



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



In the matter of:)
)
) ISCR Case No. 07-05341
)
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esq., Department Counsel
For Applicant: , Personal Representative

May 29, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant failed to mitigate the security concerns raised by her foreign influence. Eligibility for access to classified information is denied.

On December 6, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns 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 answered the SOR in writing on December 13, 2007, and again on January 15, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on March 20, 2008. DOHA issued a Notice of Hearing on March 24, 2008, and I convened the hearing as scheduled on April 29, 2008. The Government

offered Exhibits (GE) 1 through 9, which were received without objection. Applicant testified on her own behalf, called one witness, and submitted Exhibit (AE) A, which was received without objection. I granted Applicant's request to keep the record open until May 13, 2008, to submit additional matters. Applicant submitted 13 pages of documents marked collectively as AE B, and received without objection. Department Counsel's memo is Hearing Exhibit (HE) VIII. The record closed on May 13, 2008. DOHA received the transcript of the hearing (Tr.) on May 9, 2008.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the People's Republic of China (PRC). Applicant did not object and the request was approved. The request and the attached documents were not admitted into evidence but were included in the record as HE I through VII. The facts administratively noticed are set out in the Findings of Fact, below.

Applicant's Personal Representative

Applicant's husband was her Personal Representative. Applicant also wanted him to testify as a witness. Department Counsel did not object and he was permitted to testify and serve as Applicant's Personal Representative.

Findings of Fact

Applicant is a 53-year-old software engineer for a defense contractor. She has worked for the same company since 2004. She was born in the People's Republic of China. Her family was educated and was targeted for oppression by the Communist Party during the Cultural Revolution of the 1960s. Her parents were sent away from their family and the rest of the family was also subjected to harsh treatment. Applicant lived in China until she married a citizen of a European country in 1986, and moved to that country. She came to the United States in 1987. Her marriage ended in divorce in 1993. She obtained a Master of Science degree in computer science from an American university in 1999. She became a U.S. citizen in 2000, and married a native-born U.S. citizen in 2001. She has no children.¹

Applicant's mother, one brother, two half-sisters, two aunts, and an uncle are citizens and residents of the PRC. She also has a brother and sister that live in the United States and are U.S. citizens. Her mother is more than 90 years old. She has been retired for more than 25 years. Before she retired she was a senior executive with a state-run institute. She receives a retirement from the government because of her employment. She is a member of the Communist Party. She has lived off and on in the United States as a permanent resident until about three years ago when her health would no longer permit the travel and she remained in the PRC. Applicant speaks to her

¹ Tr. at 61-64, 89-93, 98; GE 1, 2; AE A.

on the telephone a couple times a month. Applicant gave her mother about \$20,000 several years ago in order to help her move.²

Applicant's brother in the PRC is more than 60 years old. He retired about three to four years ago as an executive for a national agency responsible for security in the transportation industry. He receives a retirement pension. He is a member of the Communist Party. Applicant talks to him on the telephone about once or twice a year.³

Applicant's half-sister was arrested after the Tiananmen Square uprising and was jailed for an extended period. She was living for a period in another country, but is now back living in China. She is a writer. Her other half-sister is retired from a position with a government agency dealing with agriculture. She is undergoing treatment for cancer. Applicant talks to her half-sisters on the telephone about once a year.⁴

One of Applicant's aunts is a physician and was a professor at a medical school. She is retired from teaching but still returns to the school for lectures. She receives a pension. Her other aunt retired more than 20 years ago from a position as an editor for an institute. Applicant's uncle is about 85 years old. He was a professor at a university. Applicant is uncertain if he has retired. He visited Applicant in the U.S. on one occasion. Applicant does not keep in telephonic contact with her aunts and uncle.⁵

Applicant traveled to China to visit her mother in 2006 and 2007. She anticipates that she will go again later in this year. She saw the rest of her relatives during the visits, except she did not see one of her half-sisters in 2006, and she did not see her uncle and one of her aunts in 2007.⁶

Applicant has no foreign assets. Her husband testified to her positive attributes and love of this country. She is very spiritual and has embraced a religion that has been denounced by the Communist government of the PRC. Character letters from Applicant's supervisor and co-workers attest that she has always displayed a high degree of integrity, responsibility, and a strong personal work ethic. Her loyalty and devotion to this country have never been in doubt. They recommend her for a security clearance.⁷

² Tr. at 34-36, 64, 81-89, 100-107; Applicant's response to SOR; GE 1, 2; AE A.

³ Tr. at 65-68, 82, 101-107; Applicant's response to SOR; GE 2; AE A.

⁴ Tr. at 54-56, 68-70, 82, 93-96; Applicant's response to SOR; GE 2; AE A.

⁵ Tr. at 71-76, 83; Applicant's response to SOR; GE 2; AE A.

⁶ Tr. at 76-81.

⁷ Tr. at 85; AE A, B.

People's Republic of China

The PRC is a large and economically powerful country, with a population of over a billion people and an economy growing at about 10% per year. The PRC has an authoritarian government, dominated by the Chinese Communist Party. The PRC has a poor record with respect to human rights, suppresses political dissent, and its practices include arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners.

The PRC is one of the most aggressive countries in targeting sensitive and protected U.S. technology, and economic intelligence. It has targeted the U.S. with active intelligence gathering programs, both legal and illegal. In China, authorities have monitored telephone conversations, facsimile transmissions, e-mail, text messaging, and internet communications. Authorities opened and censored mail. The security services routinely monitored and entered residences and offices to gain access to computers, telephones, and fax machines. All major hotels had a sizable internal security presence, and hotel guestrooms were sometimes bugged and searched for sensitive or proprietary materials.

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 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 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 the 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 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* 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 ¶ 7:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. Four are potentially applicable 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; and

(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;

Applicant's mother, brother, two half-sisters, two aunts, and an uncle are citizens and residents of the PRC. Her mother and brother are members of the Communist Party. The PRC has an authoritarian government, dominated by the Communist Party, with a poor human rights record, and targets the U.S. for espionage. Applicant's foreign connections create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. They also create a potential conflict of interest. AG ¶¶ 7(a) and 7(b) have been raised by the evidence. SOR ¶¶ 1.b, 1.d, 1.e, 1.g, 1, h, and 1.i are factually true, but they are repetitious with other SOR allegations. SOR ¶¶ 1.b, 1.d, 1.e, 1.g, 1, h, and 1.i are resolved in Applicant's favor.

Conditions that could mitigate Foreign Influence security concerns are provided under 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.;

(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.

Applicant has been in this country for more than 20 years and has been a U.S. citizen since 2000. Her husband is an American citizen, as are one of her brothers and one of her sisters. She has no foreign assets. She is a respected and valued employee.

However, because of her extensive and close foreign family ties and the nature of that foreign country, I am unable to find any of the mitigating conditions to be fully applicable.

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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

Applicant has a number of close family members who are citizens and residents of China. Her family was targeted for oppression by the Communist Party during the Cultural Revolution of the 1960s. Two of her close relatives are members of the Communist Party. The PRC has an authoritarian government, a bad human rights record, and has a very aggressive espionage program aimed at the U.S. The nature of a nation's government, its relationship with the U.S., and its human rights record 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 associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S.

I considered all of Applicant's very favorable character evidence. She is a valued and trusted employee. She has done nothing whatsoever to question her loyalty and devotion to this country. However, she has simply been unable to overcome the "very heavy burden" of showing that neither she nor her family members in the PRC are subject to influence by that country.⁸ Her vulnerability to foreign pressure, coercion, exploitation, or duress remains a concern.

⁸ ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007).

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Foreign Influence security concerns.

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:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge