



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



In the matter of:)	
)	
)	ISCR Case No. 07-08856
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicole Noel, Esquire, Department Counsel
Thomas Coale, Esquire, Department Counsel

For Applicant: Nancy Shih, Personal Representative

March 26, 2008

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted his Security Clearance Application on November 20, 2006. On October 18, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns for Applicant under Guideline B, Foreign Influence. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the 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 October 22, 2007. He answered the SOR in writing initially on October 31, 2007, denying all of the factual allegations in the SOR. He submitted a second answer to the SOR on November 7, 2007, and admitted the factual allegations in the SOR with explanation but denied there was a security concern. He requested a decision on the record in both answers. DOHA

received the second answer to the SOR on November 8, 2007. On December 14, 2007, Department counsel requested that the case be assigned to an administrative judge for a hearing. Department counsel was prepared to proceed on January 7, 2008. The case was assigned to another administrative judge on January 17, 2008, and reassigned to me on February 5, 2008. DOHA issued a notice of hearing on February 11, 2008, and I convened the hearing as scheduled on February 26, 2008. The government offered two exhibits (Gov. Ex.) 1 and 2, which were received without objection. Applicant submitted eight exhibits, marked Applicant (App.Ex.) A through H, which were received without objection. Applicant and two other witnesses testified on Applicant's behalf. DOHA received the transcript of the hearing (Tr.) on March 5, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Peoples Republic of China. (Tr. 23-26) The request and the attached supporting documents were not admitted into evidence but were included in the record as Hearing Exhibit I. Applicant had no objection to the request for administrative notice and the attached documents. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant initially denied all the factual allegations in the SOR, with explanations. Applicant subsequently admitted all the factual allegations in the SOR with explanation. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 58 years old and an employee of a defense contractor working in a U.S. Army laboratory performing research in the area of infrared photo detectors. He received his undergraduate degree from a university in the Peoples Republic of China (PRC) in 1981, and a master's degree in physics from a United States university in 1994. (Tr. 38-41; Government Exhibit 1, Security Clearance Application, E-QIP, dated November 20, 2006)

Applicant was born in the PRC. His father was a university professor classified by the communist Chinese government as a person opposed to the communist rule. His mother was an accountant. From 1957 until 1965, the family was exiled to a small town in the countryside. The living conditions were bad. In 1966 at the start of the Cultural Revolution in China, the family was treated as second or third class citizens.

Applicant was prohibited from starting college and was required to work on farms for ten years. In 1977, he started college at age 27. (Tr. 28-30)

After college, he taught physics at a college from 1981 until 1988. He was treated badly, and could not be promoted because of his political views. He and his family were typical political victims of the communist rule in China. (Tr. 30)

When Applicant came to the United States in 1990 to attend college, he had a PRC passport. He renewed the passport in April 2000 before becoming a U.S. citizen, and it expired in April 2005. (Applicant Exhibit B, Passport, dated April 20, 2000) He became a United States citizen on August 25, 2000, and was issued a U.S. passport in October 2000. (Applicant Exhibit C, Passport dated October 31, 2000) His PRC passport has expired.

Applicant stated he came to the United States to pursue a better life. He could no longer tolerate inequity, injustices, lack of human rights, and poverty in the PRC. The United States to him was a country of freedom, equal opportunity, and open society treating everyone fairly without discrimination. He is happy with his better life in the United States. (Tr. 27-28)

Applicant has been married three times. His first wife was born in the PRC but is a United States citizen. The marriage ended in divorce issued by a U.S. court in 2000. (Tr. 34-35; Applicant Exhibit D, Divorce Stipulation and Property Settlement Agreement, dated January 11, 2000) He has a son from this marriage who is a resident and citizen of the United States. He lost contact with his son and last talked to him in 2000. (Tr. 44, 55) His second wife is a PRC citizen. Applicant has lost contact with her and does not know her location. The marriage also ended in divorce issued by a U.S. court in 2003. (Tr. 35; Applicant Exhibit E, Marital Separation Agreement, dated April 10, 2003). He married for the third time on December 14, 2004, in the United States to a woman who is a citizen of the PRC, but now resides with him in the United States. (Applicant Exhibit F (Marriage License, dated December 14, 2004) He has a daughter from this marriage who is a citizen and resident of the United States. His present wife has a twelve year old son who resides in the PRC. He and his wife do not pay child support but his wife occasionally sends her son gifts. Applicant has no contact with the step-son. His wife and Applicant do intend to have the boy join them in the United States. His wife first has to gain custody of the boy. They have talked to the boy's father but have not started any procedures. He has not talked to the boy's father but his wife has talked to him once. (Tr. 36, 44-47, and 55)

Applicant's mother is 85 years old and a resident and citizen of the PRC. His father is deceased. His mother still lives in the small town the family was exiled to in 1957. His mother has diabetes and a heart condition and stays in bed most of the time. He calls occasionally, about once a year. He does not send her money because she has a retirement income from the company she was employed by as an accountant. She lives alone but his brother in the PRC hired someone to care for her. He does not normally help with her care but will send her money if asked to defray medical

expenses. The last money sent was \$500 about two years ago. If she asked for money and help, he would help her. (Tr. 30, 40-43)

Applicant has a brother and sister who are residents and citizens of the PRC. His brother is a retired chief executive officer of a small chemical products company who now does consulting work for the company when asked. He talks to his brother by phone when he calls his mother and his brother is with his mother. The last time he talked to his brother was February 2004. He does not provide financial support for his brother. Applicant's sister is a retired accountant for a company in the PRC. He last talked to his sister by telephone in 2004. His brother and sister have not visited Applicant or anyone else in the United States. (Tr. 47-50)

Applicant has traveled to PRC five times. He made three trips in 2000. The purpose of his first trip was to visit his parents, but he also met his second wife. He made a second trip that year to marry her, but she remained in PRC. He visited her later in 2000. He made a trip from December 2002 until January 2003 to visit his second wife, who he had divorced, and also met his third wife. He returned for his fifth trip in January/February 2004 to become engaged to his present wife. All of his trips were no more than a month in length, mostly in December and January over the holiday break, and spent in his parents' home area or that of his wife. He normally stayed with his parents or in hotels. He has not returned to PRC since early 2004. He has no plans to return to PRC in the near future. (Tr. 50-51; Applicant Exhibit A, Summary of trips to China, undated) He used his PRC passport for all trips before he became a citizen and was issued a U.S. passport. He used his U.S. passport for all trips taken after October 2000 when he received his U.S. passport. (Tr. 50)

Applicant's mother-in-law is a retired medical doctor who is a resident and citizen of PRC. She visited Applicant and his wife in the United States twice to assist his wife with the care of their infant daughter. She first visited in 2005 and stayed five months. She visited again in 2007 for four months. They would like to have her immigrate to live with them in the United States as soon as his wife becomes a citizen. He provides her no financial assistance. (Tr. 51-54)

Applicant's present wife testified she met Applicant through a matchmaker in January 2004 in PRC. She came to the United States in November 2004 and married Applicant in December 2004. They have a daughter born in October 2005. She believes her husband loves his wife and child. He is a good father. He works hard and is diligent. She has a son from a former marriage living with his father in PRC. She talks to him about once every other month. She does not send him money regularly but does send gifts on special occasions. She and her husband would like to bring the boy to the United States as soon as she can gain his custody. She speaks to her mother in the PRC about once every two or three months. She has no plans to travel to PRC. Her mother has no plans for future trips to the U.S. (Tr. 57-62)

Applicant's work colleague testified that he has worked in the same laboratory with Applicant for almost two years, but has known him for over eight years. They

previously worked for the same company. He remembers an incident when he had been laid off from the former employer but Applicant still worked for them. He called Applicant for information to prepare for a job interview. Since the witness no longer worked for the company, Applicant refused to provide the information. Applicant was loyal to his agreements and the company. He believes Applicant is strongly loyal to the United States. (Tr. 65-71)

China, also known as the People's Republic of China, is hostile to the United States, and has interests inimical to those of the U.S. China is ruled by a totalitarian government that depends on the suppression of its people. The government has a poor record of human rights that features, among other things, repression of political and religious dissenters. There have been some improvements in relations between PRC and the United States. While the United States looks forward to a constructive and broad-based relationship with China, a message reiterated by President Bush when he met with PRC President Hu in April 2006, there are areas of potential disagreement.

China is known to engage in espionage against the U.S., both economically, militarily, and otherwise. The United States is a primary intelligence target of PRC because of the United States role as a global superpower; its substantial military, political, and economic presence in Asia and the Pacific Rim; its role as a developer of advanced technology that China requires for economic growth; and the large number of Americans of Chinese ancestry who are considered prime intelligence targets by the PRC. The intelligence practice of the PRC is different from the Soviet and western concept of the use of recruited agents. The western approach is to recruit agents for a specific intelligence target. The PRC intelligence philosophy is to try to recruit agents before there is a specific need, and recruit as many as possible. The crux of the PRC approach is not to try to exploit a perceived vulnerability but to appeal to an individual's desire to help China out in some ways. A large portion of the PRC intelligence collection efforts against common targets is conducted directly by PRC students, delegations, and commercial enterprises. They also believe if large numbers of PRC personnel leave China and settle permanently in the United States, some of them may some day find their way into positions of intelligence potential. When they are in position, these individuals will be approached on the basis of loyalty to their ancestral land, and some may be persuaded to cooperate, at least on a limited basis. (Court Exhibit 1, Government Request for Administrative Notice, Intelligence Threat Handbook, at 17-24)

Chinese security personnel place foreign visitors under surveillance and subject them to search without their knowledge or consent. However, there is no information in intelligence documents that the PRC is targeting relatives of Chinese-Americans to gain access to classified, technical, or business information from their relatives in the United States. However in recent years, the PRC has been the subject of approximately half of the cases initiated by U.S. law enforcement agencies concerning the illegal diversion of technology from the United States. These cases involve people born and raised in the PRC who immigrated to the United States and became United States citizens. The PRC relies on recruitment and exploitation operations. The PRC attempts to recruit or

at least “make friends with” as many Chinese-Americans as possible, apparently hoping that at least some will perceive an obligation to help China, (Court Exhibit 1, Request for Administrative Notice, Attached State Department and Intelligence Service documents)

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 over-arching 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

There is a security concern because 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 the U.S. interests, or is vulnerable to pressure or coercion by any foreign interests. Adjudication under this guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is location, including but not limited to, such consideration 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 ¶ 6)

Applicant has contact with his mother, mother-in-law, brother, sister, and stepson, who are all citizens and residents of the PRC. His wife, a citizen of PRC residing in the United States, has contacts with her mother in PRC. These contacts may be minimal or infrequent, but they raise security concerns under Foreign Influence Disqualifying Conditions AG ¶ 79(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); AG ¶ 7(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 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).

I have considered Foreign Influence Mitigating Conditions 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 interest of the U.S.); 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; and AG ¶ 8(c) (Contact or communication with foreign citizens is so casual or infrequent that there is little likelihood that it could created a risk for foreign influence or exploitation) and determine all apply to Applicant’s circumstances.

Under the old adjudicative guidelines, a disqualifying condition based on foreign family members could not be mitigated unless an applicant could establish that the family members were not “in a position to be exploited.” The Appeal board consistently applied this mitigating condition narrowly, holding that its underlying premise was that an applicant should not be placed in a position where he is forced to make a choice between the interest of the family member and the interest of the United States. (See, ISCR Case No. 03-17620, App. Bd, Apr. 17, 2006; ISCR Case No. 03-24933, App. Bd. Jul. 28, 2005; ISCR Case No. 03-02382, App. Bd. Feb. 15, 2005; and ISCR Case No. 03-15205, App. Bd. Jan. 21. 2005). Thus, an administrative judge was not permitted to apply a balancing test to assess the extent of the security risk. Under the new guidelines, however, the potentially conflicting loyalties may be weighed to determine if an applicant can be expected to resolve any conflict in favor of the U.S. interest.

The nature of the country in which persons are located is an issue. There are some indications that China and the United States are working towards more friendly relations. There is no doubt that the PRC targets the United States for scientific, intelligence, technical, and military information. Security concerns can be raised from countries both friendly and hostile to the United States. The United States has an interest to protect its classified information whether the person, organization, or country seeking the information has interests inimical to the United States. (ISCR Case No. 02-11570, App. Bd. May 19, 2004 at 5) Friendly countries can have disagreements with the United States over matters that are vital to the national security of the United States. Friendly countries have engaged in espionage against the United States while seeking economic, scientific, and technical information. (ISCR Case No. 00-0317, App. Bd. May 29, 2002) The nature of a nation’s government, its relationship with the U.S., its human rights record, and its intelligence collection methods are relevant in assessing the likelihood that an applicant’s family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is dependent on or associated with the government, or the country is known to conduct intelligence operations against the U.S. Applicant has a heavy burden to establish that PRC does not create a security concern.

Applicant’s mother is elderly and in poor health. She lives in a small town, worked for a private company and not the government, and relies on retirement income from the company and not the government to live. Applicant talks to her by telephone only about once a year, so the contact is infrequent. He sent her money to help with medical costs only once and has not sent her funds in many years. He has not talked to his sister in over four years, and only talks to his brother if he is at his mother’s house when he calls one time a year. Applicant’s contacts with his mother and siblings in the PRC are infrequent and minimal. Since his mother and siblings are family members, there contact cannot be considered casual, even though the contacts are infrequent and minimal.

His mother-in-law is a retired doctor. She visited Applicant and his wife in the United States but he does not speak to her when she is in PRC. He has not seen or

talked to his step son. Applicant and his wife would like to sponsor the mother-in-law and step-son to come to the United States. The contact with them to have them immigrate would normally be frequent and extensive. However, there is only telephonic contact with them every few months. Applicant does not even talk to the step-son. They have not taken any significant steps to gain custody of the step-son so he can come to the United States. The contact with the mother-in-law and step-son in the PRC is minimal, infrequent, and casual.

Applicant's trips back to PRC do not show an interest in the PRC but were taken to see his parents and his former wife, as well as to court his new wife. The trips were not made because of his desire to see the PRC or for government purposes. His last trip was over four years ago, so his trips do not create a conflict of interest.

The government documents used for administrative notice purposes show that the PRC approach to intelligence gathering is different than the western approach. The PRC does not target people, like his family members, to pressure, or coerce Applicant to reveal information not in the U.S. interests. In balancing the nature of the contacts and visits with his family and relatives in the PRC, and the intelligence approach of the PRC against Applicant's loyalty to the United States, I determine that Applicant is not vulnerable to pressure or coercion by the PRC, and cannot be manipulated or induced to help PRC in a way that is against U.S. interest by the location of his family in the PRC.

The PRC approach to intelligence gathering does seem to target individuals of Chinese ancestry in the United States. The administrative judge must again balance the nature of the loyalty of the individual to the United States against his loyalty to the PRC. In this case, Applicant has a strong sense of loyalty to the United States and no loyalty or love for the PRC. He and his family suffered under PRC rule, they were sent to the countryside, he was not immediately able to follow his desires for an education, and he was discriminated against because of his family background. His most significant tie to the PRC is to marry women from that country. Applicant has little if any sense of loyalty to the PRC. He has a deep sense of loyalty and admiration for the United States and its way of life. He became a United States citizen, travels on his United States passport, brought his new wife to this country and married her here, his daughter is a United States citizen, and he has property here. He sees the United States as offering him freedom, justice, and tolerance with an opportunity to reach his potential. His sense of loyalty or obligation is not to the PRC but to the United States. A conflict of interest in this case is extremely unlikely. I am satisfied Applicant's loyalty to the United States is such that he can be expected to resolve any conflict of interest in favor of the U.S. interest. Accordingly, Applicant has met his heavy burden to show that his contacts in the PRC do not cause a security concern. I conclude AGs ¶¶ 8(a), (b), and (c) are established.

