



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-15810
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Jeff Nagel, Esquire, Department Counsel  
For Applicant: *Pro se*

February 26, 2009

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**Decision**  
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ROSS, Wilford H., Administrative Judge:

The Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on January 4, 2007 (Government Exhibit 1). On April 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant, which detailed security concerns under Guideline B stating 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 the Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked. 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 President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

The Applicant answered the SOR in writing on May 9, 2008, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on June 4, 2008. This case was assigned to me on June 6, 2008. DOHA issued a notice of hearing on July 9, 2008, and I convened the hearing as scheduled on August 15, 2008. The Government offered Government Exhibits 1 and 2, which were received without objection. The Applicant testified on his own behalf and submitted Applicant's Exhibits A through V. DOHA received the transcript of the hearing, and the record closed, on August 27, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

## **Procedural Ruling**

### **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 (China). (Transcript at 21-23.) The request and the allied documents were not admitted into evidence, but are included in the record. The facts administratively noticed are limited to matters of general knowledge and not subject to reasonable dispute. The facts administratively noticed are set out in the Findings of Fact, below.

## **Findings of Fact**

The Applicant was 55 at the time of the hearing and single. He is employed by a Defense contractor and seeks a security clearance in connection with his employment in the defense industry. In his Answers to the SOR, Applicant admitted all the allegations in the SOR, with explanations in support of his request for access to classified information.

### **Paragraph 1 (Guideline B - Foreign Influence)**

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has foreign contacts and interests that could lead to the exercise of poor judgment, unreliability or untrustworthiness on the part of the Applicant.

The Applicant was born in China in 1952. His mother has passed away from breast cancer in 1992. His father, his brother and sister continue to live in China. The Applicant has visited China annually from the year 2000 to 2007. His father's health is poor, which is the primary reason he travels to China. No one in his family works for the Chinese government. In addition to his trips, the Applicant calls his father once or twice a month. (Transcript at 42-45, 90-94; Applicant's Exhibits E and F.)

The Applicant came to the United States in 1986 to continue his education. He obtained his permanent resident status in 1991. The Applicant became a naturalized

American citizen in 1996. He has worked in the Defense industry since 1997. He has held a security clearance for that entire period.

When his mother died in 1992, the Applicant was living in the United States. He could not travel back to China to be with his mother because the Chinese government had not renewed his Chinese passport. This was due to his involvement in a protest outside the Chinese Embassy in Washington in 1989, during the Tien-An-Men Square Student Protest Movement period. (Transcript at 56-59; Applicant's Exhibit J.)

His involvement with this protest was not the first time the Applicant has had issues with the Chinese government. The Applicant's entire family was affected by the "Great Leap Forward" of the 1950s and the "Cultural Revolution" that swept China in the 1960s. During the "Great Leap Forward" the Applicant and his family nearly starved. (Transcript at 54; Applicant's Exhibits B at 3.) During the "Cultural Revolution," the Applicant and his siblings were exiled to different remote, poor, rural areas to work with the local peasants. He did that for two years, then he worked in a factory while continuing to do his studies. During this same period, the Applicant's father was sent to a labor camp and his mother was accused of being a Taiwanese spy because she had a brother living there. Because of all the things that happened to his family over the years, the Applicant submits that he has zero sense of loyalty to the Chinese government. (Transcript at 59-66, 88-90; Applicant's Exhibit B at 9, and Applicant's Exhibits I and K.)

On the other hand, the Applicant submits that he has long-standing relationships and loyalties to the United States. He is fully integrated into American society, and appreciates the life that he has here. At page 4, paragraph (2) of Applicant's Exhibit B he eloquently sets forth the differences between his life in China and that of his life here. In particular, he stated, "In 1996 after I became a U.S. citizen, I voted for the U.S. president and congress men. That was a very exciting moment when the first time in my life I had the right to vote and select my leaders." (See Transcript at 56.)

The Applicant's entire professional career has been spent in the Defense industry. He is acknowledged to be an expert in his field of expertise, and his direct contributions to the defense of the United States have been many and varied. His career is filled with awards and recognitions from his employers and the Federal government. He is knowledgeable about the security requirements connected to his job in the defense industry, and the record shows that he fulfills them. (Transcript at 66-80; Applicant's Exhibits L through T.) His most recent employee evaluation was very laudatory and stated that he has the potential to rise to one of the highest levels in his company. (Applicant's Exhibit T.)

The Applicant has considerable assets in the United States. As of the date the record closed, his net assets amounted to approximately \$1,000,000. (Transcript at 37-39; Applicant's Exhibit C.) He has no assets in China whatsoever.

The Applicant submits that the Government's own documents show that he is not an individual the Chinese government would attempt to influence. Applicant's Exhibit U is an extract from the "Intelligence Threat Handbook." This same extract is cited by the Government in their administrative notice document Roman numeral II. The Applicant states at page 9 of Applicant's Exhibit B:

As stated in page 22 of this document [Applicant's Exhibit U]: "The crux of the PRC's [People's Republic of China] approach is not to try to exploited (*sic*) a perceived vulnerability but to appeal to an individual's desire to help China out in some way." In general, the Chinese intelligence service may prefer to appeal to young students who may [n]ot know the brutality of the government, or who may have been benefited (*sic*) from the government such as government employees and the children and relatives of the central and local government leaders and authorities. I and my family were victims of this government. How could you think we have the desire to help this government out?

The Applicant is fully aware of the security issues involving his traveling to China. His employers have always been notified of his trips in advance, he has reviewed the applicable and available security videos, and he files the appropriate after action reports. (Transcript at 84-87.) He is very discrete when he visits China, spending most of his time with his ill father. (Transcript at 45, 52.) Though it has little if any weight, the Applicant also repeatedly stated that if the Government believes his trips are not in the national interest, he would stop visiting China. (Applicant's Exhibit B at 3.)

The Applicant has contacts with China. Accordingly, it is appropriate to discuss the relationship between China and the United States at this time.<sup>1</sup> China, the most populous country in the world, is economically powerful, and is an important trading partner of the United States. It is run by the Communist Party which controls all aspects of the Chinese government. It has strong military forces, and has its own foreign-policy. Although there has been some cooperation, there has been much more conflict with the United States in the past. China has an extremely large army, a sophisticated defense establishment, and space capability. China has launched satellites, has ballistic missiles, nuclear arms, and nuclear bombs. Its diplomatic and military dispute with the Republic of China (Taiwan), foreshadows a possible military conflict, which the United States opposes as a resolution of the conflict. China has an abysmal human rights record, which includes arbitrary killings; detention or incarceration without notice in mental facilities; torture; arbitrary arrest, detention or exile; no right to a public, fair trial; a politically controlled judiciary; lack of due process; restrictions on free speech, on religious freedom, on freedom of travel, on freedom of assembly; and no rights of privacy - family, home or correspondence.

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<sup>1</sup>All of the following statements are supported by the documents submitted by the Department Counsel in support of his request for administrative notice. (Administrative Notice Documents I through VI.)

The PRC engages in espionage against the United States through an extensive network of businesses, personnel, and specific programs designed to acquire advanced U.S. military technology. One approach is to covertly conduct espionage by personnel from government ministries, commissions, institutes, and military industries, independently of the PRC intelligence services. This is believed to be the major method of PRC intelligence activity in the United States. It also tries to identify ethnic Chinese in the United States who have access to sensitive information, and sometimes is able to enlist their cooperation in illegal technology information transfers. However, I also note the following in administrative notice document Roman numeral II at 21, "There is no evidence that the PRC considers Chinese-Americans to be more vulnerable to approach than any other group."

### **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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, "Any determination under this order . . . shall be a determination 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**

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has family members in China (Guideline B). The Applicant, on the other hand, has successfully mitigated the Government's case.

### **Paragraph 2 (Guideline B - Foreign Influence)**

The concern under Guideline B is styled as follows:

*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.*

In this case, Applicant has contact with his remaining family in China. Specifically, his father, brother and sister. The Applicant has traveled annually to China since the year 2000.

Based on the evidence the Government has presented, the following Disqualifying Conditions apply to this case: 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 (b) connections to a foreign person . . . 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 . . . by providing that information.*

The Applicant has provided compelling evidence to show that the following Mitigating Conditions also apply to this particular case, given his particular background: 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 interests of the U.S.; and (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.*

The Applicant is a person who has shown over an extensive period of years his connections to the United States and his desire to be not only a good citizen, but a security aware citizen. It is to his benefit that the Applicant shows an appreciation of the possible activities of the Chinese government. This is shown by his affirmative acts to make sure that his travels to China are appropriate, and his conduct when there. The evidence shows that he is discrete and prudent.

The Applicant has extensive financial ties to the United States. In addition, he is a deeply respected member of the Defense industry, who makes a substantial income. Under the particular facts of this case, the Applicant has shown that he has deep and longstanding loyalties in the United States. Based on my analysis of the facts, including a consideration of the espionage activities of the Chinese government, I find that the Applicant "can be expected to resolve any conflict of interest in favor of the U.S. interest."

### **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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

“[A] Judge is not limited to Adjudicative Guidelines mitigating conditions when deciding whether an applicant has demonstrated extenuation or mitigation.”<sup>2</sup> The application of the Directive's General Factors to the Applicant's foreign connections, specifically relevant General Factor (8), also justifies granting the Applicant a security clearance. The totality of this Applicant's conduct and circumstances, as set forth at length above, including the virtually non-existent potential for exploitation, shows that he warrants a favorable finding under the whole person standard.<sup>3</sup>

The record shows that the Applicant has been a patriotic American citizen for many years, and has substantial financial assets in the United States. His immediate family lives in China, but the evidence shows that they have no love for the Chinese government, and he would successfully withstand any hypothetical attempt at coercion. The Applicant is alert to the security concerns presented by his particular circumstances and the responsibilities incumbent upon him. The Applicant testified about his pride in being an American citizen and a member of the defense industry. Using the whole person standard, the Applicant has mitigated the security significance of his foreign connections and is eligible for a security clearance.<sup>4</sup>

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusory allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

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<sup>2</sup>ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006).

<sup>3</sup>I conclude that the whole person analysis weighs heavily toward approval of the Applicant's security clearance. Assuming a higher authority reviewing this decision determines that the mitigating conditions articulated under Mitigating Conditions 8(a) and (b) do not apply and severs any consideration of them, I find that the whole person analysis standing alone is sufficient to support approval of a security clearance in this case.

<sup>4</sup>“[Matters], such as evidence of an applicant's personal loyalties, the nature and extent of an applicant's family ties to the U.S. relative to his ties to a foreign country, his or her social ties within the U.S., and many others raised by the facts of a given case can properly be factored in to a judge's evaluation of an applicant's worthiness for a security clearance.” ISCR Case No. 04-11414 at 4 (App. Bd. Mar. 5, 2007). (Citations omitted.)



## **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:	FOR THE APPLICANT
Subparagraph 1.a.:	For the Applicant
Subparagraph 1.b.:	For the Applicant
Subparagraph 1.c.:	For the Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS  
Administrative Judge