



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-16373
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro Se*

June 3, 2008

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on November 21, 2006. On February 29, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B as the basis for its decision to deny his request for a security clearance. 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 March 5, 2008. He answered the SOR in writing on March 22, 2008, and requested a hearing before a DOHA administrative judge. On April 18, 2008, I scheduled a hearing for May 9, 2008. The parties appeared for the hearing as scheduled. Two government exhibits (Ex. 1-2) were admitted and Applicant testified, as reflected in a transcript (Tr.) received on May 21,

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

On April 16, 2008, Department Counsel requested administrative notice be taken of certain facts relating to the PRC and its relations with the U.S. The request was based on publications from the U.S. State Department, the Centre for Counterintelligence and Security Studies, the U.S. China Economic and Security Review Commission, and the Office of the National Counterintelligence Executive. The government's formal request and the attached documents were not admitted into evidence but were included in the record.

On April 24, 2008, I notified the parties of my intention to take administrative notice of specific facts, subject to revision based on the evidence admitted at the hearing and any valid objections. The parties were informed that any objections would be taken up at the hearing scheduled for May 9, 2008. Before the introduction of any evidence on May 9, I confirmed the parties had no objections. I agreed to take administrative notice of particular facts pertaining to the PRC, as set forth below.

Findings of Fact

DOHA alleged under Guideline B, foreign influence, that Applicant's spouse is a citizen of the PRC with resident alien status in the U.S. (SOR ¶ 1.a), that his spouse had worked as a proofreader for a newspaper possibly owned by the Chinese government (SOR ¶ 1.b), that his parents-in-law are PRC resident citizens (SOR ¶ 1.c), that his mother-in-law retired from her position as an accountant with a department within the Chinese government (SOR ¶ 1.d), that his father-in-law is employed as an expert within the same department of the Chinese government (SOR ¶ 1.e), and that Applicant traveled to the PRC from July through August 2004, December 2004 through January 2005, and from August to September 2005 (SOR ¶ 1.f). Applicant admitted the allegations with explanation. Concerning his spouse's PRC citizenship, Applicant indicated that she is a U.S. permanent resident, and plans to apply for U.S. citizenship. She had been employed as a proofreader in China, but for an advertising company and not the newspaper. Applicant averred that his parents-in-law are resident citizens of the PRC, but they intend to move to the U.S. to live with them in the near future. He indicated his mother-in-law had retired "a few years ago," and his father was going to retire in a year. Applicant maintained his parents-in-law had no knowledge of his employer. As for his travels to the PRC, they were for tourism and to visit his spouse. Since she immigrated to the U.S. in May 2006, he denied any intent to return to the PRC. After consideration of the evidence of record, I make the following findings of fact.

Applicant is a 30-year-old electrical engineer who has been employed by a U.S. defense contractor since June 2006 (Ex. 1, Tr. 33). His present job duties do not require

access to classified information (Tr. 33), but his employer has requested that he be granted a security clearance (Ex. 1).

Applicant was born in December 1977 in the PRC. He is the middle of three sons born to PRC native citizens. In about October 1988, Applicant's father came to the U.S. to visit his uncle. He subsequently acquired legal residency in the U.S. and he sponsored his family's immigration. In February 1996, Applicant immigrated to the U.S. with his mother and his two brothers. Applicant graduated from public high school in June 1999, and four years later, he earned his bachelor's degree in electrical engineering from the state university (Ex. 1, Tr. 32).

In late January 2002, Applicant became a naturalized U.S. citizen. He took an oath to renounce all foreign allegiances, to support and defend the U.S. Constitution and its laws, and to bear arms or perform noncombatant service or civilian service on behalf of the U.S. if required. By acquiring his U.S. citizenship, he was no longer a citizen of the PRC (Ex. 1, Ex. 2). Applicant obtained his U.S. passport in September 2002 (Ex. 1). His two brothers became naturalized U.S. citizens in Spring 2002 (Ex. 1), but his parents lacked the English language proficiency required to obtain U.S. citizenship (Tr. 26).

After looking for a job for about six months without success, Applicant applied to graduate school for the fall (Tr. 32-33). He took advantage of his time off that summer to travel to the PRC as a tourist from July to August 2004 (Ex. 1, Tr. 34). Applicant spent about two weeks of his trip in his hometown, where he stayed with a paternal uncle (Tr. 34). He met his future spouse at a private party hosted by a friend of his father's (Tr. 27-28, 35). She is from Applicant's hometown (Ex. 1), although she and Applicant were not previously acquainted (Tr. 45). They stayed in touch through email, instant messaging, and by telephone after Applicant returned to the U.S. (Ex. 1, Tr. 36).

In September 2004, Applicant began graduate studies in electrical engineering. During winter break, he went back to the PRC and married his spouse (Ex. 1). Applicant's family members did not attend his wedding as they did not approve of his marriage (Tr. 36). On his return to the U.S. in January 2005, Applicant applied for his spouse's U.S. immigration. She remained in China awaiting her visa (Ex. 1, Tr. 37). Applicant understands she attended the equivalent of a community college in the PRC learning business/secretarial skills (Tr. 47-48). She worked as a proofreader at a newspaper, but as an employee of an advertising company, before coming to the U.S. Applicant believes the newspaper is owned by the local government in the PRC (Ex. 2, Tr. 39).

Applicant traveled again to the PRC from August to September 2005 to see his spouse (Ex. 1). They stayed with her parents for about a week and then traveled together in the PRC (Tr. 37). During that trip, Applicant visited with the paternal uncle with whom he had stayed the year before ("just see my uncle once because my parents not happy." Tr. 37).

Applicant's spouse joined him in the U.S. in late May 2006 (Ex. 1, Tr. 37). In June 2006, Applicant was awarded his master's degree in electrical engineering and he started working for his present employer (Ex. 1, Tr. 33). Applicant applied for a security clearance for his duties on November 21, 2006. On his e-QIP, he disclosed his spouse's and his parents' Chinese citizenship but U.S. legal residency, his parents-in-law's PRC citizenship and residency, and his travel to the PRC in 2004 and 2005.

On April 5, 2007, Applicant was interviewed in conjunction with his background investigation for his clearance. He indicated that since her immigration to the U.S., his spouse has been taking English language classes. An only child, she contacts her parents in the PRC about once a week. Her father was currently working for the Chinese government in the public health area. Applicant described him as "an expert" in his field. His mother-in-law had worked as an accountant for the same governmental department before she retired. Applicant indicated he had contact with his in-laws about once or twice a year (Ex. 2).

At the hearing on May 8, 2008, Applicant clarified that his in-laws worked in a local health center in the PRC. His mother-in-law retired about five years ago (Tr. 25, 42). To his knowledge, his father-in-law has been in his job for more than ten years (Tr.43). He plans to retire in a year (Tr. 24-25). He testified that his father-in-law only has a middle school education (Tr. 25), and his duties involve educating the local populace about disease prevention (Tr. 24, 43). When asked to explain what it was that led him in April 2007 to describe his father-in-law as an "expert," Applicant responded:

Because I tried to find words describing, better to describe what kinds of job he does, just educating people. So he has a lot of knowledge on how to prevent disease, so I guess that's called an expert . . . He just, he is good at what he does, has experience educating people how to prevent disease, do an advertisement on disease prevention. So I think I probably, it's a mistake (Tr. 53).

Applicant's parents-in-law own their home in the PRC (Tr. 27). They have a bank account but no other investments in China (Tr. 44). His mother-in-law receives a small government pension (Tr. 42).

Applicant bought his home in the U.S. in 2007 (Ex. 2, Tr. 48). He has no foreign assets (Tr. 48-49). In March 2008, Applicant's spouse gave birth to their first child (Tr. 25, 27). She contacts her parents once or twice a week to let them know how the baby is doing (Tr. 40). During his spouse's pregnancy, Applicant applied unsuccessfully for his mother-in-law to come to the U.S. to visit (Tr. 41). Applicant was led to believe from his mother-in-law that the visa was denied because of concerns that she would not return to the PRC (Tr. 46).

Applicant's spouse intends to apply for U.S. citizenship as soon as she is eligible. After she becomes a U.S. citizen, she plans to sponsor her parents' immigration to the U.S. (Tr. 21-22, 47). Applicant believes his in-laws will sell their home and come to the

U.S. since his spouse is their only child (Tr. 27). All of her extended family members (aunts, uncles, cousins) reside in the PRC, but she has no contact with them (Tr. 39-40). Every six months or so, she contacts a couple of friends in China (Tr. 40), one of whom is an elementary school teacher (Tr. 44-45). Applicant's spouse knows he is applying for a security clearance, but he has advised her not to tell anyone of his employment (Tr. 48).

* * *

Following review of the source documents provided by the government that address the economic, political, and intelligence activities of the PRC, I take administrative notice of the following facts:

The PRC is a large and economically powerful country, with a population of just over 1.3 billion people. Its economy grows at about 10% per year. China has an authoritarian government dominated by the Chinese Communist Party. The National People's Congress, the PRC's legislative body, is the highest organ of state power. With China firmly committed to economic reform and greater openness, the influence of people and organizations outside the formal party structure has increased, but in all important government, economic, and cultural institutions in China, the Chinese Communist Party ensures that party and state policy guidance is followed. During 2007, the PRC government's human rights record remained poor, with a trend toward increased harassment, detention, and imprisonment by government and security authorities of those perceived as threatening to government authority. Foreign visitors in the PRC may be placed under surveillance by security personnel, their hotel rooms, telephones, and facsimile machines monitored, and their personal possessions, including computers, searched without their knowledge or consent. Foreign government officials, journalists, and business people with access to advanced proprietary technology are particularly likely to be under surveillance.

Since the Tiananmen Square crackdown in June 1989, the PRC has become a key participant in the international community through its seat as a permanent member of the United Nations, and through diplomatic relations with other countries. The U.S. and PRC have a history of cooperation on scientific and environmental issues. Recently, the two countries have cooperated with growing effectiveness on counterterrorism and on various aspects of law enforcement (computer crime, intellectual property rights, human smuggling, corruption). China, a member of the World Trade Organization since December 2001, is an important trading partner of the U.S. Its trade surplus with the U.S. was \$256.3 billion in 2007 while U.S. goods exports to China accounted for 5.7% of total U.S. goods exports. The U.S. is the sixth largest foreign investor in the PRC.

The PRC possesses large military forces (strategic nuclear forces, army, navy and air force), which are in the process of transformation into a smaller, more mobile, high-tech military. In the last decade, the PRC's strategic posture has been one of selective modernization with an increasing focus on space-based assets. Civil-military

integration has led to increased utilization of commercial systems in military applications. The PRC places enormous pressure on foreign companies, including U.S. firms, to transfer technology to Chinese companies as part of doing business in China. In furtherance of these efforts, the PRC has aggressively targeted sensitive and protected U.S. economic and militarily critical information subject to export control laws. The PRC blends intelligence and non-intelligence assets, relying on covert espionage activity by personnel from government ministries, commissions, institutes, and military industries independent of the PRC intelligence services, and by targeting ethnic Chinese who have access to sensitive information. U.S. Immigration and Customs Enforcement officials have rated China's espionage and industrial theft activities as the leading threat to the security of U.S. technology.

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 overarching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government

reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The security concern for foreign influence is set out in AG ¶ 6:

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.

Applicant’s parents and brothers are all residents of the U.S. His father has been in the U.S. since 1988, and under his sponsorship, Applicant, his mother, and his brothers immigrated to the U.S. in February 1996. Like Applicant, his brothers have been citizens of the U.S. since 2002. However, while vacationing in the PRC in July 2004, Applicant met, and within six months married his spouse against his family’s wishes. She immigrated to the U.S. in May 2006, but remains a citizen of the PRC (SOR ¶ 1.a). Her parents are PRC resident citizens (SOR ¶ 1.c). Under AG ¶ 7(a) security concerns are raised by “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.” The risk of undue foreign influence is minimal with regard to his spouse’s foreign citizenship. A new mother, she enjoys the protections of her U.S. legal residency, has no plans to return to China, and intends to apply for her U.S. citizenship and then sponsor her parents’ immigration. There is nothing about her former employment as a proofreader for a newspaper in the PRC (SOR ¶ 1.b) that suggests military, security, or intelligence implications. Even if the newspaper was government-owned, she was apparently an employee of an advertising company and not a civil servant.

The risk of undue foreign influence is heightened primarily because of the PRC citizenship and residency of Applicant's parents-in-law (SOR ¶ 1.c), and their connections to the Chinese government through a public health agency (SOR ¶¶ 1.d and 1.e). Applicant does not share particularly strong bonds of affection with his in-laws. While he stayed with them for about a week during a trip to see his spouse in August 2005, he speaks with them only about once or twice a year. Applicant's spouse understandably has close ties to her parents. Their only child, she contacts them once or twice a week. The bond of affection is also evident in the effort to acquire a visa for her mother to come to the U.S. when she was pregnant. AG ¶ 7(a) and ¶ 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) apply.

Concerns about Applicant's travel to the PRC (SOR ¶ 1.f) are legitimately raised in that it led to his marriage. His intent in traveling to the PRC in July 2004 was for tourism, but while visiting his hometown, he met his spouse at a private party hosted by his father's friend. They continued their long distance relationship after Applicant returned to the U.S. for graduate school. Within a few months, Applicant went back to the PRC in December 2004 to marry. While awaiting his spouse's legal immigration to the U.S., Applicant visited her in the PRC in August 2005. However, since she immigrated to the U.S., Applicant no longer has a reason to travel to China and he has no intent to do so. There is no evidence that Applicant engaged in any conduct while in the PRC that implicates security concerns under ¶ 7(i) (conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country) other than establishing the ties through marriage to his parents-in-law, which are more appropriately addressed in AG ¶¶ 7(a) and 7(d).

Mitigating condition 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 interests of the U.S.) does not apply. In addition to the concerns raised by the closeness of the relationship between his spouse and her parents, the PRC is known to aggressively target U.S. sensitive and classified information. Applicant's father-in-law also works for the Chinese government, apparently at the local level. What is known about his duties is that he educates the local populace about disease prevention and that he is good at what he does. There is nothing in the record to suggest he is likely to be targeted by those seeking to obtain classified information, but not enough is known about his activities and associates to safely discount the risk of undue foreign influence. Moreover, even though Applicant's mother-in-law has been retired for about five years from her accountant position with the same Chinese agency, the U.S. government turned down her request for a visa in 2007. Applicant testified to his belief it was solely out of concern that she would not return to the PRC. Yet she had her spouse and a home to return to in the PRC, which raises the possibility that there was more to the denial beyond what Applicant knows.

Applicant's vulnerability to undue foreign influence through his spouse's close relationships with her parents may be overcome by deep and longstanding relationships and loyalties in the U.S. (see 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)). Applicant asserts a singular loyalty to the U.S. where he is invested financially and professionally. He emigrated in February 1996 when he was 18. He attended three years of high school in the U.S. when he was older than his peers, and then earned his bachelor's and master's degrees in electrical engineering. While he has a paternal uncle in the PRC with whom he stayed in 2004 and visited in 2005, his closest relatives (spouse, newborn daughter, parents, and brother) are all in the U.S. One might reasonably question how well he knew his spouse when he married her in December 2004, given they had been acquainted for fewer than six months and it was primarily a long distance relationship. But there is no indication that he went to the PRC in July 2004 looking for a bride, and she has been granted lawful permanent residency in the U.S.

The fact that he would marry in China apparently against his parents' wishes ("Because my parents doesn't [sic] really want me to go back to get married, they want me to marry here, but I just feel I love my wife so much so I had to go back." Tr. 36) confirms the strong emotional bond Applicant has with his spouse, which has likely been strengthened over the past two years that they have been together in the U.S. Applicant has exhibited good judgment in advising his spouse to not divulge his employment to her parents, but he has not met his burden of proving the deep and longstanding ties required to overcome the risk of undue foreign influence.

Whole Person Concept

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

The salient issue in the security clearance determination is not in terms of loyalty, but rather what is clearly consistent with the national interest. (See Executive Order 10865, Section 7). An applicant may have the best of intentions and yet be in an

untenable position of potentially having to choose between a dear family member and the interests of the U.S. Applicant's connections to the PRC are now primarily through his spouse and her close relationships there. While he is sincere in his intention to remain in the U.S., I am unable to conclude at present that it is clearly consistent with the national interest to grant him access.

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:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant

Conclusion

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

ELIZABETH M. MATCHINSKI
Administrative Judge