



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



In the matter of:)
)
) ISCR Case No. 08-10667
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel

For Applicant: *Pro se*

September 17, 2009

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 submitted an Electronic Questionnaire for Investigations Processing (e-QIP), on July 12, 2007, and again on March 9, 2009, to request a security clearance required as part of his employment with a defense contractor. 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 May 5, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) (Item 1) that specified the basis for its decision: security concerns addressed in the Directive under Guideline B (Foreign Influence) of the Revised Adjudicative Guidelines (AG).

Applicant received the SOR on May 17, 2009. He signed a notarized Answer on June 1, 2009, and requested a decision without a hearing. In his Answer, Applicant admitted to all allegations in the SOR. On July 21, 2009, DOHA Department Counsel submitted a file of relevant materials (FORM) in support of the government's preliminary decision to deny Applicant's request to be granted a security clearance. The FORM contained six documents, identified as Items 1 through 6. The FORM and attached Items were forwarded to Applicant on July 22, 2009, and he received the package on August 6, 2009. Applicant was given 30 days from the date he received the FORM to respond. He timely responded to the FORM. The case was assigned to me on September 3, 2009, for an administrative decision based on the record.

Procedural Ruling

Department Counsel requested that I take administrative notice of certain facts relating to the People's Republic of China (PRC). The request, along with 15 documents pertaining to the PRC, are included in the FORM as Items I through XV. The facts administratively noticed are limited to matters of general knowledge and matters not subject to reasonable dispute and 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 FORM, I make the following additional findings of fact.

Applicant, 36 years old, joined the U.S. Marine Corps in 1992 and attained the rank of sergeant. He completed a security clearance application in 1996 (Item 6) and held a Secret clearance starting in 1997. He was honorably discharged in 2005. He has been employed by a defense contractor since that time, holding the position of technical controller. His job requires him to live overseas and, since 2005, he has lived in the United Arab Emirates (UAE) (Items 4, 6).

In April 2005, Applicant met a Chinese woman at a bar in the UAE. They had what he describes as a "one-night stand" the night they met. He returned to the bar in order to meet her again. During two of their encounters, he paid her for sex. "At his behest, their dating ended up leading to cohabitation..." in May or June 2005. Several months later, she informed Applicant that she was married and her husband was in

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

China. She stated that he abused her and she came to the UAE to get away from him and to find employment. She left her daughter in China with her husband and mother. She obtained a divorce in November 2006 (Item 5).

After Applicant and the woman began living together, she did not work as a prostitute, and she has told him that she was not a prostitute. She is no longer employed outside the home. Several of her friends, who are prostitutes, have visited them at their home. Applicant has encouraged her to dissociate herself from these friends. Applicant informed his on-site supervisor and program manager about his relationship. He did not inform the company security officer of his cohabitation with a foreign national until September 2006. He states that he did not know he was required to do so, and he followed what he thought at the time was correct procedure by informing his chain of command (Item 5).

Applicant and the Chinese citizen married in March 2007, and they currently live together in the UAE. His wife's mother and 14-year-old daughter are citizens of the PRC and live there. His wife has siblings, but Applicant was unable to provide information about them on his security clearance application (Items 4, 5).

Applicant's mother-in-law is a farmer. His interaction with her and his stepdaughter is limited because of the language barrier. Between 2007 and 2008, his wife traveled to China to see her family four times: February 2007, Spring 2007, and February 2008 and September 2008. She usually stays two to four weeks. Applicant pays for her trips. Between September and October 2008, Applicant traveled to China with his wife. He informed the company security office of this trip in advance, and checked if there were any requirements to be met. He was told to register his visit with the U.S. Embassy in China. He states that, "While on this trip I was unable to locate the US Embassy, and therefore did not register my trip." During the trip, he met his stepdaughter and other relatives. The record does not state whether or not he met his spouse's siblings, and does not provide any information as to their occupations (Item 5).

Applicant's spouse bought her mother and daughter an apartment in China in December 2007 at a cost of approximately \$25,000. Applicant contributed \$4,000 to help with installing required fixtures and furnishings in the apartment. In his Interrogatory response, he referred to it as "our apartment." The house was purchased so that Applicant's spouse would have a place to stay on her future trips to China. The title is solely in the name of Applicant's spouse. Applicant believes that Chinese law prohibits him, as a foreigner, from having title to the property. According to Applicant, Chinese citizens have a "family book" that lists members of each family. Applicant states that his wife believes he will have to obtain a "Chinese Residency Visa or most likely Chinese Citizenship to get me listed in said 'family book'." It is unclear whether Applicant intends to seek inclusion in his wife's "family book." (Item 5).

Applicant's wife has a bank account in China. She keeps funds there for her mother to withdraw to support herself and the stepdaughter. As of March 2008, it

contained about \$2,000. Applicant's name is not on the account, and he maintains that he cannot obtain information about it or make withdrawals. However, he can and does make deposits through wire transfers from the UAE. During his trip to China in September 2008, he asked the bank to enable him to wire funds directly from his U.S. bank account to the Chinese account so that he could avoid the extra fees charged for the UAE wire transfers (Item 5).

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.² Openness and economic reform have increased, and foreign journalists were allowed greater freedom during the 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 State Department warned that foreign visitors 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 increase 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

² The facts cited derive from the documents submitted by Department Counsel, identified as I through XV.

and exporting or attempting to export sensitive U.S. technology to the PRC. U.S. 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.

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 Adjudicative Guidelines (AG).³ 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 interest⁴ 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.⁵ 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 compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁶

³ Directive. 6.3.

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

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 coercion.⁷ Applicant and his wife share living quarters. He has family members who are citizens and residents of the PRC. He has helped his foreign relatives by providing \$4,000 to purchase and furnish an apartment for them in China. His wife maintains a

⁷ ISCR Case No. 07-02485 at 4 (App. Bd. May 9, 2008).

bank account in China so that her mother can withdraw cash to support herself and Applicant's stepdaughter. Applicant transfers funds to this account in China, and is trying to establish a direct link between his U.S. account and her Chinese account to make such transfers easier. Applicant's relationship with his wife, and his demonstrated ties of obligation to his Chinese relatives, 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;

(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 routinely targets U.S. interests to obtain sensitive information. Applicant has not presented information that would show 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 13 years of honorable military service, and his continued service to the government through employment with a defense contractor. However, Applicant's current situation must be evaluated as well. Nothing in the record establishes Applicant's current ties to the United States. He has lived outside the United States for four years, and there is no evidence concerning U.S. family, property, or other indications of strong ties to the United States. Within weeks of arriving in the UAE, he had established a liaison with a

foreign national, and sought to continue it, despite having a security clearance at the time. He contributed to the purchase of foreign property, and he seeks to link his U.S. bank account with a Chinese account. It is unclear whether he plans to conform to Chinese law by meeting the requirements for him to be entered in his wife's "family book," which might entail his obtaining a Chinese visa. His ties to his current wife and her family are more current and obvious than his ties to the United States, and it cannot be determined, based on these facts 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 wife's foreign family appear to be casual, as they speak different languages and cannot communicate with each other. However, his willingness to provide several thousand dollars to help purchase a home for them, and his wish to continue depositing funds to his wife's account in China that is used to support them, indicates that he has a sense of obligation to them. Given these facts, foreign influence that would sway Applicant in their favor cannot be ruled out. AG ¶ 8(c) does not mitigate Applicant's situation.

Applicant failed to inform his security officer until he had been cohabitating with a foreign national for almost one-and-one-half years. He claims that he had no knowledge that he had to inform the company security officer. However, he informed his chain of command of his relationship, which offers some mitigation under AG ¶ 8(e). However, this mitigation is insufficient to outweigh the unmitigated facts that raise security concerns. I find against Applicant on 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 must 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 31 years old. He was a mature, responsible adult who had served 13 years in the Marine Corps and had held a security clearance since 1997. Despite his experience and knowledge of the obligations imposed on those who hold security clearances, he began and continued an intimate 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 over time. Within the past year, he has traveled to China to meet his foreign relatives. He has provided funds to help them purchase and furnish a home. There is every indication that the relationship with these family members will continue, as demonstrated by Applicant's and his wife's intent to use the home when she visits China in the future. Moreover, 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 |

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