



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-02510
)
Applicant for Security Clearance)

Appearances

For Government: Dan O’Reilly, Esq., Department Counsel
For Applicant: *Pro Se*
05/05/2020

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny her eligibility for a security clearance to work in the defense industry. Applicant, a naturalized U.S. citizen from China, failed to mitigate the security concerns raised by her familial relationships with individuals who are citizens and residents of China. Clearance is denied.

Statement of the Case

The DOD Consolidated Adjudication Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing security concerns under the foreign influence guideline on September 20, 2019. The DOD CAF took this action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive), and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, implemented on June 8, 2017. Based on the available information, DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant’s security clearance and recommended that the case be submitted to an administrative judge for a determination whether to revoke or deny Applicant’s security clearance.

Applicant timely answered the SOR and requested a hearing. The Government served discovery on Applicant on November 20, 2019. The Government's discovery letter is appended to the record as Hearing Exhibit (HE) I. At the hearing, convened on February 27, 2020, I admitted Government's Exhibits (GE) 1 and 2, and Applicant's Exhibits (AE) A through D without objection. Applicant testified at the hearing. The Defense Office of Hearings and Appeals received the transcript (Tr.) on March 9, 2020.

Procedural Matters

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts regarding the People's Republic of China (China). Without objection from Applicant, I approved the request and the document is appended to the record as HE II. (Tr. 14-15)

Findings of Fact

Applicant, 57, has worked for a federal contracting company as a software engineer since 2001. She has spent her career working on projects supporting the DOD; however, these projects did not require access to classified information. Applicant completed a security clearance application, her first, in May 2016, disclosing that her husband, mother, and two brothers are residents and citizens of China. These relationships serve as the basis for the SOR. (Tr. 17, 27-29, 37; GE 1)

Applicant is a naturalized U.S. citizen from China. China is an authoritarian state in which the Chinese Communist Party (CCP) is the paramount authority. CCP members hold almost all top government and security apparatus positions. Chinese leaders are focused on developing the capabilities they deem necessary to deter or defeat adversary power projection and counter third parties including the United States in conflicts. China's military modernization is producing capabilities that have the potential to reduce core U.S. military technological advantages. The National Counterintelligence Executive has identified China and Russia as the most aggressive collectors of U.S. economic information and technology. China's intelligence services, as well as private companies and other entities, frequently seek to exploit Chinese citizens or persons with family ties to China who can use their insider access to steal secrets. Agents of the Chinese government are the world's most active and persistent perpetrators of economic espionage. Chinese attempts to collect U.S. technological and economic information continue and represent a persistent threat to U.S. economic security. (HE II.)

In assessing the national security implications of the bilateral trade and economic relationship between the U.S. and China, the U.S.-China Economic and Security Review Commission has reported that the Chinese government has conducted large-scale cyber espionage against the United States. China has compromised a range of U.S. networks, including those of DOD, defense contractors, and private enterprises. China's substantial and sustained investment in defense research and development (R&D) has helped China improve its military-industrial complex. China's state sponsored

theft of intellectual property and proprietary information has allowed China to fill knowledge gaps in its domestic defense and commercial R&D. (HE II.)

The Chinese government engages in the repression and coercion against organizations and individuals involved in civil and political rights advocacy, and public interest and ethnic minority issues. Human rights concerns in China include: repression of speech, religion, association, assembly, the press, and movement for certain minorities; extrajudicial killings; enforced disappearance and incommunicado detention; torture and coerced confessions of prisoners; a lack of due process in judicial proceedings; searches of premises without warrants; monitoring of communications (including telephone conversations, facsimile transmissions, e-mail, text messaging, and Internet communications); and opening of domestic and international mail. Additionally, citizens lack the right to change their government and had limited forms of redress against the government. (HE II.)

Before immigrating to the United States in 1996, Applicant trained and worked as a physician for 11 years. She immigrated to the United States to pursue a master's degree in computer science, and has worked in that field since completing her degree in 2001. Applicant met her husband in medical school and married in 1987. He also worked as a physician until 1997, when he transitioned into a position developing herbal medicine products for a Chinese company. Applicant sponsored her husband's immigration to the United States and he received permanent resident status in 2007. Applicant has reported her relationship and contact with her husband to her employer, as required. Applicant's husband continues to live and work in China, traveling to the United States three to four times each year to spend time with Applicant and the couple's U.S.-born son, who is now 14 years old. Each month Applicant's husband transfers money into Applicant's U.S. bank account to help her with living and education expenses for their son. Applicant's husband plans to resign his position in the summer of 2020 to move the United States permanently. He plans to sell the condominium in which he lives. He also plans on cashing out his retirement benefits and transferring the assets to a U.S.-based bank account. (Tr. 18-20, 23-25, 27, 31-34, 51-54, 26; GE 1)

Since immigrating to the United States, Applicant has traveled to China every year. She and her son last visited in the summer of 2019. Each visit lasts approximately two weeks. Applicant spends the time visiting with her mother and two brothers. She reports each trip to her employer as required and completes the required security briefings upon her departure and return. Applicant's mother, 85, is a retired engineer. She has her own home, but spends time in the homes of Applicant's brother and Applicant's husband. Applicant's brothers are also trained as engineers. Her older brother works for a private company. Her younger brother works as a subcontractor for private companies. Applicant does not provide any financial support to her Chinese relatives. (Tr. 22-23, 26, 39-41, 43, 55, 57; GE 1)

Applicant does not have any China-based assets. She owns her home in the United States, which is currently valued at \$600,000. She also has between \$250,000 and \$300,000 in her retirement savings. (Tr. 35-37, 39, 58)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

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

Analysis

“[F]oreign contacts and interests, including . . . business, financial and property interests, are a national security concern if they result in a divided allegiance [or] . . . may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest.” (AG ¶ 6) An assessment of foreign contacts and interests should consider the country in which the foreign interest is located, including but not limited to, consideration such as whether it is known to target U.S. citizens to obtain classified or sensitive information or associated with a risk of terrorism.

Chinese actors are the world’s most active and persistent perpetrators of economic espionage against the United States. In the defense industry, foreign-born engineers and scientists play a critical role in developing and implementing new technology and that technology may be of interest to others whose interests are contrary to the United States. One method employed by the Chinese government relies on the exploitation of Chinese nationals in research positions. The Chinese government’s poor human rights towards its citizens also has the potential to create a source of vulnerability for Applicant. Accordingly, Applicant’s relationships and ongoing contact with individuals who are residents and citizens of China create a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion. Foreign influence disqualifying condition AG ¶ 7(a) applies. Although Applicant has significant U.S.- based assets and is rooted to the United States by the presence of her teenage son, these ties are not sufficient to mitigate the foreign influence concerns. None of the foreign influence mitigating conditions apply.

In reaching this conclusion, I have also considered the whole-person factors in AG ¶ 2(d). A finding that Applicant failed to mitigate the security concerns raised by her relationships with her Chinese-national relatives does not suggest that Applicant is untrustworthy or unreliable. It is not a finding that Applicant is unable to follow the rules regarding the proper handling and safeguarding classified information. The evidence establishes that Applicant has properly reported her foreign contacts and foreign travel as required by her employer. At the hearing, she testified candidly about her foreign contacts, travel, and the activities of her Chinese-national relatives

In cases such as this one, the Government need not prove an applicant is a bad person before it can deny or revoke access to classified information. Even good people can pose a security risk because of facts and circumstances not under their control – such as having close relatives who are citizens or residents of foreign countries. (ISCR Case No.01-26893 at 8 (App. Bd. Oct. 16, 2002); *See also Department of Navy v. Egan*, 484 U.S. 518, 527-28 (1988). Applicant’s familial relationships with Chinese nationals presents an unacceptable security risk given the Chinese government’s acts of espionage against the United States. As a result, Applicant should not be placed in a position where she might be forced to choose between loyalty to the United States and a desire to assist her relatives living in China who might be coerced by entities operating in that country.

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, Foreign Influence	AGAINST APPLICANT
Subparagraph 1.a – 1.c:	Against Applicant

Conclusion

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

Nichole L. Noel
Administrative Judge