



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



In the matter of:)
)
) ISCR Case No. 10-04991
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

October 19, 2011

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the Foreign Influence concern raised by his family and close friends who are citizens and residents of China. Clearance is denied.

Procedural History

On January 24, 2011, the Defense Office of Hearings and Appeals (DOHA) made a preliminary determination to deny Applicant access to classified information.¹ The basis for this decision is set forth in a Statement of Reasons (SOR), which alleges the security concern under Guideline B (Foreign Influence). Applicant responded to the SOR on February 5, 2011 (Answer). He admitted all the allegations in the SOR and requested a decision on the administrative record.

¹ This action was taken pursuant to 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 Adjudicative Guidelines (AG) implemented by the Department of Defense on September 1, 2006.

On March 28, 2011, Department Counsel filed a request, on behalf of the Government, for a hearing.² A hearing in this case was originally scheduled for May 11, 2011 before another administrative judge. The hearing was canceled and the case was re-assigned to me on June 7, 2011. After coordinating with the parties, I re-scheduled the hearing for July 21, 2011. As a time management tool, I issued a prehearing order requiring the parties to serve one another and me their anticipated exhibits prior to the hearing.³

At hearing, Department Counsel offered four exhibits, which were marked as Government Exhibits (GE) 1 through 4. GE 1, 2, and 4 were admitted into evidence.⁴ GE 3 is the Government's request for administrative notice as to China. After the hearing, the Government provided the official U.S. source documents referenced in GE 3. These documents are marked as GE I through GE XVI. GE XVII and GE XVIII, which were also provided by Department Counsel, are the current versions of two of the source documents referenced in GE 3. The facts administratively noticed are set forth in my findings of fact. Applicant did not offer any documents, but did testify at the hearing. At the conclusion of the hearing, I granted the Government's motion to amend the SOR to add allegation 1.e.⁵ The transcript (Tr.) was received on August 2, 2011.

Findings of Fact

Applicant is 58 years old. He was born and raised in China. In 1986, he immigrated to the United States on a student visa. He attended a prestigious U.S. university and received his master's degree in 1989. He then moved to New York where he spent over 19 years working as a high school teacher. He was granted U.S. citizenship in 2000 and currently works on a part-time basis for a government contractor as a translator.⁶

Applicant married his wife in China in 1981. They have one adult child. Applicant's wife and child are both U.S. citizens. Applicant has lived at the same address since 1993.⁷

² Hearing Exhibit (HE) I.

³ HE II.

⁴ GE 2 contains information relating to Applicant taking and failing a polygraph examination as part of a background investigation for another government agency. The Government averred that I could "disregard" such evidence. Accordingly, I have not considered such information.

⁵ "You have two brother-in-laws and one sister-in-law, who are citizens and residents of the People's Republic of China." I made a pen-and-ink change to the SOR to annotate this amendment. Applicant admitted this additional allegation. Tr. at 59-60, 67.

⁶ GE 1; GE 2; Tr. at 62-64.

⁷ GE 1 and 2.

Applicant's mother, brother, and one of his sisters are citizens and residents of China. Applicant's mother is in her mid-eighties and in poor health. Applicant speaks frequently to his sister, who cares for their mother, in order to check on his mother's condition. Applicant's mother-in-law, brothers-in-law, and sister-in-law are also citizens and residents of China. He has several close friends who are citizens and residents of China, including two that he listed as references on his security clearance application (SCA). He travels to China once every other year to visit his family and friends. Applicant fully disclosed his foreign family members, friends, and visits to China on his SCA.⁸

China is "undergoing profound economic and social change."⁹ However, China remains an authoritarian state controlled by the Chinese Communist Party.¹⁰ "The Chinese constitution and laws provide for fundamental human rights, including due process, [] these are often ignored in practice."¹¹ Chinese security personnel conduct surveillance of those who visit China, including searching personal possessions left in hotel rooms, such as computers, without consent.¹² China and the United States work closely together in areas of mutual interest, including threats to global security posed by rogue states.¹³ However, intelligence gathering efforts targeting sensitive U.S. technologies emanating from China remains robust.¹⁴

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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 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

⁸ Answer; GE 1; GE 2; Tr. at 59-60.

⁹ GE XVII at 1.

¹⁰ GE I at 7-8; GE XVII at 1; GE XVIII at 1.

¹¹ *Id.* at 8-9. See generally, GE XVIII.

¹² GE XVII at 4.

¹³ GE I at 20-21.

¹⁴ See generally, GE IV and GE V

available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to obtain a favorable security decision. In resolving this ultimate question, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b).

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 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.”

Analysis

Guideline B, Foreign Influence

The foreign influence concern is set forth at AG ¶ 6, as follows:

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.

Applicant’s strong ties to China, through his family and friends, raise the above concern. These ties also raise the following disqualifying conditions under AG ¶ 7:

- (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;
- (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.

In light of China's abysmal human rights record and robust espionage efforts directed against the United States, there is a heightened risk that Applicant could be subjected to foreign pressure or influence through his family and friends in China. Applicant and his spouse are clearly close to their family members, who are citizens and residents of China. Applicant also maintains to the present day lifelong friendships with former co-workers and classmates who are citizens and residents of China. Consequently, these strong foreign ties, combined with the country at issue, establish AG ¶ 7(a), (b), and (d).

AG ¶ 8 sets forth a number of conditions that could mitigate the foreign influence concern. I have considered all the mitigating conditions and find the following warrant further discussion:

- (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.; and
- (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.

The Appeal Board has repeatedly made clear that there is no *per se* rule against applicants with familial ties to hostile countries, such as China. Instead, an applicant

with familial ties to a hostile country bears a “heavy burden” in mitigating the foreign influence concern raised by such foreign ties.¹⁵

Applicant failed to mitigate the foreign influence concern. His ties to the United States are self-evident. He has lived and worked in the United States since 1986, he worked as a teacher in the United States for over 19 years, and has been a citizen for over a decade. However, Applicant is still extremely close to his family and friends in China. Further, his wife is close to her family in China.¹⁶ These family members and friends are subject to the whims of a government that does not place great value on the individual freedoms of its citizens and craves sensitive U.S. technology. The confluence of these factors raises the potential of Applicant being placed in a position of having to choose between his foreign family members and friends and his obligation to protect national security. Applicant failed to establish that his ties to the United States negate this risk completely. Accordingly, Applicant failed to meet his burden to establish AG ¶ 8(a) and (b). His connections to China remain a security concern. *See, e.g.*, ISCR Case No. 07-00029 (App. Bd. Dec. 7, 2007) (favorable decision for applicant, who emigrated from China in 1986 and became U.S. citizen in 2002, reversed because applicant’s parents and siblings lived in China).

Whole-Person Concept

As noted above, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of an applicant’s conduct and all the relevant circumstances. This is generally referred to as the “whole-person” concept. An administrative judge should consider the nine factors listed at AG ¶ 2(a).¹⁷ In weighing these whole-person factors in a foreign influence case, the Appeal Board has held that:

Evidence of good character and personal integrity is relevant and material under the whole person concept. However, a finding that an applicant possesses good character and integrity does not preclude the government from considering whether the applicant’s

¹⁵ ISCR Case No. 01-26893 at 10 (App. Bd. Oct. 16, 2002) (“As a matter of common sense and sound risk management under the ‘clearly consistent with the national interest’ standard, an applicant with immediate family members living in a country hostile to the United States should not be granted a security clearance without a very strong showing that those family ties do not pose a security risk.”).

¹⁶ ISCR Case No. 09-06831 at 3 (App. Bd. Mar. 8, 2011) (“In-laws represent a class of persons who are contemplated by the Directive as presenting a potential security risk. As a matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person’s spouse.”).

¹⁷ (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.

facts and circumstances still pose a security risk. Stated otherwise, . . . *[e]ven good people can pose a security risk because of facts and circumstances not under their control.* For example, . . . an applicant with good character and personal integrity can pose a security risk because the applicant has close relatives in a country hostile to the United States.¹⁸

I have considered and given due weight to all the favorable and extenuating factors in this case. Applicant has lived in this country since 1986. He worked the vast majority of his adult life as a teacher in the United States. He raised a son, with his wife, in the United States and has lived at the same address since 1993. However, in light of the substantial risk posed by Applicant's connections to China, I am required by the Directive to resolve the doubt created by this risk in favor of national security.¹⁹ At the same time, I wish to make abundantly clear that this was an exceedingly close case. Further, this adverse determination is not a comment on Applicant's patriotism, but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved-one, such as a family member.²⁰

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence):	AGAINST APPLICANT
Subparagraphs 1.a – 1.e:	Against Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge

¹⁸ ISCR Case No. 01-26893 at 9-10 (emphasis added).

¹⁹ AG ¶ 2(b).

²⁰ ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).