



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



In the matter of:)	
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)	
[NAME REDACTED])	ISCR Case No. 10-09431
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Allison O'Connell, Esquire, Department Counsel
For Applicant: *Pro se*

06/20/2012

Decision

MALONE, Matthew E., Administrative Judge:

On May 17, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his work as an employee of a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a set of interrogatories¹ to augment or clarify information in his background. After reviewing the results of the background investigation together with his response to interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly consistent with the national interest to allow Applicant access to classified information. On January 30, 2012, DOHA issued to Applicant a

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the adjudicative guidelines³ under Guideline B (foreign influence).

On February 21, 2012, Applicant responded to the SOR (Answer) and requested a hearing. The case was assigned to a DOHA administrative judge on April 13, 2012, and scheduled to be heard on May 24, 2012. The case was transferred to me on May 23, 2012, and I convened the hearing as scheduled. DOHA received the transcript of hearing (Tr.) on June 4, 2012.

The Government presented two exhibits – Applicant's e-QIP (Gx. 1) and his response to interrogatories (Gx. 2). They were admitted without objection. The Government also asked that administrative notice be taken of certain facts germane to the issues presented by the pleadings. I granted that request and admitted as Gx. 3 Department Counsel's eight-page memorandum, supported by 15 enclosed documents (Attachments I - XV; Tr. 33 - 39). Applicant testified in his own behalf, presented one witness, and proffered six exhibits (Ax. A - F), which were admitted without objection.

Procedural Issue

The SOR was amended at the hearing to conform to the evidence.⁴ The Government had alleged at SOR 1.d that Applicant's "wife's six siblings are citizens and residents of the People's Republic of China." Applicant denied this allegation and averred that his wife has only one sibling, a brother. He admitted that his brother-in-law is a citizen of and resides in the People's Republic of China (hereinafter, China). Without objection, SOR 1.d was amended to read as follows: "Your wife's brother is a citizen and resident of the People's Republic of China." (Answer; Tr. 17 - 21)

Findings of Fact

Under Guideline B, the Government alleged that Applicant's mother (SOR 1.a), mother-in-law (SOR 1.b), four siblings (SOR 1.c), one brother-in-law (SOR 1.d, as amended), four uncles and four aunts (SOR 1.e), two nieces and three nephews (SOR 1.f), and multiple friends (SOR 1.g) are citizens of and reside in China. It was also alleged that Applicant's wife maintains three bank accounts in China, to which Applicant has access, to provide financial help to Applicant's mother and mother-in-law (SOR 1.g). Applicant admitted, with explanation, all of the SOR allegations (Answer). Applicant's admissions are incorporated in my findings of fact. Having reviewed the response to the SOR, the transcript, and exhibits, I make the following additional findings of fact.

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

⁴ Directive E3.1.17.

Applicant is 65 years old. Since August 1998, he has worked for the same employer as a services information developer. He is currently assigned as a senior database administrator and has access to sensitive information through a position of trust he first received around the time he was hired. His position of trust was last renewed in April 2004. In 2006, he was assigned to work on a contract that required he have a security clearance. He applied and was interviewed for a clearance in 2006. Applicant worked for about two years on that contract with an interim clearance. However, the contract ended before adjudication of his clearance was complete. His current request for a security clearance arose because he is working on a military contract which processes a large amount of personally identifiable information (PII) (Gx. 1; Gx. 2; Tr. 61, 107-108)

Applicant was born and raised in Shanghai, a large urban area on the east coast of China, about 800 miles southeast of Beijing. He and his wife, also a naturalized U.S. citizen who was born and raised in China, have been married since November 1971. They have a daughter, age 39, who was born in China, but was naturalized as a U.S. citizen in July 2000. Applicant's daughter joined Applicant in the United States in 1992. His wife followed in 1994. Applicant and his wife have owned and lived in the same house since May 1997. (Gx. 1; Gx. 2; Tr. 68, 71)

After Applicant and his wife, a chemical engineer, were married, they were assigned to state jobs at sites more than 1,000 miles apart. For several years, they rarely lived together. In 1977, Applicant was allowed to take a job as an instrument engineer at a state-owned oil refinery near his wife. He worked there until 1986, when, after earning his master's degree in biomedical engineering, he became an assistant professor at a Chinese university near where his wife was working. Applicant taught biomedical engineering and related subjects. In October 1987, he was sent to study as a visiting scholar at a prestigious university in the United States. (Answer; Gx. 2; Tr. 84 - 85)

After the Tiananmen Square massacre in 1989, Applicant decided not to return to China. He has lived continuously in the United States since 1987. Applicant also obtained a master's degree from a U.S. university in May 1992. Applicant became a naturalized U.S. citizen in June 2000. (Answer; Gx. 1; Gx. 2; Tr. 65 - 68)

Applicant's mother is 92 years old and in poor health, having suffered a stroke in 2011. Applicant also has three siblings, a brother and two sisters, as well as a step-sister,⁵ who are citizens of and live in China. Their ages range from 55 to 80. Applicant's mother lives with the older of his two sisters. That sister, along with his 63-year-old brother and 80-year-old step-sister are retired from non-government jobs and receive the equivalent of social security payments from the Chinese government. Applicant's 55-year-old sister works as a pharmaceutical salesperson and is expected to retire soon

⁵ Applicant has referred to this person alternatively as his step-sister and as his half-sister. At hearing, he verified she is a step-sister. (Tr. 108 - 109)

on a state pension. Applicant's other sister, age 62, is a retired employee of a medical supply company. (Answer; Ax. A; Ax. B; Tr. 79 - 81, 102 - 103)

Applicant's mother-in-law is 99 years old. She lives in a nursing home, has dementia, and suffered a broken leg in 2011. As is customary in China, she is supported and looked after by her son, Applicant's wife's brother, who works as a property and maintenance manager for a travel agency in Shanghai. (Gx. 2; Ax. A; Ax. B; Ax. E; Tr. 83 - 84)

In 2004, Applicant's wife opened three bank accounts in China. They are used for ensuring her mother and Applicant's mother, and the people caring for them, have funds for basic medical care that would otherwise not be available to their mothers. (Tr. 112 - 113) Applicant also has access to the accounts, but his wife manages them and it does not appear that he involves himself directly with the financial support of his mother and mother-in-law. The total balance of funds in the three accounts is currently about \$3,000. In response to medical needs at the time, the account balances totaled about \$20,000 in 2008. (Answer; Gx. 2; Ax. B; Ax. C; Tr. 74 - 76)

None of Applicant's relatives is or was a civilian or military official of the Chinese government. Also, none of them have been directly employed by or associated with the Chinese government. However, most places of employment in urban areas of China, such as Shanghai, have historically been state-owned and state-run. This means that, technically, most people working in those areas are state employees. (Answer; Gx. 2; Tr. 78, 85)

Applicant first traveled back to China in 2000, after he became a U.S. citizen. He also traveled there in 2008 and in 2010. All of his visits have been to see his mother. When in China, he stays with his younger sister and may see his other siblings if they are available. Applicant also has several aunts and uncles who may visit him at his sister's house. Applicant sometimes has contact with some of his cousins, nieces and nephews, but only if they accompany their parents, Applicant's aunts, uncles, and siblings. Applicant speaks by telephone each month with his sister who is caring for their mother. He has less frequent contact with his other siblings. (Tr. 86 - 88)

Applicant's wife travels to China more frequently than Applicant. Although she was educated as a chemical engineer in China, she was only able to work in food service jobs in the United States. She is no longer working and, so, has the time and inclination to be more involved than Applicant in the care of their mothers. (Answer; Tr. 88)

Applicant was asked, through extensive DOHA interrogatories, to list any friends, relatives, or other associates with ties to a foreign government through employment, military service, education, government service, or business. He responded by listing most of his immediate and extended family in China, including some who are deceased, and many who are retired. He listed them all because, as is the case with most citizens

employed in or near Chinese cities, they worked in state-owned businesses, attended state-run universities, or are receiving government pensions. (Gx. 2)

Applicant was also asked to simply list his family, friends, or associates who are citizens of and who reside in a foreign country. Applicant again listed his entire family, including extended family members with whom he has little or no contact. He also listed 32 associates, mostly from his academic career in China. Again, many are retired and some are deceased. Many also now live outside of China, including in the United States. (*Id.*) Applicant has, at most, sporadic contact with the associates other than his family listed in his response. The only government official with whom Applicant has had contact since leaving China is a former university classmate, who was appointed a vice chairman of an unnamed Chinese agency or ministry. That person has been retired for several years. Applicant received an email from him in about 2003, but that is the extent of their contact since they were at university together. (Answer; Gx. 2; Tr. 94 - 95)

Applicant also disclosed that he had contact with a Chinese government agency in 2008. As a favor to his wife's family, he and his wife's brother went to a real estate agency to inquire about land that belonged to his wife's parents before the Chinese government confiscated it in the 1950s. Although there is a recent change in Chinese policy that provides for the return of such property, Applicant and his brother-in-law were unsuccessful in reclaiming any property. (Answer; Gx. 2; Tr. 65 - 66, 94)

Having reviewed the documents received through Department Counsel's Request for Administrative Notice (Gx. 3), I make the following findings of fact regarding China.

China is an increasingly industrialized world economic and military power. The country has a population in excess of one billion people who are governed by an authoritarian, communist regime. Geographically vast and demographically diverse, the country has significant natural resources to help support its growing economy. China devotes most of its industry and domestic production to its military forces, and it has a strategic nuclear arsenal. (Gx. 3, Attachment I) China is in direct competition with the United States in many geopolitical and economic areas, and it is known to actively collect military, economic and industrial information about the United States. In 2008, it was reported to Congress that China was the leading threat to the security of U.S. technology. (Gx. 3, Attachments IV - VI)

However, China and the U.S. also are major trading partners and share other common interests. After the terrorist attacks of September 11, 2001, the two countries worked closely in counter-terrorism efforts. China and the U.S. also have worked closely on regional issues, especially those involving North Korea. However, U.S.-China relations are sometimes complicated by events in Taiwan and Hong Kong. China is one of the most active collectors of U.S. defense information and technology.

The Chinese government has an abysmal human rights record. Officials continue to engage in suppression of personal and electronic expressions of political dissent.

Arbitrary arrest and detention, forced confessions, torture, and other prisoner mistreatment are commonplace. Government and law enforcement practices are largely unchecked by any independent judicial review. (Gx. 3, Attachment III)

Applicant has long been opposed to the policies and practices of the Chinese government. His parents were disenfranchised of their property and livelihoods in the 1950s and 1960s as part of the government's imposition of a communist society. Applicant understands the practices of the Chinese government regarding intelligence gathering and espionage. He is extremely wary of associating with Chinese-American societies in the United States because he suspects most of them are run or at least monitored by the Chinese government. (Answer; Tr. 64 - 68, 104 - 107) During visits with his family, Applicant has been careful not to discuss his work or to even disclose that he has access to protected information. He credibly averred that he would not compromise the interests of the United States even in the face of pressure by the Chinese government on his family members. (Answer; Gx. 2; Tr. 122 - 125)

Applicant's only financial or property interest overseas consists of the bank accounts used to help his mother and mother-in-law. Applicant has disclosed those accounts to the U.S. Treasury as part of his compliance with U.S. tax and foreign financial disclosure laws. He has owned the same house in the U.S. for about 15 years. He also has several retirement, investment, and insurance accounts in the U.S. He does not want to rely on social security or any form of welfare after he stops working. Applicant's net worth is in excess of one million dollars. (Answer; Gx. 2; Tr. 92, 101 - 102)

Applicant has an excellent reputation in the workplace. A co-worker, who has known Applicant for most of the time Applicant has worked at their company, testified that Applicant is a loyal American who would never do anything to harm U.S. interests. He praised Applicant for his professional expertise and his excellent work ethic. (Answer; Ax. F; Tr. 109 - 113)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁶ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole person" concept, those factors are:

- (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

⁶ Directive. 6.3.

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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under AG ¶ 6, Guideline B (Foreign Influence).

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁷ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁸

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁹

Analysis

Foreign Influence

The facts established by Department Counsel's information and by Applicant's admissions raise security concerns about Applicant's personal relationships and other interests in China. Specifically, as stated in AG ¶ 6,

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁸ See *Egan*, 484 U.S. at 528, 531.

⁹ See *Egan*; AG ¶ 2(b).

[f]oreign 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 Government presented sufficient information to establish the following AG ¶ 7 disqualifying conditions:

- (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 immediate and extended family members live in a country that presents a heightened risk of exploitation by that country's government. China's human rights record, combined with its history of aggressive espionage against the United States, indicates a willingness by the Chinese government to exert pressure on Applicant through his ties of affection in China. Applicant and his wife assist their mothers with relatively modest (when compared to his U.S. net worth) sums of money deposited in Chinese bank accounts. They are both close to their immediate family and have traveled to China several times to visit them.

By contrast, Applicant's ties to the numerous associates and friends he listed in response to DOHA interrogatories are casual, at best, and he has only had passing contact with a few of those individuals since leaving China. Only one foreign associate, a retired former classmate who served as a deputy chief of a Chinese government agency or ministry, is a potential concern here. However, Applicant had one unsolicited email contact with that person a few years ago and they have not had a close or ongoing relationship since Applicant came to the United States 25 years ago.

As to Applicant's extended family, such relationships are presumed to be close. However, the only contact he has had with his aunts, uncles, cousins, nieces and nephews, has been incidental to visits with his mother and his siblings.

Applicant's contact with his immediate family consists of regular phone calls to the sister who cares for his mother, and less frequent contact with his other siblings. All of his siblings are, or soon will be, retired and living on government pensions. While it is possible that the Chinese government could pressure Applicant's family through their pensions, the more likely scenario is that Applicant would make funds available to his family, as he has for his mother and mother-in-law, rather than accede to coercion. Applicant is, by all accounts, a loyal American with substantial interests in the U.S. His family ties and other associations in China are not likely to cause him to act adversely to the U.S.

All of the foregoing supports application of the following AG ¶ 8 mitigating conditions:

(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; and

(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.

Also indicative of Applicant's position in favor of the U.S. are his statements about his awareness of the risks posed by Chinese government policies, and his wariness of seemingly benign activities, such as Chinese-American societies. Applicant was painstakingly detailed in his reporting of his associates in China, and he has been more than forthcoming about his personal, professional, academic, and financial ties to China and Chinese citizens. His candor in this regard shows his understanding of the importance of putting U.S. interests ahead of his own. On balance, he has mitigated the security concerns about possible foreign influence.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guideline B. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is a mature, responsible, and highly accomplished 65-year-old defense contractor employee. He has assimilated into American society, and he shows every sign of being a committed and loyal U.S. citizen. Since 1998, Applicant has been a reliable, trustworthy and diligent employee, who has worked without incident while holding access to sensitive and protected information. His ties to China and his activities there are solely for personal family reasons. His awareness of the security issues regarding China govern his approach to his duties, as well as his dealings with his community and his overseas family. There has been no misconduct here and there is nothing inappropriate or illegal about Applicant's contacts overseas. A fair and commonsense assessment of all available information shows Applicant has overcome the doubts about his suitability under these circumstances.

Formal Findings

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

Paragraph 1, Guideline B: FOR APPLICANT

Subparagraph 1.a - 1.h: For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge