



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-07242
)	
Applicant for Security Clearance)	

Appearances

For Government: Marc G. Laverdiere, Esquire, Department Counsel
For Applicant: *Pro se*

March 24, 2011

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On June 23, 2010, the Defense Office of Hearings and Appeals (DOHA) issued 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 (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In an undated response to the SOR received by DOHA on August 26, 2010, Applicant admitted the seven allegations raised under Guideline B and requested a hearing before an administrative judge. The case was assigned to me on September 23, 2010. Department Counsel and Applicant agreed to a October 21, 2010, hearing date. A Notice of Hearing was issued by DOHA on September 30, 2010, setting the hearing for that date. On October 19, 2010, Applicant requested a postponement of the proceedings due to the illness of a witness. By mutual agreement of the parties, the hearing was postponed to November 2, 2010. An Amended Notice of Hearing was issued on October 20, 2010, changing the hearing date to November 2, 2010.

The hearing took place as scheduled. Department Counsel submitted four exhibits (Ex.) which were accepted into the record as Exs. 1-4 without objection. I also accepted Department Counsel's memorandum requesting administrative notice of certain facts related to the People's Republic of China (China). It was accepted without objection as HE-1. Applicant gave testimony, introduced two witnesses, and offered 13 documents, which were accepted into the record without objection as Exs. A-N.¹ The transcript (Tr.) was received on November 10, 2010. Without objection, Department Counsel forwarded one additional document submitted by Applicant on November 23, 2010. It was received on December 1, 2010, and accepted as Ex. O. The record was then closed. Based upon a review of the case file, exhibits, and testimony, security clearance is denied.

Administrative Notice

The Government requested administrative notice of certain facts and materials regarding China. Its submission (HE-1) included 15 official documents to support the Government's summation about China (HE-1 i-xv). Applicant did not object to my consideration of those exhibits.² The facts administratively noticed are limited to matters of general knowledge and matters not subject to reasonable dispute. The facts administratively noticed are as follows:

China is a large and economically powerful country, with a population of over a billion people and an economy growing at about 10% per year. It has an authoritarian government dominated by the Chinese Communist Party. China has a poor record with respect to human rights, suppressed political dissent, and engages in arbitrary arrests and detentions, forced confessions, torture, and mistreatment of prisoners.

China is one of the most aggressive countries in the world for seeking sensitive and protected U.S. technology and economic intelligence. It targets the United States with active intelligence gathering programs, both legal and illegal. As a result, it is a growing threat to U.S. national security. In China, authorities routinely monitor telephone conversations, facsimile transmissions, e-mail, text messaging, and internet communications. Authorities open and censor mail. Its security services have entered personal residences and offices to gain access to computers, telephones, and fax machines. Hotel guestrooms are sometimes bugged and searched for sensitive or proprietary materials. There are several reports of recent cases involving actual or attempted espionage and the illegal export of information to China.

¹ Originally accepted as Ex. A (Tr. 41), that document was reorganized as Ex. N to conform with Applicant's lettering system on the remainder of his documents. It is a transcription of Applicant's prepared opening statement.

² Tr. 9-10.

Findings of Fact

In his answer to the SOR, Applicant admitted the seven factual allegations at issue (SOR allegations ¶¶ 1.a-1.g). Specifically, he admitted that his spouse and son are citizens of China and residents of the United States (¶¶ 1.a and 1b, respectively); that a cousin (¶ 1.b) and his father are a residents and citizens of China (¶1.c); that he maintains weekly contact with his father in China (¶ 1.d); that his brother and mother-in-law are residents and citizens of China (¶¶ 1.e and 1.f, respectively); and that he traveled to China in 2005 (¶ 1.g). His admissions are incorporated herein.

Applicant is a 49-year-old program analyst who has worked for the same defense contractor since 2009. He was born and raised in China, where his family faced considerable deprivation and Applicant endured a difficult childhood in a remote region.³ Applicant's father secretly learned English. He encouraged Applicant to do the same with the hope of some day immigrating to the United States.⁴ Applicant eventually earned a bachelor's degree in the early 1980s. In 1987, he married a highly educated professional woman. They had a child a few years later. Applicant and his family moved to the United States in 1998. In the United States, Applicant completed a master's degree in 2000.

In 2007, Applicant applied for U.S. citizenship. In 2008, he became a naturalized U.S. citizen and immediately voted in an election to feel "what democracy means."⁵ When Applicant's wife applied for a green card in 2007, she falsely claimed that she had a patent in China, thinking it would make her application stronger. She later admitted that her statement was untrue. It is Applicant's understanding that this has made her ineligible to apply for U.S. citizenship, although she maintains a resident alien card.⁶ Consequently, Applicant's wife is a resident of the United States, but remains a citizen of China. Since coming to the United States, she has visited her family in China three times, in 2000, 2005, and 2006.⁷

Concerned that his wife's falsity concerning the patent, or any other actions attributable to her, might jeopardize his career, Applicant and his wife have executed a notarized agreement. Under the terms of that document, Applicant will divorce her if "she

³ Tr. 18-22.

⁴ Tr. 21, 23. Applicant stated, "my father always said his life was ruined by the Chinese government. He don't [sic] want my life to be ruined in the same way." Tr. 23.

⁵ Tr. 24.

⁶ Tr. 46-52.

⁷ Tr. 52.

were to do anything adverse to the U.S. government or if she were to leave the [United States].”⁸

Applicant’s son is a an upperclassman at a prestigious U.S. college. He maintains a 3.9 grade point average in a difficult major, and recently received a near-perfect score on the Law School Aptitude Test (LSAT). Because of grants and scholarships, he will graduate with little to no debt. He became eligible to apply for U.S. citizenship in 2010.⁹ He has not yet applied for U.S. citizenship because the application requires one to list a place of residence of at least three months, and his quarterly semester calendar confounds his ability to stay at one address for more than three months.¹⁰ He intends to apply for U.S. citizenship after he graduates next year. The son has not been back to China since the family arrived in the United States. He has no desire to return. He is poised to have “a bright future here in the United States.”¹¹

Applicant’s father is a resident and citizen of China. He is now retired. He now teaches English to children, a vocation he enjoys and which pays more than his Chinese government pension, which only pays about \$200 a month.¹² Applicant used to maintain regular contact with his father by telephone. When advised that contact with his father in China posed a security risk, Applicant ceased all contact with his father in September 2010, an action he accepts as “reasonable.”¹³ In his late 70s, Applicant’s father is in failing health and unable to travel. He does not know what Applicant does for a living. Until recently, Applicant’s older brother, a resident and citizen of China, works in the private sector. He used to live with his father, but has since moved elsewhere. The father now lives alone. Applicant has not had contact with his older brother in over two years.¹⁴ The two have little in common and are not close.¹⁵

Applicant traveled to China in 2005. At the time, both his father and his late mother were in the hospital. His father was hospitalized with a broken leg, while his

⁸ Tr. 74; Ex. H (Agreement, dated Aug. 24, 2010).

⁹ Tr. 56-57.

¹⁰ Tr. 28.

¹¹ Tr. 30.

¹² Tr. 32.

¹³ Tr. 31. Applicant noted that he thinks his father “totally understands. Because my father is the same as me; we always think in the child’s interest. . . . My father is very proud of my being a U.S. citizen.” Tr. 32.

¹⁴Tr. 33, 62.

¹⁵ Tr. 62-63.

mother was suffering from cancer.¹⁶ During his nine-day stay in China, Applicant stayed at the hospital with his parents. There, his father, who “thinks the Chinese government ruined his whole life” told Applicant to “never come back, [to] just stay in the United States to be a good United States citizen.”¹⁷

Also a resident and citizen of China is Applicant’s mother-in-law, a retired private sector worker. Applicant’s wife calls her mother annually, usually on the Chinese New Year.¹⁸ Applicant may also phone some of her three siblings, who are residents and citizens of China, at the same time.

Applicant is a highly valued employee at work. He has received excellent appraisals. A co-worker testified that Applicant is extremely reliable, a hard worker, and a great asset to the company.¹⁹ His supervisor testified that Applicant is “absolutely outstanding, exceptional . . . number one. . . . He is really super important because we really depend on him to work the projects one by one.”²⁰ She has been impressed with his reliability and trustworthiness.

Applicant has an annual income of about \$175,000. He has paid off the mortgage on the house they bought in 2003, which presently is valued at about \$330,000. Their son will not be a dependant after he graduates from college.²¹ Applicant attends a local church and is an avid listener of talk radio. He is devoted to his job and has contributed 164 hours of voluntary service to various efforts. He donates to various charities.

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s over-arching adjudicative goal is a fair, impartial and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the

¹⁶ Tr. 34.

¹⁷ Tr. 34-35.

¹⁸ Tr. 64-65.

¹⁹ Tr. 78-79.

²⁰ Tr. 88.

²¹ Tr. 37.

“whole-person concept.” All available, reliable information about the person, past and present, favorable and unfavorable, must be and were considered 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 my decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence submitted.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”²² The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.²³

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 an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²⁴ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.²⁵ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.²⁶ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

²² See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

²³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Executive Order 10865 § 7.

Based upon consideration of the evidence, I find Guideline B (Foreign Influence) to be the most pertinent to the case. Conditions pertaining to this AG that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are discussed below.

Analysis

Guideline B – Foreign Influence

The concern under Guideline B is that 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. Consideration should be given to 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 U.S. citizens to obtain protected information or is associated with a risk of terrorism. Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are discussed in the conclusions below.

The country at issue is China. It targets the United States with active intelligence gathering programs, both legal and illegal, and poses a considerable threat to U.S. national security. Consequently, given the heightened risk associated with that country, a high degree of scrutiny is warranted in my assessment below.

Applicant's foreign contacts are his father, brother, mother-in-law, and other extended relations who are residents and citizens of China, one of the most aggressive countries conducting industrial espionage today. Although they reside in the United States, Applicant's wife and son remain citizens of China, and Applicant's wife has repeatedly traveled to China, where she could have been vulnerable to Chinese governmental influences. Such facts are sufficient to give rise to Foreign Influence Disqualifying Conditions 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 exploitation, inducement, manipulation, pressure, or coercion) and AG ¶ 7(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). With disqualifying conditions thus raised, the burden shifts to Applicant to mitigate security concerns.

Applicant's wife has consented to not return to China under penalty of divorce, and his son has no interest in visiting his former home. Applicant is not close to his older brother and the two do not maintain a relationship. However, Applicant's father remains

a citizen and resident of China. The two share an understandable fondness for each other. Applicant was inspired to seek out a life in the United States at his father's suggestion. Although Applicant recently stopped contact with his father, the cessation of their telephonic contact does not end their bond. Applicant's father is nearing 80, lives alone, and receives a Chinese government pension. Consequently, he is in a vulnerable position. In addition, Applicant's wife maintains telephonic contact with her mother and siblings in China. In these cases, foreign contacts maintained by a spouse can be attributable to an applicant. Applicant's mother-in-law may be retired from the private sector, but there is insufficient information to assess her or her vulnerability. Given these facts in the context of the country at issue, Foreign Influence Mitigating Condition 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.) applies with regard to Applicant's wife, son, and brother, but not his father and mother-in-law.

As noted, Applicant's wife and son live in the United States. It is highly unlikely either will return to China. In addition, Applicant has ceased communication with his father. He has not had contact with his older brother in over two years. His wife, however, continues to maintain contact with Applicant's mother-in-law and other relations. Insufficient evidence was introduced to gauge how close Applicant and his wife are to these relations. Therefore, 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) applies to Applicant's father and brother, but does not apply to Applicant's mother-in-law. It is inapplicable in the context of Applicant's wife and son.

Applicant has fulfilled his dream, and that of his father, by residing in and being a citizen of the United States. He is intensely proud of this achievement and is undoubtedly a loyal American. Although his wife and son are citizens of China, they have negligible contact with relations in that country. There is little information about Applicant's mother-in-law, who is a citizen and resident of China. However, although he does not maintain a relationship with his brother and he has ceased contact with his father in China, Applicant continues to demonstrate strong and natural feelings for his father.

Applicant's father has had a life-long antipathy for the Chinese government and has long motivated Applicant to seek out a new life in the United States. When Applicant visited him in 2005, his father told him not to return to China. Neither Applicant nor his father had difficulty severing ties in 2010, thinking it was the best thing for Applicant's career. Applicant's testimony implies that there is a tacit agreement between father and son to do whatever it takes to not let China jeopardize the son's future. Because the country at issue is China, however, this case requires heightened scrutiny. Applicant, understandably, retains feelings for his father. His father is elderly, lives alone, and is

partly dependent on a Chinese government pension. Such facts leave both father and son malleable. Under these facts, AG ¶ 8(b) (there is no conflict of interest, either because the individual's sense of loyalty to 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) applies to Applicant's wife, son, and brother, but does not apply to his father and mother-in-law.

Applicant is clearly a loyal U.S. citizen. While it seems reasonable to conclude that neither his wife, son, or brother represent genuine security concerns, his father and, to a lesser extent, his mother-in-law sustain foreign influence security concerns.

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). 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 all the facts and circumstances surrounding this case, as well as the "whole-person" factors. Applicant is a highly credible and mature man who has fulfilled his dream by building a successful life in the United States. His wife is a well-educated individual. His son is a highly successful student and an academic with much promise. Applicant is financially well-situated. He is a highly valued employee. At his father's urging, he has not permitted any obstacle to interrupt his pursuit of a better life in the United States. To this end, he has ceased communication with his father and signed an agreement to divorce his wife if her actions jeopardize his career.

While Applicant's wife, son, brother, and mother-in-law pose some potential degree of security concern, it is mainly Applicant's father who sustains foreign influence security concerns. Although it is clear that Applicant and his father are in accord in their belief that nothing should jeopardize Applicant's career, Applicant's father remains vulnerable to coercion and their recent resolve to cease contact has been untested by time. His age, living conditions, and partial dependence on a government pension make him vulnerable to involuntary influence. In turn, Applicant retains understandable feelings and concerns for his father. While their attempts to partition themselves from influence might be sufficient in some circumstances, the country at issue is China. The administrative notice materials and testimony are replete with information about the aggressiveness of that nation in collecting sensitive information and the threat it poses to the United States. In light of these facts, foreign influence security concerns are unmitigated. Clearance is denied.

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
Subparagraphs 1.a-1.c:	Against Applicant
Subparagraphs 1.d-1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For 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. Clearance denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge