



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 08-00732
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Pamela C. Benson, Esquire, Department Counsel  
For Applicant: *Pro Se*

January 15, 2009

**Decision**

HOWE, Philip S., Administrative Judge:

On October 9, 2004, Applicant submitted his Security Clearance Application (SF 86). On May 16, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B (Foreign Influence). 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 May 19, 2008. He answered the SOR in writing on May 19, 2008, and requested a hearing before an administrative judge. DOHA received the request on May 21, 2008. Department Counsel was prepared to proceed on June 10, 2008, and I received the case assignment on August 27, 2008. DOHA issued a Notice of Hearing on October 20, 2008, and I convened the hearing as scheduled on November 7, 2008. The Government offered Exhibits 1

through 8, which were received without objection. Applicant testified and submitted Exhibit A, without objection. DOHA received the transcript of the hearing (Tr.) on November 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**

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the People's Republic of China (PRC). (Tr. at 13-15.) The request and the attached documents were admitted into evidence and were included in the record as Hearing Exhibits 3 to 8. The facts administratively noticed are set out in the Findings of Fact, below.

### **Findings of Fact**

In his Answer to the SOR, dated June 25, 2007, Applicant admitted the factual allegations in ¶¶1.b, to 1.j of the SOR, with explanations. He denied the factual allegations in ¶ 1.a of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 47 years old, married, and works for a defense contractor in the computer industry. He came to the United States in 1987, and became a United States citizen in July 1999. His wife was born in the PRC, married Applicant in the PRC in 1986, and became a United States citizen in 2006. Applicant came to the United States in January 1987 to pursue a doctorate program in electronic engineering. He withdrew from the program in 1988 because his English was poor and he could not afford to pay the tuition for the program. He received his undergraduate and master's degrees in the PRC in 1983 and 1987, respectively. Between 1998 and 2007, Applicant took pleasure and business trips to Japan (six times), and to the PRC (eight times). He worked for an electronics company when he took the business trips. He traveled to the PRC to visit his mother on any pleasure trip there. His last trip there in 2007 was for two weeks. After he became a U.S. citizen, Applicant used his U.S. passport for these trips. He keeps his expired PRC passport as a souvenir. He cut the corner of the passport to show it is no longer effective. He wants a security clearance to increase his job security. He had an interim security clearance for about three years, with no violations, until the issuance of the SOR terminated it. (Tr. 19-26, 29, 30, 33, 34, 39, 52, 71, 81; Exhibits 1, 2 and A)

Applicant's mother was the Director of the China Central Television station in Beijing, PRC. She worked there from 1985 to 1991 when she retired. Later, she was the manager of the Central Television Tower in Beijing from 1994 to 1998, when she retired again. She is a member of the PRC Communist Party. She is 77 years old. His mother helped him obtain his first engineer's job in the United States in 1992 because she knew someone at the computer company. Applicant worked there for 12 years

before being laid off in 2004. He telephones his mother weekly. His mother knows he applied for a security clearance. Applicant told the Government investigator that his mother and father were on an FBI data base file. (Tr. 31, 39-41, 45, 58, 83; Exhibits 1 and 2)

Applicant's father is deceased, having died in 2003. When alive, he was employed by the Chinese Academy Lab, specializing in sonar development. He retired as the Director of the Lab, overseeing about 2000 staff members. The PRC Navy used his lab for research and development of sonar equipment. He was a member of the PRC Communist Party. Applicant traveled to the PRC in 2003 for his father's funeral. (Tr. 42, 43, 45, 58, 71; Exhibits 1, 2)

Applicant's brother is a Senior Colonel in the PRC People's Liberation Army (PLA). He joined it in 1975 and remains an officer in the PLA. He is involved in the international inspection of chemical warfare production and land mine issues. Since 1987, Applicant has seen his brother three times in the United States when he traveled here for conferences. Applicant visited him on his trips to the PRC. He emails his brother every couple of months. He telephones him annually. His brother knows he has applied for a security clearance. His brother's wife lives in the PRC. (Tr. 44-49, 70, 83; Exhibits 1 and 2)

Applicant's mother-in-law is a citizen of and resident of the PRC. His wife calls her twice a year. She is 87 years old and lives in Beijing. Her husband died in 1996. He was a roadway engineer. Applicant sends his mother-in-law about \$1,000 annually, and has for the past 10 years to support her. (Tr. 34-37; Exhibits 1 and 2)

Applicant's half-brother-in-law and half-sister-in-law are citizens of the PRC, and live there. They worked for the PRC national railway system. Applicant's wife has little contact with her siblings because they have a different mother and she had little contact with them growing up. (Tr. 49-51; Exhibits 1 and 2)

Applicant has two aunts and one uncle who are citizens of the PRC, and live there. He also has five adult cousins who are citizens of the PRC and live in the PRC. (Tr. 49-51; Exhibits 1 and 2)

Applicant was a member of the Communist Youth League from 1977 to 1986. Applicant joined voluntarily, wanting to be a good Communist and a model PRC citizen. He joined at age 15 (in 1976) and remained a member through college until 1987 when he became 26 years old, the maximum age for this youth league. It was the same year he graduated with a master's degree and came to the United States. Applicant believed in the communist doctrines and programs when young, but as he grew older came to realize that the PRC government was not a perfect example of communism. After college he began to question the entire idea of communism. He claims he is not a communist today. (Tr. 27, 58-70; Exhibits 1 and 2)

Applicant owns his own home in the United States. He has no property in the PRC or outside the United States. He has bank accounts in the United States and owns mutual funds for his investment portfolio. (Tr. 56, 57)

I take administrative notice of the following facts concerning the PRC. The PRC is a one-party Communist totalitarian state. It has an economy growing at 10% annually, and expanding military forces, including its naval forces. It engages in industrial and military espionage on a regular basis against the United States and other countries. The United States and the PRC have been rivals since 1948, when the Communists took control of mainland China, and the Nationalist government fled to the island of Taiwan. Taiwan remains an issue of contention between the two countries. The U.S. - China Economic and Security Review Commission's 2006 report to the U.S. Congress found the PRC has a large and aggressive intelligence gathering operation in the United States, particularly in the scientific and military fields. The PRC engages regularly in military, economic, and industrial espionage, including stealing nuclear weapons technology, missile design information, and commercial technology. The PRC also obtains commercial information through the use of front companies, buying dual-use technologies, and the direct collection of technology by non-intelligence agencies and individuals. The PLA is integrated into the civil industrial base in the PRC, known as the "digital triangle." The *2007 Report to Congress of the U.S.-China Economic and Security Review Commission* (Exhibit 5 at page 102) states the linkages between the military and Chinese commercial information technology companies and the R&D institute are longstanding, "as telecommunications and information technology in China were originally under military auspices and the commercial relationships with state and military research institutes remain important." Additionally, the U.S. State Department reported the PRC has a poor human rights record, including but not limited to, denial of free speech and press, fair and open trials, and other basic rights recognized by the international community. It also suppresses political dissent, using arbitrary arrests, forced confessions, and mistreatment of prisoners as part of its operational methods to maintain control of its population. (Exhibits 3 to 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 over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available,

reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, “The Applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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**

AG ¶ 6 expresses the security concern pertaining to foreign influence:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interest, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign county 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. Two are potentially applicable 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;<sup>1</sup> and

(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.

Applicant's mother, brother, aunts and uncles, wife's relatives, and his cousins are citizens and residents of the PRC. His mother was involved in the television industry and the Communist Party controlled news organization at a high level of management. She is a member of the Chinese Communist Party. His brother is a senior colonel in the PRC PLA, and is a member of the Chinese Communist Party. He pays his mother-in-law \$1,000 annually in support payments, and has for a decade. He contacts his mother weekly and his brother several times a year by various several communications methods. His mother and brother are or were involved in the organizations in the PRC which are closely controlled by the Communist Party and its government, according to the 2007 Report to the Congress cited in the administrative notice. His parents were on an FBI database list at some point in time, according to Applicant, indicating they were of some concern to the FBI. This situation creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. It also creates a potential conflict of interest. AG ¶ 7(a) and (b) have been raised by the evidence.

The Government produced substantial evidence of those two disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove mitigation. Two conditions that could mitigate the disqualifications are provided under 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

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<sup>1</sup> 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 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).

and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

(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;

Applicant did not establish the application of AG ¶ 8(b) and 8(c). Based on his relationship with his mother and brother, which is not casual or infrequent, and the nature of their work experience, membership in the PRC Communist Party, Applicant showed insufficient evidence and persuasive presentation that his loyalty to the U.S. is paramount over his close connections to his mother and brother. Instead, there is a risk of exploitation or influence because of these familial connections. Therefore, he cannot be expected to resolve any conflict of interest in favor of the U.S. interests, especially since he appears to maintain a strong sense of loyalty and obligation to his mother above all other interests except his own. He came to the United States for his own purposes, education and to make money, and not out of a sense of love or commitment to the United States and its democratic form of government and individual liberties. He wants a security clearance to increase his job security. He did not flee the PRC to escape persecution, but was a member of a family which were members of the ruling Communist Party, and had high-level positions in the communications and military establishments.

### **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 Appeal Board requires the whole person analysis address "evidence of an applicant's personal loyalties; the nature and extent of an applicant's family's ties to the U.S. relative to his [or her] ties to a foreign country; his or her ties social ties within the

U.S.; and many others raised by the facts of a given case.” ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Five circumstances weigh heavily against Applicant in the whole person analysis. First, he has close contacts with his mother, a confirmed member of the Communist party. Second, he maintains contact with his brother, the PLA Senior Colonel who is a committed Communist. Third, he was a member of the PRC Communist Party, or its Youth League, until age 26, when he claims he turned away from communist beliefs and toward a desire for economic and political freedom. He continued to assert his loyalty to that party into adulthood. His discussion of his progressive movement away from a Communist philosophy to a capitalist perspective was not persuasive, especially when he espoused the idea that the Communist ideal is good, but the execution of it in China was imperfect. In his case, he seemed more motivated by personal interests than any commitment to the United States and its democratic ideals. He was interested in earning more money and getting more education than he could in the PRC, so he came to the United States. His personal selfish needs predominated. He wants a security clearance to increase his job security in private industry. Fourth, throughout the hearing, I did not hear him express a stronger sense of dedication or gratitude to the United States, than to a desire for his personal economic success and an underlying loyalty to his two family members and his wife. Here, Applicant’s close connections to his family in the PRC and his personal motivations for a security clearance, as a tool to guarantee his job security in the future, are countervailing persuasive issues which weigh against Applicant. Fifth, he maintains some contact with his mother-in-law and sends her \$1,000 annually in support money.

In his favor, Applicant held an interim security clearance without any indication that he breached security policies or procedures. He held that clearance for about three years. It does not counterbalance the security concerns stated in the previous paragraph.

Overall, the record evidence leaves me with questions or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising from foreign influence.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b. to 1.j:	Against Applicant



## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security interests to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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PHILIP S. HOWE  
Administrative Judge