



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



In the matter of:)	
)	
)	ISCR Case No. 10-10466
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

August 9, 2011

Decision

HEINY, Claude R., Administrative Judge:

Applicant’s wife is a citizen of the People’s Republic of China.¹ His mother-in-law and father-in-law are citizens and residents of the PRC. Applicant has failed to rebut or mitigate the security concerns under Guideline B, foreign influence. Clearance is denied.

Statement of the Case

Applicant contests the Department of Defense’s (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,² the Defense Office of Hearings and Appeals (DOHA) issued

¹ Hereafter referred to as the PRC or China.

² 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.

a Statement of Reasons (SOR) on March 24, 2011, detailing security concerns under Guideline B, foreign influence.

On April 12, 2011, Applicant answered the SOR and elected to have the matter decided without a hearing. Department Counsel submitted the Government's case in a File of Relevant Material (FORM), dated May 16, 2011. The FORM contained six attachments. On May 23, 2011, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. Applicant's response was due on June 23, 2011.³ As of August 2, 2011, no response had been received. On August 3, 2011, I was assigned the case.

Findings of Fact

In Applicant's Answer to the SOR, he admitted his wife is a citizen of the PRC (SOR ¶ 1.a) and that his mother-in-law and father-in-law are citizens and residents of the PRC. I incorporate Applicant's admissions to the SOR allegations. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 39-year-old Director, Sensor Computing who has worked for a defense contractor since September 1999, and seeks to obtain a security clearance. Applicant produced no work or character references.

In July 2009, Applicant became a naturalized U.S. citizen. (Ex. 4) From September 1993 through August 1999, he attended a U.S. university obtaining his doctorate. In June 2001, he married his wife who is a citizen of the PRC and a registered alien. (Ex. 4) In 2005, at age 34, he obtained his U.S. Permanent Resident Card, *i.e.*, green card. His parents were born in China and are now U.S. citizens. His father-in-law and mother-in-law are citizens and residents of the PRC. His in-laws were junior high school teachers now retired since the mid-1990s. (Tr. 6) His wife talks to them by telephone weekly, but his contact is limited to holidays and birthdays.

Applicant has been issued three Chinese passports. In July 1993, he obtained a Chinese passport that expired in July 2003. In July 2003, he obtained a Chinese passport that expired in July 2008. In September 2008, he was issued a Chinese passport with a September 2018 expiration date. (Ex. 4) He did not use the most recent Chinese passport. (Ex. 4) In June 2006, he visited the PRC for six days. (Ex. 4) In May 2010, he obtained a U.S. passport which expires in May 2020. (Ex. 5) In August 2010, he went to the Consulate General of the PRC and had his Chinese passport canceled. (Ex. 5, Ex. 6)

When Applicant became a U.S. citizen, he did not renounce his Chinese citizenship. He was not aware this was necessary because China does not recognize

³ Responses to the FORM are due 30 days after receipt of the FORM.

dual citizenship. (Ex. 5) He submitted an article indicating his Chinese citizenship was automatically terminated when he became a U.S. citizen.

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the PRC. (FORM page 2) Copies of the documents were provided Applicant and additional copies were available through Department Counsel for my review. The facts administratively noticed were limited to matters of general knowledge and matters not subject to reasonable dispute. The facts administratively noticed are set out in the Findings of Fact, below.

China⁴

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

China has an authoritarian, Communist government with a poor human rights record, that suppresses political dissent, and practices arbitrary arrest and detention, forced confessions, torture, and other prisoner mistreatment. China also monitors communications devices, such as telephones, telefaxes, and internet servers.

China actively collects military, economic, and proprietary industrial information about the United States for the following reasons: (1) its position as a global power; (2) its military, political, and economic investments in the Pacific Rim and Asia; and (3) its leading role in the development of advanced technology that China desires for economic growth. China's active intelligence-gathering programs focus on sensitive and protected U.S. technologies.

The 2009 Report of the U.S.-China Economic and Security Review Commission noted the following about China's enterprise-directed industrial espionage:

Enterprise-directed espionage may also be growing in importance and taking on less random and more targeted form. The 2008 unclassified report of the Defense Security Service cited a rise in efforts undertaken by commercial entities to target restricted technologies, speculating that this likely represents "a purposeful attempt to make contacts seem more innocuous by using non-governmental entities as surrogate collectors for interested government or government-affiliated entities. . .

⁴The facts in the section concerning the PRC are from the Department Counsel's documents as well as U.S. Department of State, *Background Note, China*, August 5, 2010 (24 pages) and, *China—Country Specific Information*, August 11, 2010 (10 pages).

Chinese intelligence personnel are more inclined [than Russian intelligence personnel] to make use of sympathetic people willing to act as a "friend of China." While this most clearly has been seen in PRC-targeted recruitment of Chinese-Americans, PRC agents also have used U.S. citizens of other ethnic backgrounds as sources.

In cases resulting in federal prosecutions during fiscal years 2007 and 2008, China was ranked second only to Iran as the leading destination for illegal exports of restricted U.S. technology.

China's espionage and industrial theft activities are a threat to the security of U.S. technology. Department Counsel's summary provides additional details of China's aggressive intelligence efforts directed towards acquiring U.S. secrets and proprietary technologies, as well as nine examples of criminal cases in 2007 to 2009 involving people and organizations connected to the PRC.

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 must be considered 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the interests of 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain 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 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 Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Foreign Influence

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

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 indicates three conditions that could raise a security concern and may be disqualifying in this case:

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

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligation to protect sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information; and

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

Applicant shares living quarters with his spouse in the United States. His communications with his parents-in-law are infrequent. He has telephone contact on holidays and birthdays. “[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person’s spouse.” ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Feb. 20, 2002). Applicant has not fully rebutted this presumption. Applicant’s relationship with his wife and his parents-in-law living in PRC are sufficient to create “a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.” AG ¶¶ 7(a) and 7(b) applies to his spouse and his in-laws.

These relationships with residents of PRC create a concern about Applicant’s “obligation to protect sensitive information or technology” and his desire to help his wife, and through her, his parents-in-law who are in PRC. For example, if the Chinese Government wanted to expose Applicant to coercion, it could exert pressure on his parents-in-law. Applicant would then be subject to potential, indirect coercion through his spouse’s relationship with her parents.

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

The nature of a nation’s government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an applicant’s family members are vulnerable to government coercion or inducement. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence collection operations against the United States. The relationship of China with the United States places a significant, but not insurmountable, burden of persuasion on Applicant to demonstrate that his indirect relationships with his parents-in-law living in the PRC do not pose a security risk. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist his parents-in-law living in the PRC, or to assist his spouse, who might be coerced through his parents-in-law.

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.” ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

While there is no evidence that intelligence operatives from China seek or have sought classified or economic information from or through Applicant, his spouse, or his parents-in-law living in the PRC, it is not possible to rule out such a possibility in the future. AG ¶ 7(d) applies, and further inquiry is necessary about potential application of any mitigating conditions.

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

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

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

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

AG ¶¶ 8(a) and 8(c) have limited applicability. Applicant traveled to the PRC in 2006. Applicant lives with his wife and currently has limited contact with his parents-in-law, living in the PRC. His spouse has weekly telephone contact with her parents. The

amount of contacts between an Applicant and relatives living in a foreign country are not the only test for determining whether someone could be coerced through their relatives. Because of his connections to his wife, and her connections to her parents, Applicant is not able to fully meet his burden of showing there is “little likelihood that [he and his spouse’s relationships with relatives who are residents of the PRC] could create a risk for foreign influence or exploitation.”

In 1993, Applicant, at age 21, came to the United States as a student. In 2005, 12 years later, at age 34, he obtained his U.S. Permanent Resident Card and in July 2009, became a naturalized U.S. citizen. From these limited facts, I cannot find he has “deep and longstanding relationships and loyalties in the U.S.” The mitigating condition in AG ¶ 8(b) does not apply. His parents were born in China and are now U.S. citizens, but the record is silent as to when they came to the United States and when they became naturalized U.S. citizens. The record is also silent as to whether Applicant owns a house in the United States or has substantial investments in the United States. Therefore, there is no basis for applying AG ¶ 8(f).

Applicant’s relationship with the United States must be weighed against the potential conflict of interest created by his relationships with his family members who either live in the PRC or spend extended periods of time visiting the PRC. There is no evidence that terrorists, criminals, the Chinese Government, or those conducting espionage have approached or threatened Applicant or his parents-in-law in the PRC to coerce Applicant or his parents-in-law for classified or sensitive information. While the government does not have a burden to prove the presence of such evidence, if such record evidence was present, Applicant would have a heavy evidentiary burden to overcome to mitigate foreign influence security concerns.

It is important to be mindful of the United States’ recent relationship with China, and especially China’s systematic human rights violations and economic espionage. China’s conduct makes it more likely that it would attempt to coerce Applicant through his parents-in-law living in the PRC, if China determined it was advantageous to do so.

AG ¶¶ 8(d) and 8(e) do not apply. The U.S. Government has not encouraged Applicant’s involvement with his parents-in-law. Applicant is not required to report his contacts with his parents-in-law living in the PRC.

In sum, the primary security concern is Applicant’s close relationship with his wife, as well as her relationships with her parents. His parents-in-law are readily available for coercion. The Chinese Government’s history of espionage (especially industrial espionage) against the United States and its failure to follow the rule of law further increase the risk of coercion.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s

conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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

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

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The facts supporting mitigation of security concerns are very limited. In 2000, he earned his doctorate in the United States. In July 2009, approximately two years ago, he became a U.S. citizen. In May 2010, he obtained a U.S. passport and in August 2010, he had his Chinese passport canceled. There is no derogatory information concerning Applicant's police or financial records. He has never been fired from a job. There is no evidence of record showing any illegal drug possession or use or alcohol-related incidents. However, because Applicant chose to have this matter handled administratively, Applicant's demeanor or appearance cannot be evaluated, nor can a positive determination as to his truthfulness, sincerity, honesty, or openness be made.

The circumstances tending to support denial of Applicant's clearance are more significant than the factors weighing towards approval of his clearance at this time. Applicant's parents-in-law live in the PRC and PRC's intelligence agents have access to them. A Guideline B decision concerning the PRC must take into consideration the geopolitical situation in China, as well as the dangers existing in China.⁵ The danger of coercion from the Chinese government is more likely than in many other countries. China competes with the United States militarily, diplomatically, and through trade. China has a history of espionage targeting U.S. military and industrial secrets.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude Applicant has not mitigated the foreign influence security concerns resulting from wife's PRC citizenship and the continued residence of his parents-in-law in the PRC.

⁵ See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).

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, Foreign Influence: AGAINST APPLICANT

Subparagraphs 1.a and 1.b: Against 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 a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge