



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



In the matter of:)
)
) ISCR Case No. 08-06473
)
Applicant for Security Clearance)

Appearances

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

September 27, 2011

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline B, Foreign Influence, raised by his business contacts, friendship with a long-time friend, and small bank account in China through his longstanding relationships with the U.S. and minimal financial interests in China. Applicant’s eligibility for a security clearance is granted.

On March 22, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline 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 adjudicative guidelines (AG) effective after September 1, 2006.

Applicant answered the SOR in writing on April 18, 2011, and requested a hearing before an administrative judge. The case was assigned to me on May 24, 2011. DOHA issued a Notice of Hearing on June 6, 2011, scheduling the hearing for June 23,

2011. Applicant submitted a request for a continuance and, based upon good cause, the continuance was granted. On June 20, 2011, DOHA issued a Notice of Hearing scheduling the hearing for July 13, 2011. I convened the hearing as scheduled. The Government offered Exhibits (GE) 1 through 4. Applicant did not object and they were admitted. The Government requested administrative notice be taken of certain facts relating to China as contained in GE 5. Applicant had no objection and I took administrative notice of the facts contained in GE 5. Applicant testified on his own behalf and presented Exhibits (AE) A through H, which were admitted without objections. The record was left open for receipt of additional documentation. On July 24, 2011, Applicant presented a post-hearing submission, marked AE I; and on July 27, 2011, Applicant presented a second post-hearing submission, marked AE J. Department Counsel had no objections to AE I or AE J, and they were admitted into the record. DOHA received the hearing transcript (Tr.) on July 21, 2011.

Findings of Fact

DOHA alleged under Guideline B, Foreign Influence, that Applicant's friend and business associate resides in the People's Republic of China (China) and is a citizen of Canada (1.a); that Applicant owns a corporation that has a business agreement with a company in China to sell its product within China (1.b); that another of Applicant's companies has an agreement to purchase raw materials from a company in China (1.c); and that Applicant maintains a bank account in China valued at \$9,000 (1.d). Applicant denied all of the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 46-year-old employee of a defense contractor. He works as a computer programmer. He has worked as a government contractor since 2006. In addition to his work as a government contractor, he has owned several small businesses. (GE 1; Tr. 27-28.)

Applicant was born in China in 1965. His father, like many Chinese scholars, was imprisoned by the Chinese government during the height of the Chinese Cultural Revolution. Applicant, in a letter to the court, described how his family was harassed and socially outcast from Chinese society. (GE 1; AE J.) He recalled:

I remember it clearly that day: they (the local Chinese government officials) stormed into our home while my other was nursing my younger sister. I remember how the furniture was arranged in the apartment. They ransacked our home turning over tiles on the floor in looking for evidence used against my father. My father did not come home that day. During the next 2-3 years, we visited my father in the "re-education camp." The "re-education camp" was setup during the Chinese Cultural Revolution for detaining and incarcerating those who were falsely accused as "People's Enemies." (AE J.)

Applicant's father was officially exonerated in the 1980's before his family left China for the United States. In 1983, Applicant and his family immigrated to the U.S. He became a U.S. citizen in October 1989. He considers himself to be solely a citizen of the U.S. He attended college in the U.S. (GE 1; AE J; Tr. 49-51.)

Applicant's immediate family all live in the U.S. He is married to a citizen of Singapore. Together, they have two children who are solely U.S. citizens. His son is 19-years old and is a freshman at a Big-Ten university. His daughter is 16-years old and in high school in the U.S. Applicant's mother and sister are also U.S. citizens and residents. (GE 1; Tr. 27-29, 49-51.)

Applicant has owned several businesses. In July 1995 Applicant incorporated a sub-chapter S Corporation (Corp. 1). The primary purpose of Corp. 1 was to develop and sell photo I.D. and security products. Applicant, through Corp. 1, created software that helped create I.D. access cards. He sold his products to many customers, including a privately held Chinese company (Foreign Company, hereafter FC) owned by the sister of Applicant's former high school classmate in China. FC sold Corp. 1's products in China. In Applicant's December 2008 statement, he indicated that he believed Corp. 1 and FC had a written agreement for FC to represent and sell Corp. 1 products in China, as alleged in SOR ¶ 1.b. Applicant testified at hearing that he was unable to locate a copy of the agreement. From 1999 to 2006, Applicant took many short trips to China to meet with FC. Corp. 1 ceased business operations in 2009, prior to filing bankruptcy. Corp. 1 filed Chapter 7 bankruptcy in December 2009. A letter from Corp. 1's bankruptcy attorney establishes that this corporation has ceased doing business. (GE 2; GE 3; GE 4; AE A; AE F; AE I; AE J; Tr. 28-39, 46, 52-60.)

In May 2008, Applicant formed a second corporation (Corp. 2). The purpose of Corp. 2 was to provide finger printing technologies to other businesses and to new parents. Corp. 2 was initially part of Corp. 1, but eventually became a separate entity, prior to Corp 1 filing bankruptcy. Corp. 2 sells finger printing packets to companies around the world. A sample of the product was entered into evidence. Corp. 2 acquires plastic cases and molding for its products from FC. FC offers the best prices on these parts. Applicant testified he does not have an ongoing contract or agreement with FC for these supplies as alleged in SOR ¶ 1.c, but orders them from FC as needed. (GE 2; GE 3; GE 4; Tr. 39-48, 53-63, 71, 74-75.)

Applicant is still in contact with his high school friend, who is the general manager for FC, owned by the friend's sister. Applicant and his friend went to school together in China, prior to Applicant's immigration to the U.S. After the Tiananmen Square protests in 1989, Applicant's friend immigrated to Canada and became a Canadian citizen. He is still a Canadian citizen, but returned to China in approximately 1996 when it opened up economically. Applicant's friend was unable to master English and could only find work at restaurants in Canada. In China, he has been able to work at FC. Applicant has a close relationship with his friend and they would buy and sell products between one another when Applicant owned Corp. 1. Applicant still buys supplies for Corp. 2 through his friend from FC, as noted above. He also exchanges

emails, pictures of family, and phone calls regularly with his friend. He visits his friend when he travels to China. (GE 2; GE 3; GE 4; Tr. 29-30, 32, 37-40, 48, 57-60, 71, 74-75.)

Applicant has a bank account in China with a balance of approximately \$9,000. Applicant uses this money during his travels in China. He testified that transactions in China are cash based. He once got sick on a trip to China and needed to go to the hospital. He was expected to pay in cash. After that experience, he opened up an account in China for his use when he is on travel. As indicated on Applicant's Electronic Questionnaires for Investigations Processing, Applicant makes many short trips to China each year. His last trip to China was in March 2011. The account is used solely for personal use and is not connected with any business transactions. He testified that he has assets totaling over one million dollars in the U.S. and provided documentation on several of his investment accounts. Applicant has no investments or retirement accounts in China. (GE 1; GE 4; AE B-AE E; Tr. 33, 45-46, 66-68, 71.)

Applicant is well respected by his friends, colleagues, and fellow church members who wrote letters on Applicant's behalf. Each letter attests to Applicant's strong morals, honesty, and reliability. He votes in U.S. elections and is involved in volunteering through his church community. He has no criminal background, as evidenced by a criminal background check Applicant introduced into evidence. (AE G; AE H; Tr. 70-71.)

China¹

China is a large and economically powerful country, and has a population of over a billion people. It has an authoritarian government, dominated by the Chinese Communist Party.

China's People's Liberation Army (PLA), which includes the army, navy, air force and strategic nuclear forces, is modernizing its forces. China has articulated roles for the PLA that "go beyond China's immediate territorial interests." There is limited transparency in China's military and security affairs that enhances uncertainty and increases the potential for misunderstanding and miscalculation.

A 2009 Annual Report to Congress indicated that "China is the most aggressing country conducting espionage against the United States, focusing on obtaining U.S. information and technologies beneficial to China's military modernization and economic development." The Chinese Government rewards actions of private individuals who obtain technology on its behalf and it offers financial inducements to U.S. government officials to encourage them to compromise classified information.

The 2009 Report of the U.S.-China Economic and Security Review Commission noted the following about China's enterprise-directed industrial espionage:

¹ All of the information about China is contained in GE 5.

Enterprise-directed espionage may also be growing in importance and taking on less random and more targeted form. The 2008 unclassified report of the Defense Security Service cited a rise in efforts undertaken by commercial entities to target restricted technologies, speculating that this likely represents "a purposeful attempt to make contacts seem more innocuous by using non-governmental entities as surrogate collectors for interested government or government-affiliated entities. . ."

Chinese intelligence personnel are inclined to make use of sympathetic people willing to act as a "friend of China." While this most clearly has been seen in PRC-targeted recruitment of Chinese-Americans, PRC agents also have used U.S. citizens of other ethnic backgrounds as sources.

In cases resulting in federal prosecutions during fiscal years 2007 and 2008, China was ranked second only to Iran as the leading destination for illegal exports of restricted U.S. technology. China's espionage and industrial theft activities are a threat to the security of U.S. technology. Department Counsel's summary provides additional details of China's aggressive intelligence efforts directed towards acquiring U.S. secrets and proprietary technologies, as well as nine examples of criminal cases in 2007 to 2009 involving people and organizations connected to the PRC.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 commonsense 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, an "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 to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 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. The following is potentially applicable:

(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; and

(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.

Applicant's long-time friend and business associate lives and works in China. Applicant has a long history of conducting business with this friend through Corp. 1 and Corp. 2. Applicant also has \$9,000 in a bank account in China. However, the mere possession of close ties with a person or financial interests in a foreign country is not, as a matter of law, disqualifying under Guideline B. It must also be shown that the foreign friend, business interest, or financial interest could subject the individual to heightened risk of foreign influence or exploitation.

Most nations with substantial military establishments seek classified and sensitive information from the United States because it has the largest military industrial complex and most advanced military establishment in the world. Chinese military officials could seek or accept classified information from U.S. citizens with access to this material. In fact, the administrative notice documents highlight several recent cases involving China's attempts to collect proprietary information from U.S. sources. Applicant's access to classified information and his connection to his friend and financial interest could create a potential conflict of interest. I find AG ¶¶ 7(a) and 7(e) apply.

I have also analyzed all of the facts and considered all of the mitigating conditions under AG ¶ 8. The following are potentially applicable:

(a) the nature of the relationship 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.;

(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 interests in favor of the U.S. interests;

(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; 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.

The nature of a nation's government, its relationship with the United States, and its efforts to target U.S. protected information are relevant in assessing the likelihood that an Applicant's friendship, bank account, and business dealings make him potentially vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, the country is known to conduct intelligence operations against the United States, or there is a serious problem in the country with crime or terrorism. China is known to target U.S. intelligence.

On the other hand, Applicant's ties to the United States run deep. He immigrated to the U.S. after watching the persecution and "re-education" of his father at the hands of Chinese Communists. He attended college in the U.S., earning a bachelor's degree from an American university. His mother and sister are naturalized U.S. citizens. His children are both U.S. citizens and attend American schools. He is active in his community and his church. He votes in U.S. elections.

Applicant's ties to China are limited. Applicant admittedly has close ties to his friend in China. They communicate frequently and Applicant orders parts for Corp. 2 through this friend. Thus ¶ 8(c) is not mitigating in the instant case. However, aside from this one friendship and business connections through this friend, Applicant's ties to China are insignificant. Applicant has no assets in China, except for the \$9,000 bank account for emergencies when he is traveling in China. His bank account in China is minimal when compared to the over one million dollars in assets he possesses in the U.S.

I have had the opportunity observe Applicant, listen and consider his testimony, examine the evidence and resolve any questions. I find that, although Applicant has a friend in China and business ties to China, he has a deep and longstanding relationship with the United States. His life and that of his immediate family is entrenched in the United States. I find his connections to the United States are stronger than his connection to China. His memories of the Chinese government ransacking his home and imprisoning his father are still fresh in his mind. His loyalty to the United States is steadfast and undivided and he can be expected to resolve any conflict of interest in favor of the U.S. interest. The value and routine nature of buying parts for his finger printing kits from China are unlikely to result in any conflict and could not be used to influence, manipulate, or pressure Applicant. I find AG ¶¶ 8(a), 8(b), and 8(f) apply.

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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has been in the United States since 1983. He has no family in China, nor does he have fond feelings for China after the imprisonment of his father. Applicant has one friend, with whom he does business in China, and a bank account with \$9,000. He no longer has any type of written agreement with the FC after Corp. 1 ceased operations in 2009. He only buys parts from FC for Corp. 2 because FC produces the most affordable parts. The purchases for Corp. 2 are done through purchase orders on an as needed basis. There is no outstanding agreement binding Applicant to future purchases.

Applicant raised his children in the U.S. and is active in his community and church. His references reflect that Applicant is an honest and trustworthy individual. I have carefully considered all of the evidence and I am convinced Applicant's roots are firmly planted in the United States. I am also convinced that should there ever be a conflict of interest, Applicant would clearly resolve it in favor of this country due to his steadfast commitment to the United States.

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the guideline for 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:	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant

Conclusion

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

Jennifer I. Goldstein
Administrative Judge