



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 08-08379

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: Pro Se

July 8, 2009

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits and testimony, Applicant's request for eligibility for a security clearance is granted.

On April 22, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his work on a contract with the Department of Defense. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a set of interrogatories¹ to obtain clarification of information in his background. After reviewing the results of the background investigation together with his response to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly consistent with the national interest to

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

allow Applicant access to classified information. On November 25, 2008, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the revised Adjudicative Guidelines³ under Guideline B (foreign influence).

On December 9, 2008, Applicant responded to the SOR and requested a hearing. On January 15, 2009, Department Counsel made a pre-hearing submission through which the government asked that administrative notice be taken of certain facts germane to the issues presented by the pleadings. The submission consisted of a ten-page memorandum supported by 24 enclosed documents (Attachments I - XXIV).

The case was assigned to me on February 23, 2009, and I convened a hearing on April 2, 2009. DOHA received the transcript of hearing (Tr.) on April 10, 2009. The parties appeared at the hearing as scheduled. The government presented two exhibits – Applicant's e-QIP (Gx. 1) and his response to interrogatories (Gx. 2). They were admitted without objection. Applicant testified in his own behalf, presented three witnesses, and proffered six exhibits (Ax. A - F). I admitted into the record Ax. A - E; however, for reasons discussed at the hearing (Tr. 48 - 53) Ax. F was not admitted.

I also granted, in part, and denied, in part, the government's pre-hearing administrative notice request. The entire administrative notice request is included in the record as Judicial Exhibit (Jx. 1); however, for reasons discussed at the hearing (Tr. 21 - 25), I have not considered the information contained in Jx. 1, Attachments V - IX and XXVI - XXIV.

Findings of Fact

Under Guideline B, the government alleged that Applicant's four brothers, one of whom is a city government employee, are citizens of and reside in the Peoples Republic of China (PRC) (SOR ¶ 1.a); that his in-laws are citizens of and reside in Taiwan (SOR ¶ 1.b); that, while traveling in the PRC for conferences in 2008 (SOR ¶ 1.c) and 2006 (SOR ¶ 1.d) he visited family members there; that he traveled to Taiwan in 2003 to visit family members there (SOR ¶ 1.e); that he traveled to Taiwan in 2001 to get married and visit family there (SOR ¶ 1.f); that he also traveled to Taiwan in 2001 to attend a Rotary Club conference 2001 (SOR ¶ 1.g); that he traveled to the PRC in 1998 to see his family (SOR ¶ 1.h); that he worked for the PRC government between 1985 and 1987 (SOR ¶ 1.i); and that he worked for the PRC government on a collective farm between 1972 and 1978 (SOR ¶ 1.j).

Applicant admitted with explanation the factual allegations, but he has vigorously denied that the facts established through his admissions make him unsuitable for access to classified information. (Tr., 11 - 12) In addition to the facts established by Applicant's answer to the SOR, I make the following findings of relevant fact.

³ 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. Pending official revision of the Directive, the Revised Adjudicative Guidelines supercede the guidelines listed in Enclosure 2 to the Directive.

Applicant is 54 years old. He was born and raised in the PRC before coming to live in the United States in 1987. He and his wife, who was born and raised in Taiwan, were married in October 2001. They have two children, ages 3 and 7, who were both born in the United States. Applicant became a naturalized U.S. citizen in September 1999. His wife was naturalized in April 2008. (Gx. 1)

Applicant was educated through high school in state-run Chinese schools. In 1972, at age 17, he was sent against his will to work on a collective farm away from his family. He lived and worked there for six years, communicating only sporadically with his family.⁴ In 1978, he applied and was accepted to attend the University of Beijing, where he studied archaeology. After receiving his degree in that field in 1978, he then attended China's Central University for Nationalities, where he earned a post-graduate degree in anthropology in 1985. From 1985 until 1987, Applicant worked for the state-run Commission for Ethnic and Minority Affairs. His work involved preserving and researching the artifacts and ethnic heritage of China's several minorities. (Gx. 1; Gx. 2; Ax. A; Tr., 103 - 105)

Applicant immigrated to the United States on a student visa in 1987 after he was accepted to a university here. He graduated in 1991 with a master's degree in linguistics. Although he completed his doctoral studies in archaeology, he never completed his dissertation. Instead, in 1992, he accepted a job as an archaeological consultant near where he currently lives. Around this time, he also started working as a translator. (Gx. 1; Gx. 2; Ax. A; Tr., 106 - 112)

Applicant now owns his own translation company that does business in several countries. His company does business internationally and has been certified for work with the U.S. State Department, the U.S. Information Agency, and the state court system where he lives. Applicant is also head of the Chinese language division of an international translators' association. In 2008, he traveled to the PRC for an international translators' conference when it was held there, and visited his family while there. In 2004, he traveled through the PRC and visited family members en route to a job as a translator in Bali. He does not stay with family members in either the PRC or Taiwan when he travels to those countries. He first returned to the PRC to see his family in 1998, before he became a U.S. citizen. Applicant's wife has also traveled to the PRC with him and has been back to Taiwan three times since 2003. While some of Applicant's travel has been incidental to business travel, with one exception,⁵ all of his and his wife's travel has been self-funded. (Gx. 2; Ax. A; Tr., 133 - 144)

Since about 1995, Applicant has been active in his local chapter of the Rotary Club. The Rotary is a volunteer organization of businessmen dedicated to community service. Among their efforts are participation in the Habitat for Humanity, raising funds for polio treatment and education, and international student exchange programs aimed

⁴ As to the allegation in SOR ¶ 1.j, that he "worked for the Chinese Government Collective Farms," Applicant wryly observed that this is almost like accusing the Jews in the Nazi concentration camps of being working (sic) for the Nazi government." (Tr. 97)

⁵ The trip alleged in SOR ¶ 1.g was funded by Applicant's chapter of the Rotary Club.

at improving cultural understanding and promoting world peace through service to others. Applicant has been active in the student exchange program and was selected as the leader for an exchange trip to Taiwan in 2001. It was on this trip that he met his wife, herself a former Rotary exchange student between Taiwan and Sweden. He returned later in 2001 to get married. (Tr., 83 - 84)

Applicant has an excellent reputation in his community for service, family values, and integrity. In addition to his own business, Applicant has worked to improve opportunities for and exposure of Asian-American business development in the U.S. In 1997, as part of a U.S. Department of Commerce delegation and trade mission, he accompanied the Secretary of Commerce to Canada. Witnesses from his neighborhood and from his Rotary Club chapter provided information about his active participation in a variety of charitable endeavors. In September 2005, Applicant organized a relief effort for victims of Hurricane Katrina along the Gulf of Mexico coast. A couple who benefitted from Applicant's efforts also have vouched for his character and civic leadership. (Tr., 116 - 177; Ax. D) A physician who has known Applicant for at least 15 years, spoke highly of Applicant's patriotism and commitment to his interests in the U.S. He also opined, as did Applicant's other witnesses, that Applicant is apolitical in most matters, particularly when it comes to Sino-U.S. relations. (Tr., 54 - 60) An attorney, who has known Applicant through the Rotary Club for more than seven years, asserted that Applicant exemplifies the Rotarian principles of hard work and character. (Tr., 61 - 74) Another fellow Rotarian, a retired Army officer with over 20 years of service, who has belonged to the Rotary Club for more than 25 years, testified that Applicant has been recognized several times for his high level of personal monetary contributions. He also testified that Applicant exemplifies the Rotary Club's main values of truth, fairness, goodwill and benefit for all. (Tr., 75 - 92)

Applicant is the oldest of five children, all boys, in his family. Their parents are both deceased. Applicant's brothers are citizens of and still reside in the PRC in a city located approximately 800 miles from Beijing. They have not visited Applicant in the U.S., but Applicant tries to visit them if possible when he is in the PRC. Applicant communicates with his brothers by phone about five or six times each year. Aside from one brother, who is a municipal government employee working as a driver providing transportation to retired city employees, none of his brothers or extended family in China is employed by or has any official ties to the PRC government.

Applicant's wife's parents are retired. Her father is a retired Taiwanese military officer on whose pension they rely for subsistence. Applicant thinks he was a major, but there is no information available about when he retired or what his duties in the military were. She speaks to her parents each month by phone, and Applicant's only contact with them is by phone incidental to his wife's contact with them. None of Applicant's or his wife's family knows of his application for a security clearance. (Tr., 120 - 132)

Applicant has no financial or other interests in the PRC or Taiwan. While his business has grown significantly in the past three years, less than 1% of his total business revenues result from work in either country. (Tr., 146 - 152) Applicant is financially secure in the U.S. through his business income, ownership of two houses, and through a variety of retirement and savings accounts. Applicant receives no income

from anyone in the PRC or Taiwan and he receives no benefits from either government. He estimates his net worth to be about \$350,000. (Gx. 2; Ax. C; Ax. E)

Having reviewed the documents received through Department Counsel's Request for Administrative Notice (Jx. I), I make the following findings of fact regarding the PRC and Taiwan.

The PRC is an increasingly industrialized world economic and military power. The country has a population in excess of one billion people who are governed by an authoritarian, Communist regime. Geographically vast and demographically diverse, the country has significant natural resources to help support its growing economy. The PRC devotes most of its industry and domestic production to its military forces, and it has a strategic nuclear arsenal. (Jx. I, Attachments I, XI) The PRC is in direct competition with the United States in many geopolitical and economic areas, and it is known to actively collect military, economic and industrial information about the United States. (Jx. I, Attachments II, IV) In 2007, it was reported to Congress that the PRC was the leading threat to the security of U.S. technology. (Jx. I, Attachment III)

However, the PRC and the U.S. also are major trading partners and share other common interests. After the terrorist attacks of September 11, 2001, the two countries worked closely in counter-terrorism efforts. The PRC and the U.S. also have worked closely on regional issues, especially those involving North Korea. However, U.S.-PRC relations are sometimes complicated by events in Taiwan and Hong Kong. The PRC is one of the most active collectors of U.S. defense information and technology.

The PRC government has an abysmal human rights record. Officials continue to engage in suppression of personal and electronic expressions of political dissent, arbitrary arrest and detention, forced confessions, torture, and other prisoner mistreatment. Government and law enforcement practices are largely unchecked by any independent judicial review. (Jx. I, Attachment X)

Taiwan is an island nation governed through a multi-part democracy. Since its separation from the mainland Chinese government 60 years ago,⁶ Taiwan has become an industrialized economic entity and a leading producer of high-technology goods. In 1979, the U.S. formally recognized the PRC as the sole legal government of China. However, the U.S. has maintained cultural, commercial, and military relations with Taiwan. Maintaining strong relations with Taiwan is a major U.S. goal. The U.S. does not officially support Taiwanese independence, but it does support Taiwan's membership in international organizations such as the World Trade Organization (WTO), the Asia-Pacific Economic Cooperation (APEC) forum, and the Asian Development Bank. (Jx. I, Attachment XIII) The U.S. is also committed to help Taiwan maintain its defensive capabilities, and has sold the Taiwanese defensive military

⁶ The PRC does not recognize Taiwan, and insists there is only "one China." In 1949, Taiwan was populated by refugees fleeing a civil war in China. That same year, Communists in mainland China established the People's Republic of China (PRC), and a separate, independent government was established in Taiwan. (Jx. I, Attachment XII)

equipment and weapons, including destroyers, anti-submarine aircraft, and diesel submarines. (Jx. I, Attachment XIV) Notwithstanding these close ties with the U.S., Taiwan continues to target the U.S., among others, as part of its long-standing use of aggressive economic and information espionage activities. (Jx. I, Attachment XV)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁷ and consideration of the pertinent criteria and adjudication policy in the revised Adjudicative Guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole person” concept, those factors are:

(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.

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 AG ¶ 6, Guideline B (Foreign Influence).

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁸ 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.⁹

⁷ Directive. 6.3.

⁸ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁹ See *Egan*, 484 U.S. at 528, 531.

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Thus, 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 her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the government.¹⁰

Analysis

Foreign Influence.

The facts established by the government’s information and by Applicant’s admissions raise security concerns about Applicant’s personal relationships and other interests in the PRC and Taiwan. Specifically, as stated in AG ¶ 6,

[f]oreign 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.

As to the allegation in SOR ¶ 1.j, that Applicant was employed by the PRC when he was forced to leave home and work on a collective farm from 1972 until 1978, I find for the Applicant. It is absurd to characterize Applicant as having entered into an employee-employer relationship with the PRC at that time. This is in stark contrast to the allegation in SOR ¶ 1.i, that he was a government employee in the PRC’s Ethnic and Minority Affairs ministry after he graduated from college in the mid-1980s. However, it is unlikely that an official tie to the PRC government that ended more than 20 years ago may now form the basis for undue pressure or coercion in furtherance of the PRC’s efforts against U.S. interests. I find for the Applicant as to SOR ¶ 1.i.

As alleged in SOR ¶¶ 1.a and 1.b, Applicant has close family ties to his brothers in the PRC and, by virtue of his close relationship with his wife, to her family in Taiwan. As to those family members in Taiwan, that country’s known targeting of U.S. economic, technical and military information presents a risk of exploitation; however, the risk may be countered, or at least diminished by the fact that Taiwan is an open society governed by democratically-elected officials. Nor does the Taiwanese government present human rights abuse issues that might suggest unchecked government pressure or influence on its citizens. The concerns about Applicant’s brothers in the PRC are a different matter.

¹⁰ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

The PRC is in direct geopolitical competition with the U.S., and is known to conduct economic, military and technical espionage in the U.S. Combined with its repressive form of government and unhindered abuse of human rights within its borders, the concerns about the presence of an applicant's family in the PRC are well-founded. While the government's information about Applicant's foreign travel (SOR ¶¶ 1.c - 1.f, and 1.h)¹¹ is not by itself disqualifying, it is evidence of the influence of his relationship with his family in China and Taiwan. The foregoing requires application of the disqualifying condition at AG ¶ 7(a) (*contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion*).

Of the mitigating conditions listed under AG ¶ 8, only AG ¶ 8(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.*), 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 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 AG ¶ 8(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*) are potentially applicable to these facts.

As to ¶ AG 8(a), the presence in the PRC of Applicant's brothers, to whom Applicant is undoubtedly close, precludes use of this mitigating condition. There is also a rebuttable presumption that, because Applicant is close to his wife he is also close to her family. Nor is application of AG ¶ 8(c) supported by these facts. Applicant's close relationship with his brothers and his in-laws, combined with his regular phone contact with at least one of his brothers and his wife's regular phone contact with her parents do not allow a conclusion that the contact with family is casual or infrequent.

However, as to AG ¶ 8(b), Applicant has presented sufficient information to show that his interests, relationships and loyalties in the U.S. are so well-entrenched that he is likely to resolve any conflict of interest in favor of the U.S. Since the time he arrived in the U.S. as a graduate student more than 20 years ago, Applicant has not just assimilated into the fabric of U.S. society, he has done so in a high profile and all-encompassing way. The information contained in Ax. A reflects a complete "Americanization" of this immigrant. All of his interests – his wife and children, his business, his finances and property, and his identity as a citizen – are inextricably rooted in the United States and its society. The cross-section of information that supports application of AG ¶ 8(b) and reflects well on his character and integrity, also

¹¹ The travel to Taiwan alleged in SOR ¶ 1.g occurred before Applicant had any ties to that country. Moreover, Applicant made that trip as part of an international service and student exchange mission with the Rotary Club. As such, it is not evidence of any foreign ties or influence. SOR ¶ 1.g is concluded for the Applicant.

outweighs the security concerns about his family ties in the PRC and Taiwan. I conclude Guideline B for the Applicant.

Whole Person Concept.

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guideline B. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant is a mature, responsible, and highly accomplished 55-year-old businessman who, since arriving in the U.S. in 1987, has worked diligently to succeed in business and to better the community in which he lives. The circumstances of his family ties in the PRC and Taiwan are not likely to change. However, the ties he has established in the U.S. through the Rotary Club, and through his myriad other business-related and civic activities make it highly unlikely that he would act contrary to U.S. interests in response to pressure by any foreign government. Certainly, there has been no misconduct here and there is nothing inappropriate or illegal about Applicant's contacts overseas. A fair and commonsense assessment¹² of all available information shows Applicant has overcome the doubts about his suitability under these circumstances.

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:

Paragraph 1, Guideline B:	FOR APPLICANT
Subparagraph 1.a - 2.j:	For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge

¹² See footnote 7, *supra*.