



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



In the matter of:)
)
) ISCR Case No. 09-04632
)
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel

For Applicant: *Pro Se*

March 26, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, testimony, and exhibits, I conclude that Applicant failed to mitigate the Government's security concerns under the Foreign Influence adjudicative guideline. His eligibility for a security clearance is denied.

On November 20, 2007, Applicant signed and certified an Electronic Questionnaire for Investigations Processing (e-QIP). On October 16, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, Foreign Influence. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the

President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On November 6, 2009, Applicant answered the SOR, provided additional information, and requested a hearing before a DOHA administrative judge. The case was assigned to me on January 19, 2010. I convened a hearing on February 22, 2010, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The Government called no witnesses and introduced two exhibits (Ex. 1 and Ex. 2), which were admitted without objection. The Government offered for administrative notice a summary memorandum containing facts about the People's Republic of China (China) found in 16 official U.S. Government documents. The Government also provided for administrative notice the 16 source documents from which the facts in the summary memorandum were derived. I marked the Government's summary memorandum as Hearing Exhibit (HE) 1. Applicant did not object to my taking notice of the facts about China in the summary memorandum or in the source documents.

Applicant testified on this own behalf and called no witnesses. At the hearing, he introduced seven exhibits, which were identified as Ex. A through Ex. G and admitted without objection. I left the record open until close of business March 1, 2010, so that Applicant could, if he wished, provide one additional document for inclusion in the record. By e-mail dated March 9, 2010, Applicant provided a character reference from an individual who supervised him from November 2000 until September 2003. Department Counsel did not object to the admission of the document. Accordingly, it was admitted to the record as Applicant's Ex. H. DOHA received the transcript (Tr.) of the hearing on March 3, 2010.

Findings of Fact

The SOR contains seven allegations under AG B, Foreign Influence (SOR ¶¶ 1.a. through 1.g.). In his Answer to the SOR, Applicant admitted all seven allegations and provided additional information. Applicant's admissions are admitted herein as findings of fact.

After a thorough review of the record in the case, including Applicant's testimony, all exhibits, all relevant policies, and the applicable adjudicative guideline, I make the following findings of fact:

Applicant is 51 years old and employed as an associate by a government contractor. He was born and raised in China, where he received his secondary education and an undergraduate academic degree. From 1985 to 1993, he was employed first as a research assistant and later as a research associate by a specialized Chinese research institute. In 1993, he came to the United States to pursue Ph.D. studies, and he was awarded a Ph.D. by a university in the United States in 1996. Since that time, he has been employed by U.S. government contractors. Applicant

became a U.S. citizen in 2007. He has not previously held a security clearance. (Ex. 1; Ex. 2; Tr. 25-32, 78-79, 93-94.)

Applicant and his wife married in China in 1983. Their daughter was born in China in 1987. Applicant's wife and daughter accompanied him to the United States when he came to study for his Ph.D. His daughter, a recent graduate of a U.S. university, is a naturalized U.S. citizen. His wife is a citizen of China and has U.S. permanent resident status. In December 2009, she applied for naturalization as a U.S. citizen. (Ex. 1; Ex. A; Tr. 33-34, 80.)

Applicant is an only child. His parents, who are citizens and residents of China, are both 77 years old and retired. They reside in a Chinese provincial city in an apartment that they own. During her working years, Applicant's mother was an administrative assistant for a local government in China. Applicant's father was employed as a teacher of the Chinese language. Both parents receive pensions under the Chinese system. Neither parent has served in the Chinese military, is or has been a member of the Chinese Communist party, or has held political office in China. (Tr. 36-38; 63, 80.)

Applicant is close to his parents, who are in good health, and he communicates with them by telephone about once a week. He does not provide for their support, but he sends them a monetary gift at Chinese New Year. (Tr. 39, 57, 76-77.)

Applicant's mother-in-law, a widow, is also a citizen and resident of China. She is retired and resides in the same city as do his parents. Like Applicant's parents, she lives in an apartment she owns, and she receives a pension under the Chinese system. Applicant's wife communicates with her mother about once a month. (Tr. 39-41, 91.)

Applicant's wife has a brother and a sister, both of whom are citizens and residents of China. Applicant's sister-in-law, a retired factory worker, is married. The sister-in-law's husband, a professor of social science at a local college, served as a government official for a time. He is a member of the Communist Party. Applicant's sister-in-law and her husband are the parents of one daughter, who is in her 20s and works for a travel agent. (Tr. 41-44.)

Applicant's wife's brother owns a small auto parts business in China. He is married and the father of two children. His wife works with him in his business. Neither the brother-in-law nor his wife has been imprisoned, served in the military, or held a government office. Applicant's wife communicates with her siblings once a month or once every several months. (Tr. 45-46, 91.)

Between 1985 and 1993, when Applicant was employed at the Chinese research institute, he worked closely with an individual who was his supervisor and advisor. The person is a citizen and resident of China. In 2000, after Applicant received his Ph.D, the research institute invited him to a conference in China. Applicant attended the conference and saw his former supervisor and advisor, who was also at the conference.

After the conference, Applicant visited his parents. Applicant has not seen his former supervisor since the conference in 2000 in China. He and the former supervisor, who is now retired, have occasional e-mail contact and exchange greeting cards at Chinese New Year. (Ex. 2 at 2; Tr. 47-51.)

In addition to his trip to China in 2000, Applicant traveled with his family to China in 2002 and 2005 to visit his parents and his wife's family. He has not traveled to China since 2005. In 2008, Applicant's daughter traveled to China to attend the Olympic Games and to visit her grandparents. (Tr. 48-50, 92-93.)

In about 2002, before becoming a U.S. citizen, Applicant became active in a Chinese association in the U.S. city where he was living and working. He served on the organization's board of directors for about two years. In that capacity, he was invited, on one occasion, to a breakfast meeting with two Chinese government officials who were serving in the United States. Applicant has had no further contact with the officials. (Ex. 2 at 1-2; Tr. 51-52.)

Since becoming a U.S. citizen, Applicant has worked as a volunteer in a U.S. Presidential campaign. One of the individuals who worked with him as a volunteer provided a letter of character reference for the record. The individual stated that he perceived Applicant to be intelligent, kind, generous, thoughtful, and inquisitive. (Ex. C; Tr. 52-53.)

Applicant and his wife do not own property in China. He has no bank accounts, assets, or retirement funds in China. He acknowledged that, as an only child, he may inherit his parents' apartment some day. He estimated the value of the apartment to be between \$10,000 and \$20,000. (Tr. 54-55, 64-66.)

Applicant stated that all of his financial interests are in the United States. He owns his home, which he values at \$620,000. He and his wife have approximately \$330,000 in their 401(k) plans. Additionally, Applicant has about \$84,000 in bank accounts and stocks. He owns three automobiles which he values at \$60,000. (Tr. 79-80.)

Applicant provided a letter of character reference from an individual who has known him and his wife for about 20 years. The individual described Applicant as "a sincere, warm, honest, and ethical person" who is trustworthy and proud to be an American citizen. The person who supervised him from November 2000 to September 2003 observed that Applicant exhibited a high level of professionalism and personal integrity. (Ex. B; Ex. H.)

Applicant provided copies of several awards and commendations he had received from his employers for his leadership and technical expertise. (Ex. D; Ex. E; Ex. F; Ex. G.)

I take administrative notice of the following facts, which appear in official U.S. government documents:¹

China has powerful military forces, including strategic nuclear missiles. China is geographically vast, and has a population of over a billion people. It has significant resources and an economy that in recent years has expanded about 10% per year. China aggressively competes with the United States in many areas. China's competitive relationship with the United States exacerbates the risk posed by Applicant's connections to family members living in the China.

In China reported human rights problems include suppression of political dissent, arbitrary arrest and detention, forced confessions, torture and mistreatment of prisoners. The China also monitors communications devices, such as telephones, telefaxes, and internet servers.

China has an authoritarian, Communist government. China has a poor human rights record, suppresses political dissent, and practices arbitrary arrest and detention, forced confessions, torture, and other prisoner mistreatment.

China actively collects military, economic, and proprietary industrial information about the United States for the following reasons: (1) its position as a global power; (2) its military, political, and economic investments in the Pacific Rim and Asia; and (3) its leading role in the development of advanced technology that China desires for economic growth. China's active intelligence gathering programs focus on sensitive and protected U.S. technologies. "China's espionage and industrial theft activities [are] the leading threat to the security of U.S. technology."² China seeks "to obtain sensitive U.S. technologies (e.g., missile, imaging, semiconductor and submarine) illegally by targeting well-placed scientists and businessmen."³

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the

¹ The following facts are from the Department Counsel's documents submitted for Administrative Notice and U.S. Department of State, *Background Note, China*, October 2009 and, *China—Country Specific Information*, July 20, 2009 (Enclosures I and II).

²U.S.-China Economic and Security Review Commission, *2007 Report to Congress of the U.S.-China Economic and Security Review Commission* (2007 U.S. China ESRC Report), dated November 2007 at 104 (Enclosure V). Department Counsel's summary provides additional details of China's aggressive intelligence efforts directed towards acquiring U.S. secrets and proprietary technologies. *Id.* at 2-5.

³U.S. Department of Defense, Office of the Secretary of Defense, *Annual Report to Congress: Military Power of the People's Republic of China 2009* at 31; Department Counsel's summary at 3.

authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, the administrative judge applies these guidelines 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, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

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

Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

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 indicates three conditions that could raise a security concern and may be disqualifying in this 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; and
- (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.

AG ¶¶ 7(a), 7(b), and 7(d) are raised in this case. Applicant, his spouse, his parents, his mother-in-law, his sister-in-law, his brother-in-law, his daughter, and his former supervisor were born in China. His parents, mother-in-law, brother-in-law, sister-in-law, and former supervisor reside in China. Applicant, his spouse, and his daughter have close connections with family members living in China. Applicant has particularly close connections with his parents. His spouse has close connections to her mother,

brother, and sister, who is married to a member of the Communist Party in China. Applicant shares living quarters with his spouse.

Applicant has a continuing relationship with his former supervisor at a Chinese government research facility. Although Applicant has not seen the supervisor since he attended a conference in China in 2000, he continues to exchange greetings with the supervisor at least once a year. This contact, while not regular, is significant because the individual acted as Applicant's advisor and has knowledge of his professional training and expertise.

Applicant communicates weekly with his parents, and his wife communicates with her mother monthly and with her siblings monthly or every few months. These frequent familial communications reflect Applicant's and his spouse's ties of affection with their family members living in China. "[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120 at 3 (App. Bd. Feb. 20, 2002). Applicant provided no information to rebut the presumption. His relationship with his parents and his wife's relationship with her mother and her siblings are sufficient to create "a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." These relationships with residents of China create a potential conflict of interest between Applicant's "obligation to protect sensitive information or technology and [his] desire to help" family members who are in China. For example, if the Chinese Government wanted to expose Applicant to coercion, it could exert pressure on his parents. Applicant is also subject to potential, indirect coercion through his spouse's relationship with her mother, brother, and sister.

The mere possession of close family ties with a family member living in China is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one relative living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See *Generally* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

The nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion or inducement. 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, or the country is known to conduct intelligence collection operations against the United States. The relationship of China with the United States places a significant, but not insurmountable, burden of persuasion on Applicant to demonstrate that his contacts with his family members living in China, and his spouse's relationships with her family members living in China, and his relationship with his former supervisor living in China do not pose a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.” ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317 at 4-5 (App. Bd. Mar. 29, 2002).

While there is no evidence that intelligence operatives from China seek or have sought classified or economic information from or through Applicant, his spouse, or their family members or his former supervisor living in China, it is not possible to rule out such a possibility in the future. Applicant’s relationships with family members and his former supervisor living in China create a potential conflict of interest because these relationships are sufficiently close to raise a security concern about his desire to assist his spouse or their family members living in China, in the event they should be pressured or coerced by agents of the Chinese government or intelligence services for sensitive or classified information. Department Counsel produced substantial evidence of Applicant’s contacts with his parents and his spouse’s contacts with her mother, sister, and brother living in China and has raised the issue of potential foreign pressure or attempted exploitation. AG ¶¶ 7(a), 7(b), and 7(d) apply.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns including:

- (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;
- (d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(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; 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.

AG ¶¶ 8(a) and 8(c) have limited applicability. Applicant traveled to China in 2000, 2002, and 2005. Applicant has frequent contact with his parents and more intermittent contact with his former supervisor, all of whom live in China. His spouse has frequent contact with her mother. Because of his connections to China, to his parents, and to his former supervisor, and his spouse's contacts with her mother, sister, and brother, Applicant is not able to fully meet his burden of showing there is "little likelihood that [his and his spouse's relationships with relatives who are Chinese citizens] could create a risk for foreign influence or exploitation."

AG ¶ 8(b) partially applies. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S." Applicant has strong family connections to the United States. His daughter is a U.S. citizen and his wife recently sought naturalization as a U.S. citizen. Applicant has participated as a volunteer in the U.S. presidential election process. He owns a house in the United States. He has lived in the United States since 1993, and he has been a citizen since 2007.

Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationships with his family members and his former supervisor who live in China. He frequently communicates with his parents. His spouse frequently communicates with her mother. There is no evidence, however, that terrorists, criminals, the Chinese Government, or those conducting espionage have approached or threatened Applicant or his family in China to coerce Applicant or his family for classified or sensitive information. As such, there is a reduced possibility that Applicant or Applicant's family would be specifically selected as targets for improper coercion or exploitation. While the Government does not have any burden to prove the presence of such evidence, if such record evidence was present, Applicant would have a heavy evidentiary burden to overcome to mitigate foreign influence security concerns. It is important to be mindful of the United States' recent relationship with China, and especially China's systematic human rights violations. China's conduct makes it more likely that China would coerce Applicant through his family living in China, if China determined it was advantageous to do so.

AG ¶¶ 8(d) and 8(e) do not apply. The U.S. Government has not encouraged Applicant's involvement with family members living in China. Applicant is not required to report his contacts with family members living in China.

AG ¶ 8(f) has minimal applicability. Applicant has substantial property interests in the United States, which include his employment and the value of his home in the United States. However, this mitigating condition can only fully mitigate security concerns raised under AG ¶ 7(e), and AG ¶ 7(e) is not raised in this case.

In sum, the primary security concern is Applicant's close relationship with his spouse, his parents, and his former supervisor, as well as his spouse's relationships with her mother, brother, and a sister who is married to a member of the Chinese Communist party. His parents, former supervisor, and his in-laws live in China and are readily available for coercion. The Chinese government's history of espionage (especially industrial espionage) against the United States and its failure to follow the rule of law further increase the risk of coercion.

Nothing in Applicant's answers to the Guideline B allegations in the SOR suggested he was not a loyal U.S. citizen. Section 7 of Executive Order 10865 specifically provides that industrial security clearance 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."

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 relevant 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 the whole person concept and all the facts and circumstances surrounding this case. Applicant is a talented, honorable, and hard-working U.S. citizen. He is considered to be a valued employee. He sought to use his experience, skills, and knowledge to serve his adopted country, and he sought a security clearance as a government contractor.

Applicant, an only child, is attentive and devoted to his mother and father, who are citizens and residents of China. Applicant is an admirable family member and an appreciative friend. However, he failed to extenuate or mitigate the security concerns raised by his contacts and relationships with his parents, who are citizens and residents of China, and his former supervisor, who is a citizen and resident of China, and with his wife's mother, brother, and sister, who are residents and citizens of China, a country that poses "an extraordinary threat to the national security, foreign policy, and economy of the United States."

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising under AG B.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the amended SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B: AGAINST APPLICANT

Subparagraphs 1.a through 1.g.: Against Applicant

Conclusion

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

Joan Caton Anthony
Administrative Judge