



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-03506
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Fahryn Hoffman, Esquire, Department Counsel
For Applicant: *Pro Se*

January 16, 2008

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant submitted his security clearance application (e-QIP) on April 10, 2006. On July 11, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline B for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on July 17, 2007. He answered the SOR in writing on July 26, 2007, and requested a hearing before an Administrative Judge. DOHA received Applicant's response on August 6, 2007. Department Counsel was prepared to proceed on September 26, 2007, and the case was assigned to me on October 2, 2007. On November 15, 2007, I scheduled a hearing for December 11, 2007. At the hearing convened as scheduled, two government exhibits (Ex. 1-2) and

four Applicant exhibits (Ex. A-D) were admitted. Applicant and one witness, his direct supervisor, testified on Applicant's behalf. DOHA received the transcript of the hearing (Tr.) on December 21, 2007. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Request for Administrative Notice

On September 26, 2007, Department Counsel requested administrative notice be taken of certain facts relating to the People's Republic of China (PRC). The request was based on publications from the U.S. State Department, the Office of the Secretary of Defense, the Centre for Counterintelligence and Security Studies, the U.S. China Economic and Security Review Commission, and the Office of the National Counterintelligence Executive. The government's formal request and the attached documents were not admitted into evidence but were included in the record. On October 9, 2007, I gave Applicant until October 30, 2007, to file any objections and/or to submit alternative facts for administrative notice. Applicant did not respond by the due date but indicated at the hearing that he had no objections. I agreed to take administrative notice of certain facts, which are set out in the Findings of Fact, below.

Findings of Fact

DOHA alleged under Guideline B, Foreign Influence, that Applicant's brother is a resident citizen of the PRC (SOR ¶ 1.a), that his parents are PRC citizens who were staying with him in the U.S. on visitor visas as of October 2006 (SOR ¶ 1.b), that his mother-in-law and stepfather-in-laws are resident citizens of the PRC (SOR ¶ 1.c); that his mother-in-law had worked as a technician for a PRC nuclear agency before her retirement (SOR ¶ 1.d) and his stepfather is or had been an employee of the same government agency (SOR ¶ 1.e), and that Applicant traveled to the PRC in at least May 2002 (SOR ¶ 1.f). In his response of July 26, 2007, Applicant admitted the factual allegations in the SOR without explanation. After consideration of the evidence of record, I make the following findings of fact.

Applicant is a 36-year-old senior electrical engineer employed by a U.S. defense contractor since January 2006. He held an interim secret-level security clearance that was withdrawn on issuance of the SOR.

Applicant was born in the PRC to resident citizens in December 1971. His father was a math teacher and his mother was an administrator at a public technology school in the PRC before they retired in 2001 and 2002, respectively.¹ They were never members of the Chinese Communist Party. Applicant's maternal grandfather had

¹Applicant testified that on graduation from junior high school, students may attend technology school in lieu of high school and then go to work ("...in China the technology school gives a degree that's lower than high school but above junior high. . . ." Tr. 55).

immigrated from Indonesia to the PRC in the early 1940s to avoid prosecution and his mother was discriminated against during the Cultural Revolution because of her ethnic background. She was denied the opportunity to study for a medical degree despite top academics in high school. After being trained as a nurse, she went into school administration.

Applicant was raised in the PRC with his brother, who was born in February 1973. After he graduated from college, Applicant began working as an electrical engineer for a privately owned telephone company. In August 1995, Applicant came to the U.S. to pursue graduate studies in electrical engineering at a public university. Applicant planned to work in the U.S. for a few years after he finished his graduate studies and then return to the PRC. While at the university, he met his spouse. A native of the PRC, she had been raised by her grandparents. Her mother and stepfather lived in another city because of their jobs. In 1991, when he was 15, she came to the U.S. with her father who was studying at a private technological university. Following his premature death in 1993 or 1994, she decided to stay in the U.S. permanently.

After he earned his master's degree, Applicant relocated to his present locale in July 1997 to work as an electrical engineer in the semiconductor industry. In August 1999, Applicant and his spouse married. Although he had applied for his green card back in 1997, Applicant decided on his marriage to make the U.S. his permanent home. His spouse, who was already a U.S. permanent resident, wanted to remain in the U.S. He was also persuaded by his parents, who feared that his time in the U.S. and the nature of his work could lead to their persecution in the PRC if the Chinese Communist Party should change their present policies. In December 2000, Applicant's spouse became a naturalized U.S. citizen.

Applicant traveled to the PRC to see his parents and brother for three weeks, from May 2002 to June 2002. It was his first trip back to China since coming to the U.S. in 1995 and he had not seen his relatives in seven years.

In September 2002, Applicant left his job to pursue doctoral studies at a private technological university in the area. In late July 2005, Applicant became a U.S. citizen, taking an oath to renounce all foreign allegiances, to support and defend the U.S. Constitution and its laws, and to bear arms or perform noncombatant service or civilian service on behalf of the U.S. if required. Applicant formally took on the anglicized first name that he had been using since 1995. A few days after his U.S. naturalization, he and his spouse had a daughter. In August 2005, he obtained his U.S. passport.

Applicant's mother-in-law came to the U.S. from the PRC in late June 2005 to help Applicant's spouse who was then expecting. She stayed for six months with Applicant and her daughter. After her mother returned to the PRC, Applicant's spouse contacted her about once every two months.

In January 2006, Applicant began working for his present employer as a senior electrical engineer while finishing up his Ph.D. degree, which was awarded him in

February 2007. In March 2006, Applicant's parents came to the U.S. on visitor visas so that he could take care of them. In summer 2006, he sponsored his parents for U.S. permanent residency, and they obtained their green cards in July 2007.

In about April 2006, Applicant's direct supervisor asked Applicant to apply for a secret-level clearance so that he could contribute to a particular project. On April 10, 2006, Applicant executed an electronic questionnaire for investigations processing (e-QIP). Applicant gave his parents' permanent residence in the PRC as their current residence, although they were staying with him and his spouse at the time. He disclosed that his brother and parents-in-law were resident citizens of the PRC. In October 2006, Applicant was interviewed by an authorized investigator in conjunction with his background investigation for his security clearance. Applicant's parents were still in the U.S. He had twice yearly contact with his mother-in-law, who was living with her spouse in an apartment in a PRC major city.

As of December 2007, Applicant's parents were residing in a rented apartment in the U.S., in a city convenient to public transportation and the local Chinatown. Applicant was paying the rental costs as his parents did not have any stable source of income. Once in awhile, his mother earns some money taking care of the neighbor's children. His parents rent out a small apartment that they own in the PRC, which is being handled by Applicant's brother, but the income is just enough to cover the maintenance costs. His parents intend to acquire U.S. citizenship when they become eligible and hope to sell their apartment in the PRC when it becomes profitable to do so. They do not intend at present to move back to the PRC ("they don't have any intention at the moment to move back." Tr. 68). Applicant believes his mother intends to travel to the PRC in 2008 to visit her mother, who is almost 90. Applicant has contacted his maternal grandmother only three or four times in the past 12 years.

Applicant's brother resides in the PRC with his spouse and young daughter (born in 2001). Since his college graduation in 1994, Applicant's brother has been employed by the Chinese government in a local tourist department. He presently works as a clerk. To Applicant's knowledge, his brother is a Christian and not politically active in the PRC. Before March 2006, Applicant had monthly contact with his brother to check on their parents. In the past 18 months, Applicant has contacted his brother only once, on his brother's birthday. He does not anticipate contacting his brother any more frequently than once or twice a year now that their parents are living near him in the U.S. Applicant's parents call his brother about once a month.

Applicant's parents-in-law had worked for a nuclear agency within the PRC government until their retirements in early 2000. During their last ten years on the job, they organized family benefit activities for the workers. Applicant does not know the nature of their previous duties. Due to their small pensions, they mainly live off their savings. Neither Applicant nor his spouse provides financial support for her mother and stepfather. In September 2007, Applicant's parents-in-law came to the U.S. to visit their daughters and grandchildren. Applicant's spouse has a sister who lives in the U.S. with her family. Applicant's parents-in-law have been staying primarily with Applicant's family

and intend to return to the PRC in March 2008 before his mother-in-law's visitor's visa expires. Applicant's parents and parents-in-law know that he is applying for a U.S. security clearance for his job.

Applicant and his spouse are active in their Christian church in the U.S. Applicant volunteers as a parent helper with the children during church services. All his and his spouse's financial assets are in the U.S. They own a condominium and two cars and have 401(k), checking and savings accounts, and stock assets in the U.S. Both Chinese and English are spoken in their home. Applicant's spouse is employed part-time as a business administrator for a local company that sells flow meters. She has a bachelor's degree in psychology from a private college in the U.S. Applicant has no plan to visit the PRC.

Applicant designs monolithic microwave integrated circuits for his employer. His work performance has exceeded his employer's expectations. Applicant's direct supervisor has observed Applicant to be very conscientious in his handling of sensitive and proprietary information. Applicant recently completed secure facility training offered by his employer.

* * *

Following review of official publications of the U.S. government that address the economic, political, and intelligence activities of the PRC, I take administrative notice of the following facts:

China is a large and economically powerful country, with a population of more than a billion people and an economy growing at about 10% per year. China has an authoritarian government dominated by the Chinese Communist Party. The National People's Congress, the PRC's legislative body, is the highest organ of state power. With China firmly committed to economic reform and greater openness, the influence of people and organizations outside the formal party structure has increased, but in all important government, economic, and cultural institutions in China, the Chinese Communist Party ensures that party and state policy guidance is followed. During 2006, the PRC government's human rights record remained poor, with a trend toward increased harassment, detention, and imprisonment by government and security authorities of those perceived as threatening to government authority. Foreign visitors in the PRC may be placed under surveillance by security personnel, their hotel rooms, telephones, and facsimile machines monitored, and their personal possessions, including computers, searched without their knowledge or consent.

While Taiwan has complicated the relationship and been a source of discord between the U.S. and PRC at times, the U.S. formally recognizes the government of the PRC as the sole legal government of China. Since the Tiananmen crackdown in June 1989, the PRC has sought a higher international profile through its seat as a permanent member of the United Nations, and through diplomatic relations with other countries. The U.S. and PRC have a history of cooperation on scientific, environmental and more

recently counterterrorism and aspects of law enforcement (computer crime, intellectual property rights, human smuggling, corruption). China is an important trading partner of the U.S. Its trade surplus with the U.S. was \$232.6 billion in 2006, and the U.S. is the second largest foreign investor in China.

The PRC possesses large military forces (strategic nuclear forces, army, navy and air force), which are in the process of transformation into a smaller, more mobile, high tech military. The PRC acquired some advanced weapon systems from Russia. In an effort to acquire advanced technology, the PRC has aggressively targeted sensitive and protected U.S. economic and militarily critical information. The PRC blends intelligence and non-intelligence assets, relying on covert espionage activity by personnel from government ministries, commissions, institutes, and military industries independent of the PRC intelligence services, and by targeting ethnic Chinese who have access to sensitive information.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 6:

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 has several close family members (parents, brother, and parents-in-law) who are citizens of the PRC, a country known to engage in sensitive data collection in the U.S. Although his parents enjoy the protections of U.S. permanent residency, they are bound to comply with the obligations of their PRC citizenship. Applicant’s brother and in-laws make their permanent homes in the PRC. The security concerns underlying 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) are implicated. Moreover, the risk of undue foreign influence through his spouse and her relationship to her parents requires consideration of disqualifying condition AG ¶ 7(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).

The Government also urges security concerns over Applicant's brother's present and his in-laws' former government employments in the PRC. Nothing about his brother's duties as a clerk in a local government tourism office suggests military, security, or intelligence activities. Although his parents-in-law worked for the PRC's nuclear agency, Applicant credibly testified that their duties were nontechnical, at least during the ten years preceding their retirements in 2000. However, it is highly probable that his brother is in contact with other government officials because of his work, and his brother depends on the PRC government for his livelihood. His parents-in-law sustain themselves at least in part on their government pensions. It is difficult to discount the risks of Applicant's brother or in-laws being exploited by the PRC to enlist Applicant's cooperation in furnishing sensitive data. Applicant has not broken his contacts with his brother, even if he calls him only once or twice a year. Moreover, Applicant is bound by affection and financial obligation to his parents, who have a close enough relationship to their younger son to telephone him regularly and to rely on him to handle their apartment in the PRC. Applicant's in-laws are staying with him and his spouse for six months, from September 2007 to March 2008. Although his spouse was raised by her grandparents, she has a bond with her mother, who is on her second extended stay in Applicant's home.

Applicant's travel to the PRC in May 2002 was primarily to see his parents. His travel is relevant as it confirms his affection for his parents, but there is no evidence that Applicant engaged in any conduct while in the PRC that would warrant application of AG ¶ (7)(i) (conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country). Applicant's trip to the PRC in 2002 does not raise current security concerns where his parents now reside in the U.S. and he has no plan to visit the PRC.

Applicant bears a heavy burden of mitigation, given the history and current political and security conditions extant in the PRC and Applicant's relationships with family members who have citizenship and/or residency ties to the PRC. The PRC has an aggressive record of pursuing sensitive U.S. information, even targeting U.S. citizens of Chinese ancestry to obtain cutting-edge technology. While the PRC continues to maintain strong diplomatic interest with the U.S. and has been helpful in strategic efforts to suppress nuclear threats in the region and terrorism internationally, it continues to violate basic human rights of its citizens and to suppress activities perceived to threaten Communist Party control. The risk of undue foreign influence is substantially lessened with respect to his parents because of their legal permanent residency in the U.S. and their intention to remain in the U.S. and sell their apartment in the PRC. However, I am unable to apply AG ¶ 8(a) (the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.). Applicant's mother was discriminated against because of her ethnicity in the past, and she intends to travel to

the PRC to see her mother sometime in 2008. His brother and parents-in-law (albeit to a lesser extent) depend on the PRC government for their incomes.

Security concerns could be overcome by deep and longstanding relationships and loyalties in the U.S. (see AG ¶ 8(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)). Although Applicant came to the U.S. in 1995, his intention at that time was to earn his graduate education, work for a few years, and then return to his native PRC. However, shortly thereafter, he met his spouse. Unlike Applicant, she had been educated in the U.S. from high school, and intended to remain here. In 1997, he applied for legal permanent residency, and after his marriage in 1999, decided to make his home in the U.S. Knowing the PRC does not recognize dual citizenship, he became a U.S. citizen in 2005 and within a month had his U.S. passport. While his parents were visiting him from the PRC, he sponsored their U.S. immigration, and they became lawful permanent residents in July 2007. Applicant has also developed ties within his community, particularly within his church where he volunteers to help with the children. All of his financial assets, including a home, are in the U.S. His work performance has exceeded his employer's expectations, and he has conscientiously handled sensitive information.

Yet, his demonstrated commitments to the U.S. and trustworthiness at work are relatively recent and must be evaluated in the context of the geopolitical realities that govern PRC-U.S. relations and the potential for exploitation of family members who are resident citizens of the PRC. Applicant testified that his parents and parents-in-law are aware that he is applying for a security clearance. Applicant has not told his brother, but his parents have ongoing contact with their younger son, and it is not clear what he knows about Applicant's work. Based on the record before me, I am unable to conclude with a reasonable degree of certainty that Applicant is unlikely to be placed in a position of having to choose between the interests of a foreign government and the interests of the U.S.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): (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) 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.

Nothing in the record suggests that Applicant is other than a loyal U.S. citizen. However, the salient issue in the security clearance determination is not in terms of loyalty or allegiance, but rather what is clearly consistent with the national interest. See Executive Order 10865, Section 7. Too much uncertainty exists to permit safe predictive judgments about Applicant's ability to recognize and withstand the risks of undue influence attributable to his familial relationships in the PRC. When asked at his hearing whether he considered his in-laws vulnerability at all heightened by the knowledge that he is applying for a security clearance, Applicant responded that his in-laws no longer have any connection to the PRC government. (Tr. 72) In its efforts to acquire sensitive technology and information, the PRC employs a variety of techniques (overt and covert) and personnel, including foreign visitors and commercial sector employees. While his in-laws' retirement may reduce the likelihood of foreign influence, it does not completely eliminate the risk.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ELIZABETH M. MATCHINSKI
Administrative Judge