



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



In the matter of:)
)
) ISCR Case No. 08-07147
)
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esquire, Department Counsel

For Applicant: *Pro se*

January 29, 2010

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the case file, pleadings, and exhibits, I conclude that Applicant has not mitigated the security concerns raised under the guideline for foreign influence. Accordingly, his request for a security clearance is denied.

Statement of the Case

Applicant requested a security clearance by submitting an Electronic Questionnaire for Investigations Processing (e-QIP) on January 3, 2007. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office

of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

On June 10, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of the Revised Adjudicative Guidelines (AG).² In his Answer to the SOR, signed and notarized on July 6, 2009, Applicant admitted all the allegations except allegations 1.b. and 1.h. under Guideline B, and allegation 2.b. under Guideline E. He also requested a decision without a hearing. In accordance with ¶E3.1.8 of the Directive, however, the government requested a hearing before an administrative judge. Department Counsel was prepared to proceed on July 30, 2009, and the case was assigned to me September 4, 2009. DOHA issued a Notice of Hearing on October 7, 2009, and I convened the hearing as scheduled on November 5, 2009. The government offered three exhibits, marked as Government Exhibits (GE) 1-3, which were admitted without objection. Applicant testified, but did not offer exhibits or witness testimony. DOHA received the transcript on November 12, 2009.

Procedural Rulings

Prior to the hearing, by memorandum dated July 29, 2009, the government amended the SOR as follows:

Guideline B: The government withdrew factual allegations 1.f. and 1.g.

Guideline E: The government withdrew the entire paragraph.

Applicant had no objection, and the SOR is so amended.

At the hearing, the government requested I take administrative notice of certain facts relating to the People's Republic of China (PRC). The facts are summarized at pages 1 through 10 of the request, and supported by 15 documents pertaining to the PRC (identified as Hearing Exhibit I). The documents are included to provide elaboration and context for the summary. The facts administratively noticed are limited

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. The Revised Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

to matters of general knowledge not subject to reasonable dispute, and included in government reports. They are set out in the Findings of Fact.

Findings of Fact

Applicant's admissions in response to the SOR are admitted as fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant, 50 years old, was an enlisted service member in the U.S. Marine Corps from 1979 to 1987. He was trained in electronics and satellite communications. Applicant is a systems analyst, and has been with the same defense contractor since 1987. He has held a top secret security clearance since the late 1980s. As part of a job assignment, Applicant lived in Taiwan from 1996 to 1998 and from 2004 to 2006 (GE 1, 2, 3; Tr. 18-32, 49, 63).

Applicant first married in 1983 and had a stepson and two sons from the marriage. They are now 20, 25 and 30 years old. His 25-year-old son has lived and worked in China for the past three years. He is aware that his father has a security clearance (GE 2). Applicant's first wife died in 1995. He married his second wife, a Taiwanese citizen, in 1996.³ He has two sons from his second marriage, who are 9 and 12 years old. They are dual U.S.-Taiwan citizens, and live with their mother in Taiwan. As of 2008, Applicant was providing approximately \$1,100 per month child support for his sons in Taiwan. He divorced his second wife in May 2006. From July to October 2004 and again from October 2005 to July 2006, Applicant had an intermittent relationship with a Taiwanese woman (GE 1, 2, 3; Tr. 18-32, 49, 63, 71-72).

In June 2006, Applicant met his third and current wife, a Chinese citizen, on an internet dating website that focused on Asian women. She holds a Ph.D degree and was an English teacher at a Chinese university from 2005 to 2008. He testified that he did not believe the school was affiliated with the government; however, in his interrogatory response, he indicated that it was. He was required to obtain proof of eligibility to marry and a "permission to marry" certificate from the Department of State and the Chinese Embassy, and they married in September 2006 in China. His wife remained in China for approximately two years. During this period, Applicant traveled to China to visit her approximately five times. He also took two trips to Taiwan to see his family there during the same period. In June 2008, he traveled to China to assist his wife during the immigration process, when she moved to the United States (GE 1, 2, 3; Tr. 18-32, 49, 63).

Applicant's wife received a conditional residency in June 2008, which will expire in June 2010. At that time, he expects her to apply for permanent U.S. residency. She teaches the Chinese language at a university in Applicant's state and is pursuing a

³ Applicant mistakenly stated in his security clearance application that he was married to his second wife in 1986. The correct date, according to his testimony and interrogatory response (GE 1; Tr. 19), is 1996.

graduate degree. She became aware of his security clearance status when he informed her that his security clearance interview was pending. She is also aware that he works on military vehicle communications (GE 2; Tr. 33-35; 50).

Applicant's wife's family lives in China. His mother-in-law is a 63-year-old retired school teacher who lives in China. His father-in-law is a 65-year-old retired college teacher. Applicant testified that he is unaware if the schools were affiliated with the Chinese government; however, he indicated they were government owned or operated in his interrogatory response. Applicant's brother-in-law is married, 36 years old, and works as a free-lance environmental impact consultant to companies. Applicant's sister-in-law is 32 years old and lives with her parents. She is single, and works as a reporter and editor for an independent television station. None of his wife's family has visited Applicant and his wife in the United States (GE 3; Tr. 36-41; 50; 62).

Applicant's wife's son is 13 years old. He has been living in China with Applicant's mother-in-law and father-in-law, and at times with his father. Applicant and his wife have not provided financial support for him. At the end of 2008, Applicant's wife coordinated the process to obtain an immigrant visa for her son, and Applicant sponsored him. He was expected to arrive in the United States in November 2009 to live here permanently with Applicant and his wife. Applicant will also sponsor his step-son for a permanent visa. Applicant's wife speaks with her son by telephone every two to three days, and with her mother and sister about once per week. Applicant has met and talked with his mother-in-law and his sister-in-law. Applicant and his wife do not have contact often with her father or brother. He believes that his wife will not inherit property from her family in China. She does not have financial assets in China (Tr. 22; 36-48; 59-60).

Applicant keeps his security officer informed of his foreign travel. He is kept informed by his company of security and foreign travel issues. He agrees that he is in an exploitable position, given his foreign family, but believes that he would "do the right thing" and report to his security officer any attempts to exploit him. Applicant testified that although he does not think he has been targeted during foreign travel, he has met people two or three times "who are just a little too inquisitive, and, usually, you just ignore them or don't even get on the subject at all." He has also received emails on his personal computer, written in Chinese, that he believes were advertisements, but has deleted them without opening them (Tr. 52-56, 65).

Applicant testified that he and his wife do not plan to return to China at the present time. However, in his security interview, he stated that he expected that he and his wife would visit her family in China. He also stated he is open to the idea of retiring to Taiwan or China (GE 2; Tr. 57-58).

Applicant's wife currently holds a Chinese passport. He believes that when she becomes a U.S. citizen, she should retain her Chinese passport. In relation to his Taiwanese sons' U.S. and foreign passports, he also testified that, "I don't know why

anybody would want to give up their, you know, born national passport...I pushed heavily for my sons to make sure they kept theirs. It just makes sense to me to not give up something like that." "...I always felt that, you know, they should keep those both, and keep them both up to date, and active." (Tr. 73-74).

The People's Republic of China (PRC)

The PRC has an authoritarian government dominated by the Chinese Communist Party, which ensures that party and state policy guidance is followed.⁴ Openness and economic reform have increased, and foreign journalists were allowed greater freedom during the most recent Olympic Games. In addition, the United States and China have cooperated in some areas, including various law enforcement matters, transnational health issues, and threats posed by North Korea's and Iran's nuclear programs.

However, according to the State Department's 2008 Human Rights Report, the Chinese government's human rights record remained poor and worsened in some areas. The government engaged in harassment, detention, and imprisonment of those perceived as threatening to the government, as well as unlawful killings by security forces, physical abuse and torture of prisoners, and denial of fair public trials. Authorities monitored telephone conversations, facsimile transmissions, text messages, and internet and email communications. Security services routinely monitored and entered residences and offices to gain access to computers, telephones, and fax machines. In 2009, the U.S. State Department warned that foreign visitors in China may be placed under surveillance, hotel rooms and telephones may be monitored, and personal possessions may be searched without the traveler's knowledge or consent. In addition, Americans in China, including those staying with relatives or friends, must register with local police when they arrive.

The PRC possesses large military forces that are transforming into a smaller, more mobile high-tech military. Civil-military integration has led to increased use of commercial systems in military applications. 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. Americans of Chinese ancestry are considered prime intelligence targets.

Among the record number of countries (108) that engaged in collection efforts against the United States in 2005, the PRC was among the most aggressive. Ethnic Chinese with U.S. citizenship and/or legal residency have been convicted of procuring and exporting or attempting to export sensitive U.S. technology to the PRC. U.S.

⁴ The facts cited derive from the documents submitted by Department Counsel, identified as Hearing Exhibit I.

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. The U.S.-China Economic and Security Review Commission's 2007 Report to Congress concluded that Chinese espionage activities in the United States are so extensive that they comprise the single greatest risk to the security of U.S. technologies.⁵

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised AG.⁶ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the "whole person" concept. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline B.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁷ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case.

Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁸ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The "clearly consistent with the national interest" standard

⁵ There is no allegation that Applicant or his family has engaged in economic espionage or attempted to violate export controls for the benefit of the PRC. The criminal activity of others is relevant to the extent it reflects ongoing efforts by the PRC to target U.S. sensitive technologies.

⁶ Directive. 6.3.

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁸ See *Egan*, 484 U.S. at 528, 531.

compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁹

Analysis

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern under Guideline B:

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. I have considered all the disqualifying conditions, and find that the following are relevant to the 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;
- (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;
- (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.

The possession of close family ties with a resident or citizen of a foreign country is not, of itself, disqualifying under Guideline B. However, the country in question must be considered and, in particular, whether or not that country targets United States citizens to obtain protected information. The PRC is an active collector of such information, and so presents a heightened risk of exploitation, manipulation, or

⁹ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

coercion.¹⁰ Applicant and his wife share living quarters. In addition, as of the date of the hearing, he expected his step-son, a Chinese citizen, to arrive from China shortly to begin living permanently with him. Applicant sponsored the immigrant application of his step-son. Applicant's actions indicate that he has ties of obligation to his family members who are citizens and residents of the PRC. His demonstrated ties of affection to his wife, and at least ties of obligation to his Chinese step-son, represent a heightened risk of exploitation, and support application of AG ¶ 7(a), (b), and (d).

I have also considered the mitigating conditions under Guideline B, especially the following:

(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.;

(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; 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;

(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.

It cannot confidently be predicted that Applicant would not be placed in a position that could force him to choose between U.S. and foreign interests. He is bound by strong ties of affection to his wife, a citizen of a country that is one of the most aggressive collectors of U.S. sensitive information. Applicant admits that his foreign family places him in an "exploitable" position. Applicant has not presented information to show that his foreign relatives could not be subject to coercion that would force him to choose between their interests and those of the United States. AG ¶ 8 (a) cannot be applied.

In evaluating mitigation under AG ¶ 8(b), I considered Applicant's eight years of honorable military service, and his continued service to the government through more than 20 years employment with a defense contractor. However, the extent of Applicant's

¹⁰ ISCR Case No. 07-02485 at 4 (App. Bd. May 9, 2008).

ties in the United States must be evaluated as well. The record shows that Applicant lived outside the United States, in Taiwan, from 1996 to 1998, and again from 2004 to 2006. He has consistently chosen to seek out relationships with foreign nationals, even while he held security clearances. He was married to a Taiwanese citizen for 10 years, and had two sons born in Taiwan. Shortly after his divorce, he sought out a dating service that focused on Asian women, and within two months of meeting a Chinese woman online, he traveled to China and married her. He has strong ties to his current wife, who is still a citizen of China, and is willing to live with and support her son, also a Chinese citizen. Given China's aggressive targeting of sensitive information, and Applicant's strong ties to Chinese citizens, I cannot confidently conclude that any conflict of interest would be resolved in favor of the United States. AG ¶ 8(b) does not apply.

Applicant's contacts with his in-laws appear to be casual. However, his relationship with his step-son cannot be so characterized. There is a rebuttable presumption that applicants have a non-casual relationship with the immediate family of a spouse. In regard to Applicant's step-son, the presumption is not rebutted. Applicant has shown his willingness to sponsor his step-son's immigration to the United States, to bring him into his own household and to support him here in the United States. His actions demonstrate his sense of obligation to his step-son. These facts raise a risk of foreign influence or exploitation. AG ¶ 8(c) does not mitigate Applicant's situation.

Applicant receives some mitigation because he informs his security officer about his foreign travel and is aware of the risk represented by his foreign family. However, Applicant's persistent involvement with foreign citizens, even while holding a security clearance, and while acknowledging that such contacts place him in an "exploitable" position, raises questions about his judgment. The mitigation under AG ¶ 8(e) is insufficient to outweigh the disqualifying conditions. I find against Applicant under Guideline *B*.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the relevant circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guidelines. I have also reviewed the record before me in the context of the whole-person factors listed in 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

When Applicant began a relationship with his wife, a foreign national, he was 47 years old. He was a mature, responsible adult who had served 8 years in the Marine Corps and had long held a security clearance. Despite his experience and knowledge of the obligations imposed on those who hold security clearances, he began and continued a relationship with a foreign national, raising serious questions as to his trustworthiness and good judgment. The relationship continues and his involvement with Applicant's Chinese family has increased. He has sponsored his step-son, a Chinese citizen, for immigration into the United States. His step-son is about to take up permanent residence with Applicant. Most significantly, Applicant's close and ongoing relationship is with foreign nationals of China, a country whose aggressive targeting of sensitive United States information poses a heightened risk of exploitation.

For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guideline. A fair and commonsense assessment of the available information bearing on Applicant's suitability for a security clearance shows he has not satisfied the doubts raised under the guideline for foreign influence. Such doubts must be resolved in favor of the government.

Formal Findings

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

Paragraph 1, Guideline B:	Against Applicant
Subparagraph 1.a. – 1.e.	Against Applicant
Subparagraphs 1.f. – 1.g.	WITHDRAWN
Subparagraph 1.h.	Against Applicant
Paragraph 2, Guideline E	WITHDRAWN

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge