



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



In the matter of:)
)
) ISCR Case No. 09-06481
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

May 31, 2011

Decision

COACHER, Robert E., Administrative Judge:

Although Applicant mitigated the security concerns raised by his personal conduct, he failed to mitigate the security concerns raised by his foreign influence. Eligibility for access to classified information is denied.

Statement of the Case

On October 6, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline B, Foreign Influence and Guideline E, Personal Conduct. DOHA acted 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 implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on October 15, 2010, and requested a hearing before an administrative judge. The case was assigned to me on January 18, 2011.

DOHA issued a Notice of Hearing on January 24, 2011, and I convened the hearing as scheduled on February 17, 2011. The Government offered Exhibits (GE) 1 through 5, which were admitted into evidence without objection. The Government's exhibit list was marked as Hearing Exhibit (HE) I. Applicant testified, called five witnesses, and submitted exhibits (AE) A through G, which were admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on February 25, 2011.

Procedural and Evidentiary Ruling

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the People's Republic of China (PRC). Applicant did not object and the request was approved. The request and the attached documents were not admitted into evidence but were included in the record as HE II. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

Applicant is a 26-year-old software engineer for a defense contractor. He has worked for the same company since 2006. He was born in the Taiwan in 1994, came to the United States when he was three years old, and has lived here since. He was naturalized as a U.S. citizen in 1999. He has a master's degree. He currently holds a security clearance. He married his wife in June 2010.¹

Applicant's wife is a citizen of the PRC.² She is 24 years old. She moved to the United States eight months before Applicant's hearing. Before moving here, she resided in the PRC. She was a member of the Communist Party while she lived in the PRC until she resigned in October 2009. She joined the party for career enhancement purposes when she was in college. She was declared ineligible for permanent residency status by the U.S. Citizenship and Immigration Service because of her communist party membership. After her resignation from the Communist Party was transmitted to the U.S. Citizenship and Immigration Service, she was issued a green card. She last visited the PRC two weeks before Applicant's hearing. He accompanied her on that visit. The purpose of the trip was to spend time with her family during the Chinese New Year holiday. In the future, she plans on visiting China every two years.³

Applicant's father-in-law and mother-in-law are both citizens and residents of the PRC. Neither are members of the Communist Party. Applicant has minimum contact with his wife's parents. He chatted with them, using a computer phone service, a "handful" of times since his wife came to the United States. His wife initially contacted

¹ Tr. at 6, 7; GE 1, 4; Answer to SOR (Answer).

² SOR ¶¶ 1.b through 1.i refer to Applicant's fiancé, who is now his wife.

³ Tr. at 65-72, 85; GE 3 (p. F71); AE B; Answer.

her parents every day using the computer phone service. More recently, her telephone contact with her parents has been about once a month.⁴

Applicant's wife has an uncle, aunt, and cousin who are citizens of and reside in the PRC. All three are members of the Communist Party. Her aunt had a position with the district government where she resides. She recently retired from that position. Her uncle is an airport administrator for the district and a higher ranking official in the Communist Party than his wife. Her cousin is a speechwriter for a local official. Applicant has met all three relatives. On one occasion, upon Applicant's arrival in China, he was met at the airport by the uncle and aunt. They asked him questions about his job to the point that Applicant felt uncomfortable about answering their questions and decided to remain silent.⁵

Applicant traveled to the PRC the four times alleged in the SOR (July 2008, December 2008, May 2009, December 2009). The first trip was with his bible study group. The purpose of the trip was to teach English to Chinese children. He first met his wife-to-be when he was on this trip. His second trip was with his brother and a friend. The purpose was to visit his wife-to-be and let his brother and friend meet her. The third trip was when Applicant proposed to his wife-to-be and attend her college graduation. The fourth trip allowed him to assist her as she sought a visa to come to the United States. Additionally, Applicant returned to the PRC in January and February 2011 to spend the Chinese New Year celebration with his wife's family.⁶

In September 2008, upon learning of Applicant's contacts with his girlfriend (future wife) and her family members, the company's security manager advised Applicant about refraining from discussions about work. Additionally, Applicant was specifically advised that he might want to sever his relationship with his girlfriend to maintain his security clearance. Applicant indicated that he had no intentions of severing his relationship.⁷

Applicant admitted that he made a number of acquaintances who are citizens and residents of China on his trips there. They do not keep in close contact and he may only hear from them once or twice a year. He has extensively reported all of his contacts to his company's security representative.⁸

Applicant's sister, who is a U.S. citizen, is a teacher who taught in South Korea, but she no longer teaches there. She is currently teaching English in Saudi Arabia.⁹

⁴ Tr. at 91-92; GE 1; Answer.

⁵ Tr. at 88, 91, 93; GE 1, 3, 4.

⁶ Tr. at 74, 90; GE 3; Answer.

⁷ GE 3 at p. F63.

⁸ GE 1, 3; Answer

⁹ Answer.

Applicant had three security incidents between April 2007 and December 2008. None of the incidents resulted in the compromise of classified information. The first incident occurred in April 2007, when he inadvertently brought his cell phone inside a sensitive compartmented information facility (SCIF). He recognized that the cell phone was in his pocket when he initially sat down to start work for the day and immediately left the SCIF and reported his actions. The second incident occurred in June 2007, when he failed to secure a safe in his office as he departed the facility. In response to this incident, he set up a reminder system to check the safe before he departed for the day. The last incident occurred in December 2008, when he used a classified computer for a software test but failed to log-off the computer when he left work for the day. An automatic screen saver activated within a few minutes to lock the computer so there was no compromise. He was required to complete a security checklist every day for 30 days before leaving work because of his actions. He was given training after each incident and he has not had a security incident since then. No disciplinary actions resulted from any of these incidents because management considered them minor.¹⁰

Four witnesses from Applicant's company testified favorably for him. All were of the opinion that he was an outstanding worker with high integrity. They all recommended that he should be granted a security clearance. His performance evaluations from 2007 through February 2011 show an overall rating of "far exceeds expectations" or "exceeds expectations." He is viewed as a top-notch employee by his company.¹¹

People's Republic of China

The PRC is a large and economically powerful country, with a population of over a billion people and an economy growing at about 10% per year. The PRC has an authoritarian government, dominated by the Chinese Communist Party. The PRC has a poor record with respect to human rights, suppresses political dissent, and its practices include arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners.

The PRC is one of the most aggressive countries in targeting sensitive and protected U.S. technology, and economic intelligence. It has targeted the U.S. with active intelligence gathering programs, both legal and illegal. In China, authorities have monitored telephone conversations, facsimile transmissions, e-mail, text messaging, and internet communications. Authorities opened and censored mail. The security services routinely monitored and entered residences and offices to gain access to computers, telephones, and fax machines. All major hotels had a sizable internal security presence, and hotel guestrooms were sometimes bugged and searched for sensitive or proprietary materials.

¹⁰ Tr. at 38-43; 94; GE 1; Answer.

¹¹ Tr. at 33-64; AE G.

Policies

When evaluating an applicant's suitability for a security clearance, the 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 to be 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, Administrative Judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense 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 the 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 adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 7:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. Three are potentially applicable 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.

Applicant's wife is a citizen of the PRC. She has lived in the United States less than one year. She was a member of the Communist Party until 2009. Her parents are citizens and residents of the PRC. Her uncle, aunt, and cousin are citizens and reside in the PRC, and are members of the Communist Party. China is a communist country with a poor human rights record. It is one of the world's most aggressive nations in the collection of U.S. intelligence and sensitive economic information. Applicant's wife creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion. She also creates a potential conflict of interest. Applicant made several acquaintances with citizens and residents of China during his many visits there. Applicant's foreign connections create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. AG ¶¶ 7(a), 7(b), and 7(d) have been

raised by the evidence. Applicant's sister is no longer residing in South Korea, thus alleviating any heightened risk of potential conflict of interest. SOR ¶ 1.a is resolved in Applicant's favor.

Conditions that could mitigate Foreign Influence security concerns are provided under 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.;

(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.

Applicant is clearly a loyal U.S. citizen with no allegiance to the government of China. However, he is in a difficult position because his wife of less than one year is a citizen of China, and former member of the Communist Party. Her parents still live in China and her uncle, aunt, and cousin not only live in China, but are active members of the Communist Party. They even queried Applicant about his job on one occasion. His frequent trips to China, including his most recent trip in January and February 2011, indicate his close ties to his wife's family. Although Applicant has longstanding ties to the United States and has fully met his reporting requirements concerning his foreign contacts, his wife has almost no ties to this country. As stated above, the protection of the national security is the paramount consideration and any doubt must be resolved in favor of national security. Doubts remain about Applicant's wife. Because of Applicant's close ties to his wife and the nature of the government of China, I am unable to find any

of the mitigating conditions to be fully applicable to SOR ¶¶ 1.b. through 1.j. AG ¶ 8(b) partially applies because of Applicant's long-standing loyalties in the United States. AG ¶ 8(e) applies because Applicant reported his foreign contacts. Additionally, AG ¶ 8(c) applies to the acquaintances he made, outside of his wife's family, while traveling in China. Despite the presence of some mitigation, it is insufficient to overcome the significant security concerns generated by Applicant's Chinese wife and her family.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant's three security incidents are covered under Guideline K, Handling Protected Information. The Government did not allege his conduct under that guideline, but proceeded under the personal conduct guideline. Applicant's conduct was inadvertent in all three cases and was promptly reported when discovered by him. There was no compromise of protected information. Applicant was trained after each incident and responded by creating techniques for future use to avoid duplicating his errors. No further incidents have happened in over two years. Applicant's actions in response to these incidents reflect good judgment, trustworthiness, reliability, candor,

and a willingness to comply with rules. Additionally, any vulnerability to his personal standing created by his actions was remedied by his follow-up actions after each incident. The record contains insufficient evidence to support application of AG ¶¶ 16(d) and (e) in this case.

Whole-Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

Applicant's wife has been in this country for less than one year. She is a citizen of China and a former member of the Communist Party. She has strong ties to her family in China, including family members who are Communist Party members. Applicant has visited China five times since 2008. On one visit he was asked about his job by his wife's family who are Communist Party members. The PRC has an authoritarian government, a bad human rights record, and has a very aggressive espionage program aimed at the United States. 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. 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 operations against the United States. There is no reason to question Applicant's loyalty and devotion to this country. However, he has not overcome the vulnerability to pressure, coercion, exploitation, and duress created by his foreign wife.

I considered all of Applicant's very favorable character evidence. He is a valued and trusted employee. He has done nothing whatsoever to question his loyalty and devotion to this country. However, he has simply been unable to overcome the "very heavy burden" of showing that he, his wife, or her family members in the PRC are not

subject to influence by that country.¹² His vulnerability to foreign pressure, coercion, exploitation, or duress remains a concern.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Foreign Influence security concerns. The Government failed to establish substantial evidence supporting the allegations under personal conduct.

Formal Findings

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

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b – 1.j:	Against Applicant
Subparagraph 1.k:	For Applicant
Paragraph 2, Guideline E	FOR APPLICANT
Subparagraphs 2.a – 2.c:	For Applicant

Conclusion

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

Robert E. Coacher
Administrative Judge

¹² ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007).