



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-08219

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: *Pro Se*

June 17, 2008

Decision

WESLEY, Roger C., Administrative Judge:

History of Case

On September 24, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on October 9, 2007, and requested a hearing. The case was assigned to me on January 17, 2008, and was scheduled for hearing on April 8, 2008. A hearing was held on April 8, 2008, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of two exhibits; Applicant relied on one witness (himself) and two exhibits. The transcript

(R.T.) was received on April 17, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility to access classified information is denied.

Besides its two exhibits, the Government requested administrative notice of six documents: *Background Note: China*, U.S. Department of State (January 2007); *Intelligence Threat Handbook* [Unclassified/For Official Use Only], Interagency OPSEC Support Staff (IOSS) (June 2004); *2007 Report to Congress*, U.S.-China Economic and Security Review Commission (November 2007); *Annual Report to Congress from the National Counterintelligence Executive on Economic Collection, 2005-2006* (August 2006); *Country Reports on Human Rights Practices - 2006, China* (March 2007); *Consular Information Sheet on China*, U.S. Department of State (March 2007).

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 (App. Bd. April 2007); ISCR Case No. 02-24875 (App. Bd. October 2006). Administrative notice is appropriate for noticing facts or government reports that are well known. See *Stein*, Administrative Law, Sec. 25.01 (Bender & Co. 2006). For good cause shown, administrative notice was granted with respect to the above-named background reports addressing the geopolitical situation in China.. Administrative notice was extended to the documents themselves, consistent with the provisions of Rule 201 of Fed. R. Evi. This notice did not foreclose Applicant from challenging the accuracy and reliability of the information contained in the reports addressing Taiwan's current state.

SUMMARY OF PLEADINGS

Under Guideline B, Applicant is alleged to have (a) a spouse who is a citizen of the PRC, (b) met his spouse on a web-site in 2005, (c) a step-son who is a citizen of the PRC; (d) a mother-in-law who is a citizen and resident of the PRC; and (e) a father-in-law who is a citizen and resident of the PRC.

For his answer to the SOR, Applicant admitted all of the allegations in the SOR with explanations. He claimed to have initiated first contact with his spouse through an internet dating service. He claimed his spouse was already living and working in the U.S. at the time while holding an H1B work visa. He claimed his spouse and step-son are lawful U.S. green card holders who he expects to apply for U.S. citizenship. And he claimed his mother-in-law and step-son (who have since returned to the PRC) were visiting and living with Applicant and his wife when he was interviewed.

FINDINGS OF FACT

Applicant is a 36-year-old quality assurance engineer for a defense contractor who seeks to retain his security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Applicant's background

Applicant was born and raised in the U.S., and holds bachelors and masters degrees in engineering from an accredited university. He has worked for his current defense contractor for over ten years and has held a security clearance since 2003.

Applicant's wife (W), who is 37 years old, came to the U.S. on a work visa in 2003. W was born and raised in the PRC and attended a PRC university (R.T., at 40-41). She and her former spouse (who she met at the university they both attended) reportedly started a business together in the PRC, which fell apart when they divorced. To the best of Applicant's knowledge, W never worked for the PRC government, but did some work for a PRC controlled television station for several years before she married her ex-spouse (R.T., at 45).

Applicant met W on an internet dating service in October 2003 (R.T., at 34) and dated for about a year before marrying her in October 2005 (R.T., at 34-35). W left behind a child to live with her parents when she relocated to the U.S. (R.T., at 48-49). After their marriage, Applicant and W brought the step-son over to live with them (R.T., at 36, 47-48). W has a green card and is pursuing U.S. citizenship (R.T., at 46). Because her green card expires this year, Applicant will need to provide probative evidence that W is still with him, and their marriage is legitimate (R.T., at 46). Once her green card is renewed, she will need to wait another year to satisfy eligibility requirements for applying for U.S. citizenship as Applicant's spouse (R.T., at 46). In the meantime, W has applied for the renewal of her PRC passport in her maiden name, and provided copies of her marriage certificate and green card application (R.T., at 76-79). While her renewed passport will be issued in her maiden name, it should include a note that confirms her marriage and her husband's sir name (R.T., at 75-76). W expects to pick up the new passport in April 2008 (R.T., at 79-80).

Applicant and his wife have no children. W has no known benefits (like a pension). His wife's parents are citizens and residents of the PRC (see ex. 1; R.T., at 51-54). Applicant believes his father-in-law served in the PTC military, but does not have any specifics about his military assignments during his service (R.T., at 70, 90-91). Before his recent retirement, his father-in-law worked as a professor in a Chinese school system (R.T., at 54-55). Because his father-in-law does not speak English, Applicant has never spoken to him (R.T., at 91). Applicant believes his father-in-law receives a pension based on his military service (R.T., at 55-56), but has no details.

Applicant's mother-in-law is a house-wife and does not work outside the home (R.T., at 52). Neither of his in laws have a computer at home. W does speak to her parents weekly (R.T., at 52-53, 56-57). Besides her parents, W has a sister who is a citizen and resident of the PRC. W speaks to her sister once a month. Applicant does not know whether W's sister is married, or has any children. He knows she has several cousins, but does not know of their whereabouts in the PRC. Applicant is aware of government monitoring in the PRC and does not foreclose the possibility of PRC

government officials monitoring his spouse's telephone conversations with her family members.

W has one sibling, a sister who is a citizen and resident of the PRC (R.T., at 58). Applicant has no knowledge of what W's sister does for a living. W speaks to her sister approximately once a month (R.T., at 58). W also has uncles and cousins who reside in the PRC. But Applicant does not have any information on their identities (R.T., at 59).

Applicant has no reason to believe that any of his family members residing in the PRC are at risk to pressure, coercion or influence from PRC intelligence or military personnel (R.T., at 81-82). While W knows the identity of Applicant's employer and his possession of a security clearance, Applicant does not believe W ever identified his employer or security clearance to anyone residing in the PRC (R.T., at 82-83). Applicant expressed concerns, though, about his company's outsourcing its sensitive equipment and parts to the PRC (R.T., at 84-87).

The PRC's country status

Established in 1949, the Peoples Republic of China (PRC) with over 1.3 billion people is the world's most populous country. Today it continues to undergo rapid economic and social change. Political power, however, remains centralized in the Chinese Communist Party (CCP) with little indication of any change in the foreseeable future. China's 70.8 million country is authoritarian in structure and ideology and possesses increasingly sophisticated military forces which continues to transform itself from a land-based military power to a smaller, mobile, high tech military that eventually will be capable of mounting limited operations beyond its coastal waters. See *Background Note: China*, U.S. Department of State, at 14-16 (January 2007).

While not a country acclaimed to be hostile to US persons and interests, the PRC maintains a relationship that is more competitive than cooperative. The PRC operates a large and sophisticated intelligence bureau, entitled the Ministry of State Security (MSS). See *Intelligence Threat Handbook* [Unclassified/For Official Use Only], Interagency OPSEC Support Staff (IOSS), at 17 (June 2004). These operations use clandestine agents to collect intelligence on Western consortia investing in the PRC who are suspected of involvement in attempts to democratize the PRC, as well as other pro-democracy groups thought to be engaging in anti-communist activities. See *Intelligence Threat Handbook, supra*, at 72.

Based on past reports to Congress, the PRC is considered one of the most active collectors of U.S. economic and proprietary information. See *Annual Report to Congress from the National Counterintelligence Executive on Economic Collection, 2005-2006* (August 2006) The PRC is known especially to use its intelligence services to gather information about the US and to obtain advanced technologies. See *Intelligence Threat Handbook, supra*, at 17. The PRC actively monitors international communications satellites from maintained intercept facilities, in addition to collecting information on US military operations and exercises. Examples of PRC economic espionage are cited in

the *Annual Report to Congress from the National Counterintelligence Executive on Economic Collection, 2005-2006*, *supra*, at 10-12. Most of the examples of illegally exported technology to the PRC involved high tech equipment and devices used in missile and aircraft guidance systems, highly sensitive weapons parts, infrared cameras and missile microchips.

As a corollary of its authoritarian roots, the PRC has never been known for a positive human rights record among Western nations and international human rights groups. Part of this can be explained in terms of the PRC's lack of any cognizable tradition for respect for developing democracies and the rule of law. State Department country reports on the PRC cite the country's poor human rights record. Its noted historical abuses include the suppression of political dissent, arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners. See *Country Reports on Human Rights Practices - 2006, China* (March 2007); *Consular Information Sheet on China*, at 1-6 U.S. Department of State (March 2007).

Of growing concern to U.S. security interests are State Department's latest reports of increased high profile cases in the PRC involving the monitoring, harassment, detention, arrest, and imprisonment of journalists, writers, activists, and defense lawyers seeking to exercise their law-protected rights. See *Country Reports on Human Rights Practices - 2006*, *supra*, at 2-9. The State Department cites a comprehensive, credible accounting of all those killed, missing, or detained, reported incidents of deaths in custody, disappearance, torture, and other cruel, inhuman, or degrading treatment or punishment (see *id.*, at 2-3). While the PRC officially denies holding any political prisoners, Western non-government organizations estimate that approximately 500 persons remained in prison in 2006 for the repealed crime of counterrevolution, and thousands of others were either serving sentences or were being detained for counter-revolutionary offenses (*id.*, at 8). State Department advisories caution American citizens visiting or residing in China to take the normal safety precautions and remain aware of their individual surroundings. See *Consular Information Sheet*, U.S. Department of State, at 2-9 (December 2007).

In its November 2007 Report to Congress, the Security Review Commission describes the PRC as a country intent on acquiring and exploiting the knowledge developed by multiples of collection agents: legally, if possible, and otherwise illegally by espionage. See *2007 Report to Congress, U.S.-China Economic and Security Review Commission*, at 104-06 (November 2007). The PRC's concerted efforts to acquire sensitive technology poses a considerable challenge to U.S. counterintelligence measures. Recent indictments of Chinese citizens for espionage have served to highlight the PRC's spying activities in the U.S. (see *id.*). Violating its own 2004 U.S.-China agreement, the PRC oft-fails to schedule timely end-use inspection visits of dual-use items licensed for export to the PRC. Better export controls can be effective only if they are multilateral in scope (see *id.*). Without effective dual use export controls in place, the PRC can be expected to acquire dual use technologies with military potential through the U.S. and other source countries.

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by administrative judges in the decision making process covering DOHA cases. These Guidelines require the administrative judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the administrative judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the administrative judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Foreign Influence

The Concern: "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 the this Guideline can and should considered 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" (see Adjudicative Guidelines, ¶ 6).

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the

Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

ANALYSIS

Applicant is a U.S. citizen by birth who is married to a citizen of the PRC. Security concerns focus on Applicant's spouse and son from a prior marriage, in addition to her immediate family (*i.e.*, her parents and sister) who are citizens and residents of the PRC, a country historically competitive with the U.S., and known for its reported record of economic collection activities in the U.S and poor human rights protections.

Department Counsel urges security concerns over risks that W's parents and her son from a another marriage currently residing with them, might be subject to undue foreign influence by PRC government authorities to access classified information in Applicant's possession or control. Because W's parents and sister reside in the PRC, they present potential heightened security risks covered by disqualifying condition (DC) 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," of the Adjudication Guidelines for foreign influence. The citizenship/residence status of these in-laws and sibling in the PRC pose some potential concerns for Applicant because of the risks of undue foreign influence that could compromise sensitive or classified information under Applicant's possession and/or control.

Because W's father has prior military service (although aged for the most part), some consideration of DC 7(b), "connection 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," is warranted as well. Although Applicant himself has virtually no contact with his in-laws (in part due to language barriers), W maintains regular contact with them. Her contacts afford her some potential for accessing PRC officials who might be interested in proprietary, sensitive, or even classified information that Applicant is privy to. It is this potential for information exploitation that is security-significant; even though Applicant himself has no identified affiliations or contacts with PRC officials currently known to be associated with intelligence or military organizations interested in collecting proprietary or sensitive information in the U.S.

To be sure, from what is known from the presented evidence, none of W's immediate family residing in the PRC have any political affiliations with the PRC's government or military, have any history to date of being subjected to any coercion or influence, or appear to be vulnerable to the same. With the exception of W's father's government-funded pension, her parents and sister have no known financial interests associated with the PRC government.

Upon fully considering Applicant's explanations about his step son and W's parents and sister, risks of undue foreign influence on Applicant, his step son, and/or W's parents and sister, appear to be substantial and ongoing, and clearly of the magnitude that could make them subject to a heightened security risk of pressure or compromise under Guideline B.

The PRC, a country reported to have targeted U.S. economic and proprietary interests in the past, is a powerful communist state with an historically poor history of respect for human rights and the rule of law. Not only is the PRC a reported active collector of economic intelligence in the U.S., but it has been known to use acquired information to harm U.S. strategic interests. Still, the PRC remains a pivotal trading partner of the U.S. and is a member in good standing with the WTO.

The Adjudicative Guidelines governing collateral clearances do not dictate *per se* results or mandate particular outcomes for applicants with relatives who are citizens/residents of foreign countries in general. What is considered to be an acceptable risk in one foreign country may not be in another. While foreign influence cases must by practical necessity be weighed on a case-by-case basis, guidelines are available for referencing in the supplied materials and country information about the PRC.

Unlike the old Adjudicative Guidelines, the new ones do take into account the country's demonstrated relations with the U.S. as an important consideration in gauging whether the particular relatives with citizenship and residency elsewhere create a heightened security risk. The geopolitical aims and policies of the particular foreign regime involved do matter. As demonstrated, the PRC has long been known to target the U.S. and its companies for economic and proprietary information, and remains a country with a known recent history of hostage taking or disposition for exerting undue influence against family members to obtain either classified information, or unclassified economic and proprietary data.

As for security concerns associated with the presence of Applicant's extended family members in the PRC (a country whose interests have recently been and continue to be competitive with the U.S.), the potential heightened risk of a hostage situation or undue foreign influence brought in the hopes of eliciting either classified information or economic or proprietary data out of Applicant through his wife's parents and sister residing in the PRC is considerable for so long as they reside there. In the past, the Appeal Board has shown great reluctance to absolve applicants of security risks who have family members of foreign-born spouses who reside in countries (like the PRC) who present heightened risks. See ISCR Case No, 01-10128 (App. Bd. Jan. 6, 2005). Based

on his case-specific circumstances and the Appeal Board's past guidance in dealing with applicants with family members who reside in the PRC, MC 8(a), "the nature of the relationships with foreign persons, the country in which these persons are located, or the persons or activities of these 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 a foreign individual, group, organization, or government and the interests of the U.S." is not available to Applicant. Neither W (a resident of the U.S. and citizen of the PRC) nor her parents and sister (residents and citizens of the PRC) can be characterized as sufficiently insulated from potential pressures and influence from PRC intelligence and military officials to warrant application of this mitigating condition.

Of some benefit to Applicant is MC 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." Applicant's demonstrated loyalty, patriotism, and professional commitments to the U.S., while considerable, are not enough to neutralize all potential conflicts that are implicit in his relationships with his spouse, his step-son and her parents/sister. MC 8(c), "contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create risk for foreign influence or exploitation," has some applicability, too, based on Applicant own infrequent contacts with his wife's family members residing in the PRC. Application of MC 8(c) is necessarily limited, though, because of W's frequent exchanges with her parents and sister.

Two other mitigating conditions have mixed application to Applicant's situation. MC 8(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," has some prospective value based on Applicant's assurances of reporting his travel plans for the PRC. But there is really no documented record of Applicant's prior reporting of his contacts with members of W's family to warrant any more than minimal consideration at this time. The same holds true with respect to MC 8(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." The extent of W's financial interests and expectancies (e.g., inheritance) in the PRC is for the most part still unknown.

Whole person assessment is not available either to minimize Applicant's exposure to conflict of interests with his PRC family members. While Applicant is not aware of any risks of coercion, pressure, or influence that any of his family members might be exposed to, he acknowledges language barriers with W's parents and sister and knows little about their backgrounds and relationships with former associates. So, in Applicant's case, the potential risk of coercion, pressure, or influence being brought to bear on his wife and/or any of her family members remains considerable.

Overall, any potential security concerns attributable to Applicant's spouse, stepson, and her immediate family members residing in the PRC are insufficiently mitigated to permit safe predictive judgments about Applicant's ability to withstand risks of undue influence attributable to his familial relationships in the PRC. Unfavorable conclusions warrant with respect to the allegations covered by Guideline B.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E2.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE B: (FOREIGN INFLUENCE):	AGAINST APPLICANT
Sub-para. 1.a :	AGAINST APPLICANT
Sub-para. 1.b:	AGAINST APPLICANT
Sub-para. 1.c:	AGAINST APPLICANT
Sub-para. 1.d:	AGAINST APPLICANT
Sub-para. 1.e:	AGAINST APPLICANT

CONCLUSIONS

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

