



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



In the matter of:)
)
) ISCR Case No. 11-05102
)
Applicant for Security Clearance)

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: Levi Kennedy, Personal Representative

03/15/2012

Decision

Duffy James F., Administrative Judge:

Applicant mitigated Foreign Preference security concerns, but was unable to mitigate Foreign Influence security concerns due to his foreign contacts in the People’s Republic of China (PRC or China), a country that is ruled by an authoritarian government controlled by the Chinese Communist Party. Eligibility for access to classified information is denied.

Statement of the Case

On August 10, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, Foreign Influence, and Guideline C, Foreign Preference. DOHA acted under Executive Order (EO) 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 on September 1, 2006.

On August 29, 2011, Applicant answered the SOR and requested a hearing. Department Counsel submitted a notification that the Government was ready to proceed

on December 14, 2011. The case was assigned to me on January 10, 2012. DOHA issued a notice of hearing on January 25, 2012, and the hearing convened as scheduled on February 13, 2012. The Government offered exhibits (GE) 1 through 3 that were admitted into evidence without objection. In Hearing Exhibit (HE) 1, the Government also requested that administrative notice be taken of facts regarding the PRC. Applicant had no objection to the administrative notice request and it was granted. Applicant testified and submitted two exhibits (AE) A and B. Applicant's list of exhibits was marked as HE 2. DOHA received the hearing transcript (Tr.) on February 28, 2012.

Findings of Facts

The SOR alleged that Applicant's mother, father, brother, sister, mother-in-law, brother-in-law, and sister-in-law were citizens and residents of the PRC (SOR ¶¶ 1.a through 1.e); that he provided about \$1,000 per year in financial assistance to his parents and about \$500 per year to his mother-in-law (SOR ¶ 1.f); that he maintained periodic contact with former academic colleagues from Chinese academic institutions (SOR ¶ 1.g); and that he possessed a Chinese passport that was issued in October 1997 and, due to extensions, will expire in October 2012 (SOR ¶ 2.a). In his Answer to the SOR, Applicant admitted SOR ¶¶ 1.a through 1.f, denied ¶ 1.g, and admitted ¶ 2.a. With regard to the passport, he indicated that he cut its cover and was willing to relinquish it. His admissions are incorporated herein as findings of fact.¹

Applicant is a 45-year-old engineer who works for a defense contractor. He has worked in his current position since November 2005. He obtained his undergraduate and graduate degrees from PRC universities. In 1994, he obtained a PhD in electrical engineering from a PRC university and specializes in advanced electromagnetic computation methods. He is married and has two children, ages 7 and 17. This is the first time that he has applied for a security clearance.²

Applicant, his wife, and eldest child were born in the PRC. He was married in the PRC. His younger child was born in the United States. Applicant, his wife, and eldest child became U.S. citizens in 2008. His wife studied computer science in China, but is now a housewife. His wife and children visited China for a month in 2006 and 2009. He did not go with them on these trips.³

The Chinese Government funded Applicant's education, which was standard practice. Upon obtaining his doctorate degree, he was expected to work for five years at PRC universities to repay his education. Prior to coming to the United States, he worked as a research assistant/professor at two PRC universities from 1994 to 1997, but did not complete his work commitment. Due to his decision to immigrate to the United State, the PRC Government fined him \$10,000 and seized his residence in China, which was

¹ Applicant's Answer to the SOR.

² Tr. 18-21, 46-48 52; GE 1, 2.

³ Tr. 18-21, 27, 42, 45-48; GE 1, 2.

worth about \$5,000. He paid the fine in 2000. He has no other financial obligations to the PRC Government.⁴

Applicant originally came to the United States as a visiting scholar in 1997. He obtained a new U.S. visa in 2000. At that time, he decided that he wanted to stay permanently in the United States because he was unhappy with the level of corruption and environmental conditions in the PRC and wanted a better life. Since 2000, he worked as a research associate at two U.S. universities and then as a senior research scientist at a company before obtaining his current job.⁵

Applicant's mother and father live in a village in the PRC and are retired farmers. His father completed mandatory military service as a medic in the 1950s. He talks to his parents about once a month on the telephone and sends them about \$1,000 per year as gifts. His brother and sister live close to his parents. His brother is a truck driver who delivers paint to customers. His sister is a tailor. He does not talk to his brother or sister regularly. His mother-in-law was an accountant for a private company. He generally does not talk to his mother-in-law directly, but his wife calls her about twice a month. His mother-in-law visited him and his wife in the United States in 2002. She stayed for about a year and a half. He and his wife provide his mother-in-law about \$500 per year in gifts. His father-in-law is deceased and was a librarian. His sister-in-law is a self-employed attorney and her husband, his brother-in-law, works for her. Except for his father's military service, none of his relatives have been employed by the PRC Government.⁶

Applicant has no property in China. He does not maintain a checking account there. He returned to the PRC for two weeks in 2007. The purpose of this trip was to visit his parents and other relatives. While there, he gave a lecture to graduate students at a PRC university. A former colleague at that university invited him to give this lecture. His lecture concerned papers he wrote on computation methods that are available to the public. This PRC university focuses its studies on railroad construction and trains. Upon coming to the U.S., Applicant maintained email or telephone contact with this former colleague about three to seven times a year. In recent years, his contact with the former colleague has decreased. He had contact with this former colleague once last year. He used his Chinese passport during his 2007 trip because he was not a U.S. citizen at that time. He has also maintained infrequent contact with other former colleagues who reside in China.⁷

Applicant is a volunteer at a Chinese school in the United States. His sons attend the school once a week, which is the only day it is open. This school teaches Chinese-

⁴ Tr. 20-21, 34-37; GE 2. Applicant's mother-in-law was residing in his Chinese residence when it was seized.

⁵ Tr. 18-21, 24, 51-52; GE 2.

⁶ Tr. 21-36, 48-50; GE 2.

⁷ Tr. 24-27, 36-43, 50-51; GE 2.

American children about the Chinese language and culture, including art and dance. He also serves as the school's treasurer.⁸

Applicant stated that he had invalidated his PRC passport. He cut off one corner of this passport's cover opposite the fold. The removed piece resembles a right triangle with the 90% angle being the cover's corner. During his Office of Personnel Management interview, he stated that he was willing to relinquish his passport to proper officials. He had also cut his wife's PRC passport in a similar manner, and she had to obtain a visa to travel to the PRC for her last trip there.⁹

Visas are generally required for non-PRC citizens to travel to the PRC. For Applicant to obtain such a visa, the PRC Government provides:

Original Chinese Passport – First-time applicants whose former nationality was Chinese, or who were born in China (including Hong Kong, Macao and Taiwan), need to submit the original Chinese passport and a photocopy of the passport's information/photo page, and extension page (if applicable).¹⁰

Applicant indicated that he does not have dual citizenship. He stated that the PRC does not recognize dual citizenship and, when he acquired his U.S. citizenship, he lost his PRC citizenship. He stated that he has kept his invalidated passport so that he could obtain a visa.¹¹

China¹²

China is geographically vast, and has a population of over a billion people. It has significant resources and an economy that in recent years has expanded about 10% per year. The PRC has powerful military forces, including strategic nuclear missiles.

China has an authoritarian government controlled by the Chinese Communist Party with a poor human rights record. It suppresses political dissent, engages in arbitrary arrests and detentions, and is involved with forced confessions, torture, and other prisoner mistreatment. China also monitors communications devices, such as telephones, telefaxes, and internet servers.

⁸ Tr. 56; GE 2.

⁹ Tr. 19-20, 43-45, 52-57; GE 3; AE B.

¹⁰ AE A.

¹¹ Tr. 19-20, 43-45, 52-53; GE 2, 3; AE A, B.

¹² HE 1. The administrative notice request included U.S. Government publications and press releases.

In its 2009 Report to Congress, the U.S.-China Economic and Security Review Commission (U.S.-China ERSC) stated:

The Counterintelligence Community considers the People's Republic of China to be one of the most aggressive countries targeting U.S. military, political, and economic secrets as well as sensitive U.S. trade secret and technologies.

China was ranked second only to Iran as the leading destination for illegal exports of restricted U.S. technology. In discussing China's industrial espionage, the U.S.-China ERSC noted:

Enterprise-directed espionage may also be growing in importance and taking on a 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. . . .

Chinese intelligence personnel are more inclined than other foreign intelligence services 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.

China's espionage and industrial theft activities are a threat to the security of U.S. technology. From 2007 to 2009, a number of individuals have been convicted in U.S. courts of espionage or export violations involving the PRC. China does not recognize dual nationality.

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 that 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 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.

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 to obtain a favorable 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 about 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.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding foreign influence:

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 describes conditions that could raise a security concern and may be disqualifying. Two are potentially applicable here:

(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.

Under Guideline B, a security concern exists when an individual has foreign family members or other foreign contacts that may be manipulated to help a foreign government in a way that is not in U.S. interests. In such situations, common sense suggests that the stronger the ties of affection or obligation are to a foreign contact, the more vulnerable a person is to being influenced if the foreign contact is brought under control or used by a foreign intelligence or security service.

Here, Applicant has close and ongoing family ties in China, as does his wife. The strength of Applicant's family ties is demonstrated by his monthly telephone contact with his parents, his travel to China in 2007 to visit his parents and other relatives, and the gifts he has provided to his parents and mother-in-law. During his trip to China in 2007, he also gave a lecture to graduate students at a PRC university. A former colleague at the university invited him to give this lecture. Since then, he has had infrequent contact with that former colleague, but did have contact with him once last year.

AG ¶¶ 7(a) and 7(d) requires substantial evidence of a "heightened risk." The "heightened risk" required to raise this disqualifying conditions is a relatively low standard. "Heightened risk" denotes a risk of greater than the normal risk inherent in having family members or professional associates living under a foreign government. Specifically, the nature of a foreign government, its relationship with the U.S., and its human rights record are relevant factors in assessing the likelihood that an applicant's foreign contacts are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a foreign contact is associated with or dependent upon the foreign government, or the country is known to conduct intelligence operations against the U.S. In this case, China has an authoritarian government, dominated by the Communist Party, with a poor human rights record, and aggressively targets U.S. military, political, and economic secrets for collection. Although Applicant's foreign contacts are completely legal, they create a potential conflict of interest and a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion, both through him and through his wife. AG ¶¶ 7(a), 7(b), and 7(d) apply.

SOR ¶ 1.f does not raise an independent disqualifying condition, but merely alleges facts that support SOR ¶¶ 1.a and 1.b. SOR ¶ 1.f is concluded for Applicant.

AG ¶ 8 provides conditions that could mitigate foreign influence security concerns. Three are potentially applicable in this case.

(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.

Applicant lived in China until he was about 30 years old. He has resided in the United States for the last 15 years. He became a U.S. citizen three years ago. His wife and children are U.S. citizens. Nonetheless, his family ties in China are not minimal, infrequent, or casual. Such contacts in China include close family members. He has also had contact with a former colleague who is a professor at a PRC university. While his contact with the former colleague has decreased over the years, he has had recent contact with that colleague. Given China's intelligence operations against the United States, Applicant's contacts who reside in China are in a position where there is a potential for them to be exploited in a way that could force Applicant to choose between loyalty to those individuals and the interests of the United States. While these are circumstances beyond Applicant's control, they raise security concerns under Guideline B that have not been mitigated. AG ¶¶ 8(a), 8(b), and 8(c) are not applicable.

Guideline C, Foreign Preference

Under AG ¶ 9 the security concern involving foreign preference is as follows:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

AG ¶ 10 describes conditions that could raise a security concern and may be disqualifying. One is potentially applicable in this case:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport.

Applicant obtained a PRC passport when he was a citizen of that country. It is due to expire in October 2012. Due to his possession of a foreign passport that has not yet expired, AG ¶ 10(a) applies.

AG ¶ 11 set forth conditions that could mitigate foreign preference security concerns. Two are potentially applicable here:

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor; and

(d) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Since becoming a U.S. citizen in 2008, Applicant has not used his PRC passport to travel. He invalidated the PRC passport by cutting a piece from its cover. He only possesses the PRC passport so that he can obtain a visa the next time he travels to China. AG ¶¶ 11(c) and 11(d) apply.

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 relevant facts and circumstances surrounding this case. I have incorporated my

comments under Guidelines B and C in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. I considered Applicant's work history and professional skills. He is a dedicated and productive U.S. citizen. Although I decided this case against Applicant, this decision should not be construed as a reflection of his loyalty or patriotism to the U.S., as those matters are not at issue. Instead, the "clearly consistent with national interest" standard is a demanding benchmark that requires resolution of any doubt against Applicant. His close family ties in China, an authoritarian state controlled by the Chinese Communist Party, create such doubt.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Considering all the evidence, I conclude Applicant mitigated the security concerns under Guideline C, Foreign Preference, but failed to mitigate the security concerns arising under Guideline B, Foreign Influence.

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.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	Against Applicant
Paragraph 2, Guideline C:	FOR APPLICANT
Subparagraph 2.a:	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. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge