DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
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SSN: ------ ---- --------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Robert R. Bohn, Esquire

January 30, 2009

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Decision

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WHITE, David M., Administrative Judge:

Applicant is a dual-citizen willing to renounce his Belgian citizenship and had his foreign passport destroyed. He voted by mail in one foreign election. His wife was raised in China and her parents are citizens and resident there, although they recently received green cards and plan to move to the U.S. in the future. Applicant lived in Taiwan to learn Mandarin before meeting his wife. He mitigated foreign preference but not foreign influence concerns. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Applicant submitted his Electronic Questionnaires for Investigation Processing (e-QIP), on June 7, 2007, in connection with renewing the security clearance he has held since 1996. On July 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines B and C. 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 July 31, 2008. He answered the SOR in writing (AR) on August 27, 2008, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on September 23, 2008, and the case was assigned to me on that same date. 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 (GE) 1 and 2, which were admitted without objection. The Government also offered HE II, comprising a request that I take administrative notice of certain facts concerning the People's Republic of China and six Government documents supporting the veracity of those facts. Applicant had no objection, and administrative notice was taken of these facts. Applicant testified on his own behalf, and submitted exhibits (AE) A through N, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on November 17, 2008.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations except those contained in SOR ¶¶ 1.d, 1.e (in part), and 2.b. Applicant's admissions, including those contained in his response to DOHA Interrogatories (GE 2), are incorporated in the following findings.

Applicant is a 35-year-old software engineer employed by a major defense contractor. He has worked for his present employer and held a security clearance since 1996. He has had no security violations or other incidents involving mishandling of sensitive information. Six senior supervisors and co-workers submitted sworn declarations attesting to his excellent work performance, character, judgment, and loyalty to the United States. He has received regular training in security matters and proper handling of sensitive information. (GE 1 at 6, 14; AE B - I; Tr. at 26-31.)

Applicant was born in France. His father was a U.S. citizen working in Belgium, and his mother was a Belgian citizen. His birth was properly registered as a U.S. citizen born overseas. At the time he was not recognized as a Belgian citizen because their law only conferred citizenship along paternal lines. When he was five years old, the family moved to the United States, where he has continued to reside ever since. He has four younger brothers, two born in Belgium and two born in the U.S. In 1995, shortly after Belgian law changed to retroactively permit citizenship along maternal lines, Applicant's parents applied for, and obtained, Belgian citizenship for all their sons. All remain dual citizens to date. Applicant's mother became a naturalized U.S. citizen in 1998. (Tr. at 33-39, 54-55.)

Applicant was issued a one-year Belgian passport in 1995. In 1998, his employer needed him to go to Europe to support a project on short notice. They knew he was a dual citizen, and it was much quicker for him to get a Belgian passport and work in Europe on that basis than to apply for a European work permit as a U.S. citizen. Accordingly, and with his employer's full knowledge and blessing, he obtained another Belgian passport in 1998. He only used it one time, in connection with entering Europe to work on that project. He has used his U.S. passport for all other foreign travel. He

renewed his Belgian passport again in 2006, because his 1998 passport was expiring and he thought it could be useful if he needed to go work in Europe for his employer again. He did not otherwise intend to seek work or move there. Upon becoming aware that it created potential security concerns, Applicant surrendered his Belgian passport to his employer, who had it destroyed on September 19, 2008. (GE 2 at 3-4; AE A; Tr. at 53-58, 78-80.)

In July 2007, Applicant told a security investigator that he would not be willing to renounce his foreign citizenship because he wanted to pass dual-citizenship on to his children to maximize their options, and in case he wished to travel or work in Europe in the future. (GE 2 at 3.) During the hearing, he testified that he had no connections to Belgium that could cause or create potential for foreign influence, and has no intention to move there in the future. He said that he would be willing to renounce that citizenship if it was necessary to do so to maintain his security clearance. He explained that he was confused at the time of his earlier statement, and was not really aware of what it all meant. (Tr. at 70-72, 74.)

Applicant voted in one Belgian election in 2007. He received a ballot in the mail, together with a letter explaining his legal obligation as a citizen to vote and that he could be fined if he did not. He did not know the candidates, so asked his mother who contacted her brother then recommended a candidate. He has no other connection to or participation in Belgian government. He testified that if he received another ballot in the future he would not vote, and would risk being fined if necessary. (GE 2 at 3; Tr. at 59-60, 74-75.)

Applicant took a college course in the Mandarin Chinese language. He had always been good at math and science, but found language more challenging to learn. He applied for, and was granted a leave of absence from June though August 2000 to attend a Mandarin immersion study program at a university in Taiwan. He reads and writes the language more proficiently than he understands and speaks the spoken version. He no longer has any contact with anyone he knew in Taiwan. (Tr. at 51, 63-65, 89-90.)

One of Applicant's two younger brothers attended and graduated from an MBA program at a business school in China from August 2006 to August 2008. He has since returned to the U.S., found work as a salesman, and intends to remain here. He chose to go to school overseas because he had not been accepted at various top U.S. schools and felt he could differentiate himself that way. His classes there were taught in English. (Tr. at 39-41.)

Applicant met his wife by chance in a restaurant in 2001 and they married in August 2002. She was born and raised in China. She came to the U.S. in 1999, in order to gain work experience and improve her English language skills. They now have two children, ages three and one. Applicant applied for, and obtained dual Belgian citizenship for his children. They speak only English in their home, except during one recent visit by her parents. His wife became a naturalized U.S. citizen in 2006, and

renounced her Chinese citizenship in the process. She still works at a U.S. company. All of their financial assets, including a home in which they have substantial equity, are in the U.S. (Tr. at 41-45, 65-69, 83, 90-91; AE J-N.)

Applicant's wife's sister in a Chinese citizen residing and also working in the U.S. on an H1B work visa. She has been in the U.S. since entering on a student visa in 2000, and has a pending application for a green card. Her work visa expires in a year, but is renewable and she hopes to remain in the U.S. She is single, with no children. (Tr. at 52-53, 87-88.)

Applicant's mother-in-law and father-in-law are life-long citizens and residents of China. He is a retired owner and chief executive of a private company, and she worked for that company as a secretary. Before that, she worked in an assembly plant. Neither has ever worked for the Chinese government or been members of the Communist Party. Applicant and his wife visited them and her grandmothers in China in 2003, after their marriage, and in 2006 after the birth of their elder daughter. During July to September 2008, they came to visit the U.S. for two months using recently issued green cards awarding them permanent resident status for which Applicant and his wife had sponsored them. However, they did not establish actual residency here, and returned to China in September to live in their home there and help their two elderly mothers through the winter months. Applicant testified that they intend to move to the U.S. next spring or summer, and will likely live with Applicant's sister-in-law, at least to begin. He has some difficulty conversing with them because their Chinese is somewhat different than he learned, and has minimal discussion with them. Almost all contact is through his wife, who has a close family relationship with them and her grandmothers. (Tr. at 47-52, 75-77, 80-82.)

I took administrative notice of the facts set forth in HE II concerning The People's Republic of China. That country is large and economically powerful, with an authoritarian government dominated by the Communist Party. They are a geo-political rival of the United States, and among the leading practitioners of espionage and industrial theft activities against the United States. The U.S.-China Economic and Security Review Commission's *2007 Report to Congress*, dated November 2007, concluded, "Chinese espionage activities in the United States are so extensive that they comprise the single greatest risk to the security of United States technologies." (AN III at 106.) According to the State Department, China has a poor record of human rights, and its practices include arbitrary arrest and detention, forced confessions, torture, monitoring of electronic communications, and mistreatment of prisoners. The *Intelligence Threat Handbook*, issued by the Interagency OPSEC Support Staff, stated, "The United States is a primary intelligence target of China because of the U.S. role as a global superpower; its substantial military, political, and economic presence in the Pacific Rim and Asia; its role as a developer of advanced technology that China requires for economic growth; and the large number of Americans of Chinese ancestry who are considered prime intelligence targets by the PRC." (AN II at 17.)

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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides that "Any determination under this order adverse to an applicant 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."

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9 security concerns involving foreign preference arise because, "When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States."

AG ¶ 10 describes conditions that could raise a security concern and may be disqualifying:

> (a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:
>
> (1) possession of a current foreign passport;
>
> (2) military service or a willingness to bear arms for a foreign country;
>
> (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
>
> (4) residence in a foreign country to meet citizenship requirements;
>
> (5) using foreign citizenship to protect financial. or business interests in another country;
>
> (6) seeking or holding political office in a foreign country; and,
>
> (7) voting in a foreign election;
>
> (b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;
>
> (c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest; and,
>
> (d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

Applicant's actions in obtaining and maintaining a Belgian passport since 1998 raised security concerns under ¶¶ 10(a)(1) and 10(b) above. His single vote in a Belgian

elections raises potential concerns under AG ¶ 10(a)(7) as well. He has not exercised any other rights, privileges or obligations of his Belgian citizenship, and does not intend to do so in the future.

Applicant's earlier-stated refusal to renounce his Belgian citizenship, and application for dual citizenship for his children, were based on his desire to retain future options for himself and his children to travel, live, or work in Europe, and not on any sense of loyalty to Belgium or present intent to do any of those things. He is now willing to renounce his citizenship there, if necessary. Accordingly, I do not find that these actions establish any ongoing allegiance to Belgium, as contemplated under AG ¶ 10(d).

AG ¶ 11 provides conditions that could mitigate these security concerns:

> (a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;
>
> (b) the individual has expressed a willingness to renounce dual citizenship;
>
> (c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;
>
> (d) use of a foreign passport is approved by the cognizant security authority.
>
> (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and,
>
> (f) the vote in a foreign election was encouraged by the United States Government.

Applicant's Belgian citizenship was based on his mother's, and his parents made initial application for him together with his brothers. He expressed his present willingness to renounce it, and withdrew his earlier reluctance to do so. His use of the Belgian passport to work in Europe was fully known to, and approved by, his supervisors at work, and no security concerns were ever raised on that score. In fact, he did that only to more quickly meet the need for his services on a contract that benefitted U.S. security interests. His passport has since been destroyed, and is no longer available to him for use in foreign travel. And finally, his vote in the Belgian election was not encouraged by the U.S. Government, but was legally required by Belgian law and seemed perfectly harmless to him at the time. Appellant established substantial mitigation under AG ¶¶ 11(a), (b), (d), (e), and (f).

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding 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. 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 describes conditions that could raise a security concern and may be disqualifying. Department Counsel argued that the evidence in this case established one of them: ¶ 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, pressure, or coercion." (Tr. at 95.) At my request, both counsel also addressed the applicability of ¶ 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." (Tr. at 116-120.) China is a country of significant concern for information security and espionage against the U.S., so connections there are more likely to generate heightened risk of exploitation, etc. than most other countries. Applicant's direct relationship with his mother-in-law and father-in-law, who remain in China caring for his wife's two elderly grandmothers, meets the Government burden of production raising both of these disqualifying conditions. His two visits to China to visit these family members demonstrates the importance he and his wife place on their family relationship. These contacts and relationships shift a heavy burden to Applicant to prove mitigation under applicable Appeal Board precedent. However, his brother no longer lives in China and intends to remain in the U.S. Nor does Applicant have any ongoing contacts or relationships from his three months spent studying Mandarin Chinese in 2000. These former potential issues no longer raise security concerns under this guideline.

AG ¶ 8 provides conditions that could mitigate security concerns. Those with potential application in mitigating AG ¶¶ 7 (a) and (c) security concerns are:

> (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

(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's wife's relationships with her family in China are close and important to her, and his relationship with her makes him susceptible to pressure and exploitation. It is not necessary that such pressure or exploitation be shown to have occurred to establish these concerns. Their sponsorship of her parents for green cards, so they have the ability to move permanently to the U.S., is a favorable factor that may, in time, alleviate concerns from his wife's family members remaining in China subject to that country's direct control.

The present potential is the problem, however. Although they have been granted permanent resident alien status to come to the U.S., Applicant's parents-in-law have not yet done so, and their mothers have no intention of doing so. Given the nature of the Chinese government and Applicant's family's ongoing presence there, the heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion remains a concern. Applicant failed to establish either of the mitigating conditions set forth in AG ¶¶ 8 (a) or (c) because his relationship with his wife and, through her, to her family is not one that supports a conclusion that such risk of exploitation is unlikely.

Other Guideline B mitigating conditions were established to some degree by Applicant, but are framed to provide mitigation for disqualifying conditions that were not asserted by the Government. These include:

(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 (addressing AG ¶ 7(b));

(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 (addressing AG ¶¶ 7(f) or (g)); 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 (addressing AG ¶ 7(e)).

These mitigating conditions do not squarely address the ¶¶ 7 (a) or (c) security concerns arising from heightened risk of foreign exploitation from the contacts and relationships of concern. Accordingly, their mitigating effect is insufficient to overcome those concerns raised by the undisputed facts in this case.

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 established by the record evidence. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's conduct of security concern does not involve any personal misconduct, dishonesty or disloyal activity. While other factors including his excellent work record, character and loyalty have been duly considered, the primary whole-person conduct that is of concern under these circumstances is his marriage to a former Chinese citizen with Chinese citizen/resident parents and grandmothers. This raises, "(8) the potential for pressure, coercion, exploitation, or duress;" and "(9) the likelihood of continuation or recurrence."

Applicant has not sufficiently met his burden to mitigate the resultant security concerns. His close family ties, through his wife, to people who currently reside in and are citizens of the People's Republic of China create an ongoing potential for pressure, coercion, exploitation or duress, and the likelihood of continuation in the medium-term future is established by the evidence of record. While his wife's family still lives there, he may well visit there again and be personally subject to the actions of the Chinese government as well.

Overall, the record evidence leaves me with substantial doubt as to Applicant's present eligibility and suitability for a security clearance. He mitigated foreign preference security concerns, but has not met his burden to mitigate the security concerns arising from foreign influence considerations.

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 C:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	For Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge