



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-00044
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: John F. Mardula, Esquire

August 14, 2008

Decision

CURRY, Marc E., Administrative Judge:

On March 16, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines B. 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.

DOHA received Applicant's answer, requesting a hearing before an administrative judge, on April 4, 2008. I received the case assignment on June 10, 2008. DOHA issued a notice of hearing on June 18, 2008, and I convened the hearing as scheduled on July 10, 2008. During the hearing, I received six government exhibits, marked and identified as Exhibits 1 through 4, and Exhibits 6 through 7 (Exhibit 5 was not admitted.), and three Applicant exhibits, marked and identified as Exhibits A through C. Also, at the government's request, I took administrative notice of the facts listed in six

source documents concerning the People's Republic of China. Based upon a review of the record evidence, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 43-year-old married man with three children, ages 15, 10, and 8. He and his wife are natives of the People's Republic of China (PRC). He earned a bachelor's degree in physics from a university in PRC in 1988. Shortly afterwards, he received a scholarship from an American university. In 1990, he moved here and began attending the university that awarded him the scholarship. In 1992, he earned a master's degree in art and mathematics (Tr. 35), and in 1996, he earned a master's degree and a Ph.D in electrical engineering from another U.S. university (Tr. 35).

Currently, Applicant works for a contractor performing modeling simulation and system engineering for a government agency's network. According to his supervisor, he is a highly competent, conscientious employee (Tr. 20-22).

Applicant and his wife became naturalized U.S. citizens in 2006. They were married in PRC in 1988. All of their children were born in the U.S. Applicant has a sister who lives in Australia. Another sister passed away in 2005.

Applicant's mother is a PRC citizen and resident. She worked as a physician in the health division of the Beijing Foreign Affairs University before retiring in 1990 (Tr. 47, Ex. A at 2). His father worked as a property manager before his death in 2002 (Tr. 52, 59).

In 2005, Applicant talks with his mother frequently in an effort to help her cope with the death of her husband and daughter. As she recovered, Applicant's communications began to decrease (Tr. 48). Currently, they communicate approximately two or three times per month (Tr. 58). He does not support her financially (Tr. 61).

Applicant's father-in-law is a retired professor, and his mother-in-law is a retired pediatrician (Tr. 44). Both worked at the Beijing Foreign Affairs University and retired more than 15 years ago (Exhibit A at 1, 3, Exhibit B). During the PRC's Cultural Revolution, they were accused of being "anti-revolutionary" and exiled to a remote area of the country for more than 10 years (Tr. 46). During this era, Applicant's mother also experienced some persecution, but it was not severe as the persecution experienced by his in-laws (Tr. 47).

Applicant's in-laws traveled to the U.S. to visit his family in 2002, staying for two months (Tr. 60). Since then, they have drifted apart. Currently, neither Applicant nor his wife has a close relationship with them (Tr. 60). He does not speak with them, and his wife speaks with them rarely (Tr. 59).

In 2005, Applicant paid \$120,000 USD for the purchase a condominium in Beijing (Tr. 48). He leases it to a tenant who pays him \$600 USD per month in rent (Tr. 57). His brother-in-law manages the property. Applicant does not pay any property taxes to the PRC on the condominium (Tr. 58). Since approximately May 2008, he has been attempting to sell it (Exhibit C).

Applicant's primary residence in the U.S. is worth approximately \$800,000. He has a stock portfolio worth approximately \$100,000, and has \$10,000 invested in a 401k.

Since 2002, Applicant has traveled to PRC five times. In 2002, he attended his father's funeral, staying for five days (Tr. 52). In 2004, he visited his sister, shortly after she was diagnosed with terminal cancer. He returned the following year when she died (Tr. 53). In 2006, he visited his mother to persuade her to return with him to the U.S.¹ Most recently, he visited in 2007 (Tr. 63). Accompanied by his family, he visited both his mother and his parents in-laws (Tr. 64). Each of the trips, other than the 2002 one, lasted approximately three weeks.

The PRC is a totalitarian state with a large and diverse intelligence infrastructure in the United States (Exhibit VI at 1, Exhibit II at 28). It seeks to collect both military and industrial information with the dual purpose of making the Chinese military-industrial base more sophisticated, and the economy more competitive. (Exhibit II at 24; Exhibit I at 24). U.S. Immigration and Customs Enforcement officials rate the PRC's espionage and industrial theft activities as the leading threat to the security of U.S. technology (Exhibit III at 104).

The PRC continues to abuse human rights in violation of internationally recognized norms (Exhibit I at 9). Local police can unilaterally detain suspects for up to 37 days before releasing them or placing them under arrest (Exhibit V at 5). The PRC routinely monitors its citizens' communications (Exhibit 6 at 9). PRC security personnel may sometimes place foreign visitors under surveillance, monitoring hotel rooms, telephones, and fax machines (Exhibit 5 at 2, ¶ 8).

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

¹She refused, citing health concerns that prohibited lengthy travel.

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.”

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 an 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.

Analysis

Guideline B, Foreign Influence

Under this guideline, “foreign contacts and interests may be a security concern if an 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 interests.” Here, the presence of Applicant’s family members in the PRC, a totalitarian country with an aggressive intelligence-gathering apparatus, and a history of human rights abuses, generates a security concern under AG ¶ 7(a), “contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, or coercion.” Similarly, Applicant’s ownership of a condominium in PRC triggers the application of AG ¶ 7(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.” Because of the nature of the PRC’s government, Applicant bears a heavy burden in seeking to mitigate these security risks.

Neither Applicant's mother nor his in-laws currently work at the Beijing Foreign Affairs University. Consequently, I resolve SOR subparagraph 1.d in his favor. Their retiree status does not minimize Applicant's vulnerability to coercion, however.

Applicant has lived in the U.S. for approximately 18 years, and his entire immediate family are U.S. citizens and residents. Since living in the U.S., he has developed a successful career, and is respected by his professional acquaintances. His strong sense of loyalty to the U.S. and his longstanding relationships and contacts in the U.S. are not enough to outweigh the vulnerability to coercion created by his familial obligation to his mother. None of the mitigating conditions apply.

Applicant's sense of familial obligation to his mother and his concern for her well-being are positive attributes. However, positive attributes can generate security concerns as readily as negative ones. Here, the PRC is a large, powerful country intent on enhancing its military and economic power by any means necessary. Under these circumstances, Applicant's vulnerability to coercion is compounded, rendering him an unacceptable security risk.

Although Applicant is not close to his in-laws, there is a rebuttable presumption that he could be subject to coercion from them through his spouse (ISCR Case No. 01-03120 (February 20, 2002) at 4). His in-laws visited his family for two months in the U.S. approximately six years ago. Applicant and his family visited them in the PRC approximately six months ago. He has not rebutted the presumption, and none of the mitigating conditions apply to these relationships either.

Applicant's PRC investment property is minimal in relation to his U.S. financial interests. Also, he is in the process of selling it. AG ¶ 8(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."

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.

Upon evaluating the whole person factors, I conclude that Applicant's application for a security clearance must be denied.

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
Subparagraphs 1.a - 1.c:	Against Applicant
Subparagraph 1.d-1.e:	For Applicant
Subparagraph 1.f:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

MARC E. CURRY
Administrative Judge