflict arise, and reversing the administrative judge's decision to grant a clearance).

There are significant factors supporting approval of his access to classified information. Applicant has lived in the United States since 1991 (except for his visits to the PRC). He became a U.S. citizen in 2005. His wife and son are U.S. citizens. He is an excellent employee and U.S. citizen. He compellingly explained why his loyalty is to the United States, rather than to the PRC. He thoroughly developed the evidence showing his connections to the United States and to the PRC. I found his statements to be honest, candid and credible. He provided corroborating statements concerning his loyalty and trustworthiness. He provided recommendations of employers, friends, and/or a family member supporting his application for a security clearance.

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<sup>14</sup> The Supreme Court in *United States v. Raddatz*, 447 U.S. 667, 690 (1980) succinctly defined the phrase "de novo determination":

[This legal term] has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 23 [(1974)], the Court had occasion to define "*de novo* proceeding" as a review that was "unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency's] determination is supported by substantial evidence." And, in *United States v. First City National Bank*, 386 U.S. 361, 368 [(1967)], this Court observed that "review *de novo*" means "that the court should make an independent determination of the issues" and should "not . . . give any special weight to the [prior] determination of" the administrative agency.

(internal footnotes omitted). In ISCR Case No. 05-01820 (App. Bd. Dec. 14, 2007), the Appeal Board criticized the administrative judge's analysis, supporting grant of a clearance for a PRC-related Applicant, and then decided the case itself. Judge White's dissenting opinion cogently explains why credibility determinations and ultimately the decision whether to grant or deny a clearance should be left to the judge who makes witness credibility determinations. *Id.* at 5-7. See also ISCR Case No. 04-06386 at 10-11 (App. Bd. Aug. 25, 2006) (Harvey, J., dissenting) (discussing limitations on Appeal Board's authority to reverse hearing-level judicial decisions).



A Guideline B decision concerning the PRC must take into consideration the geopolitical situation in PRC, as well as the dangers existing in PRC.<sup>15</sup> The PRC is a diplomatic and strategic partner of the United States in some areas where both countries have mutual interests. For example, the PRC is a key partner in the search for peace and resolution of problems with North Korea. China's relationship with the United States has significantly changed over the decades and is likely to change again in the future. China was an important U.S. ally in World War II, and then an enemy of the United States during the Korean and Vietnam Wars. China has a mixed to poor human rights record. The PRC is one of the most aggressive nations in the collection of U.S. intelligence and sensitive economic information.

One element increasing the foreign influence security concern was Applicant's travel to the PRC seven times between 1999 and April 2007. His most recent trip to PRC in February 2008 was with the permission of his U.S. corporate employers, and was designed to close his PRC bank account. His most recent trip tends to mitigate some of the security concerns.

An important element in the foreign influence analysis is that he lived in the PRC from 1951 until 1991, which is approximately two thirds of his life. He did not become a U.S. citizen until relatively recently in 2005.

Applicant has significant ties to his mother, his father-in-law, and his brother (MZ). These three relatives are citizens of and live in the PRC. He has frequent telephone contact with and frequently visits these relatives. His gifts to his mother and father-in-law demonstrate his close ties of affection to them. There is a possibility Applicant could 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 United States.

After weighing the evidence of his connections to the PRC, and to the United States, I conclude Applicant has not carried his burden of fully mitigating the foreign influence security concern.

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"<sup>16</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is not eligible for access to classified information. However, I conclude the government should not revoke his access to sensitive information based on his public trust position. It is extremely unlikely that the PRC would target anyone's relatives to gain access to sensitive, but unclassified information.

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<sup>15</sup> See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).

<sup>16</sup> See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

## 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:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraphs 1.f to 1.i:	For Applicant
Subparagraph 1.j:	Against Applicant

## Conclusion

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.

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Mark W. Harvey  
Administrative Judge