



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



In the matter of:)
)
) ISCR Case No. 18-01649
)
Applicant for Security Clearance)

Appearances

For Government: Mary M. Foreman, Esq., Department Counsel
For Applicant: *Pro se*

02/25/2019

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant did not mitigate financial considerations, but did mitigate foreign influence security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On August 8, 2018, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F (financial considerations) and Guideline B (foreign influence). The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on August 29, 2018, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's file of relevant material (FORM) on September 21, 2018. Applicant received the FORM on November 14, 2018, and had 30 days to submit material in refutation, extenuation, or mitigation. Applicant did not respond to the FORM. The

Government's documents, identified as Items 1 through 7, were admitted into evidence without objection. The case was assigned to me on February 12, 2019.

Request for Administrative Notice

Department Counsel submitted a written request that I take administrative notice of certain facts about China or the Peoples Republic of China (PRC). (Item 8) The request and the attached source documents were not admitted into evidence but were included in the record as Hearing Exhibit (HE) I.

The request listed supporting documents to show detail and context for those facts. AG ¶ 6, Foreign Influence, provides, "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." A risk assessment in this case necessitates administrative notice of facts concerning the PRC.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). Usually administrative notice at ISCR proceedings is accorded to facts that are either well known or from government reports. See Stein, *ADMINISTRATIVE LAW*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

Applicant did not object, and I have taken administrative notice of the facts contained in the HE I source documents, and incorporated them by reference. The facts are summarized in the written request and will not be repeated in this decision. However, of particular note, are the following salient facts gleaned from HE 1.

PEOPLE'S REPUBLIC OF CHINA

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 corporate networks to steal secrets using removable media devices or e-mail.

In assessing the military and security developments in China, the DOD has reported that: Chinese actors are the world's most active and persistent perpetrators of economic espionage. Chinese attempts to collect U.S. technological and economic information will continue at a high level and will represent a growing and persistent threat to U.S. economic security. The nature of the cyber threat will evolve with continuing technological advances in the global information environment. Chinese leaders are focused on developing the capabilities they deem necessary to deter or

defeat adversary power projection and counter third-party including U.S. intervention during a crisis or conflict. China's military modernization is producing capabilities that have the potential to reduce core U.S. military technological advantages.

Further, the DOD found that China very likely uses its intelligence services and employs other illicit approaches that violate U.S. laws and export controls to obtain key national security and export-restricted technologies, controlled equipment, and other materials unobtainable through other means. China is using its cyber capabilities to support intelligence collection against the U.S. diplomatic, economic, and defense industrial base sectors that support U.S. national defense programs. China uses state-sponsored industrial and technical espionage to increase the level of technologies and expertise available to support military research, development, and acquisition.

The organizational network of China's military-industrial complex is such that the People's Liberation Army (PLA) is able to access sensitive and dual-use technologies or knowledgeable experts under the guise of civilian research and development. China has in place a long-term, comprehensive military-modernization program designed to improve its armed forces' capacity to fight short-duration, high-intensity-regional conflicts and, as China's global footprint and international interests grow, its military modernization program has become progressively more focused on investments for a range of missions beyond China's periphery.

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: Since at least the mid-2000s, 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 material incentives for continuing this activity are immense and unlikely to be altered by small scale U.S. actions. China's progress modernizing its defense industry is due in large part to China's substantial and sustained investment in defense research and development (R&D). China's large-scale, state-sponsored theft of intellectual property and proprietary information also has allowed China to fill knowledge gaps in its domestic defense and commercial R&D.

With respect to human rights concerns observed in China, the U.S. Department of State reported: The People's Republic of China (PRC) 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. Repression and coercion have markedly increased recently, particularly against organizations and individuals involved in civil and political rights advocacy, and public interest and ethnic minority issues, and against law firms that took on sensitive cases.

Human rights concerns that were observed included: extralegal measures to prevent public expression of critical opinions; repression of free speech, religion, association, assembly and movement for certain minorities; extrajudicial killings; enforced disappearance and incommunicado detention, including prolonged detentions in "black jails"; torture and coerced confessions of prisoners; detention and harassment

of individuals who sought to peacefully exercise their rights under the law; a lack of due process; searches of premises without warrants; monitoring of communications; opening of domestic and international mail; as well as severe restrictions on citizens' freedom of association and free speech.

Findings of Fact¹

Applicant is 41 years old. He was born in the United States (U.S.) and obtained a graduate equivalency diploma in 1995. He completed some college courses but did not obtain a degree. Applicant married in 2003 and divorced in 2012. He has two children from that marriage, ages 13, and 14. He married again to a Chinese national on April 9, 2016. She moved in with Applicant and brought her own two children to join his two biological children. Applicant's wife is a resident alien in the U.S. She has a green card and is presently in the process of applying for citizenship. She signed official documents renouncing her Chinese citizenship and she is a stay-at-home mother to the four children. Applicant has never traveled to China, and he has no intent to do so. He owns no property, bank accounts, or other assets in China. Applicant has been employed as a senior-systems-engineer for a federal contractor since March 2016. He reports a previous security clearance from 2010.

Applicant submitted a Questionnaire for National Security Positions or security clearance application (SCA) on April 13, 2016.² In his personal subject interview (PSI) with a clearance investigator on May 15, 2017, he disclosed that his wife's parents, her brother, and her sister, are citizens and residents of PRC. It is unclear whether her siblings in the PRC have any affiliation with the PRC government or intelligence services. Applicant's father-in-law is 77 years old and suffering from late stage Alzheimer's disease. He is retired as an office clerk from a home loan agency in PRC. Applicant's mother-in-law has always been a housewife-mother. It is unclear whether either in law has any affiliation with the Chinese government, or whether Applicant and his wife will inherit property located in China when they pass away. Applicant's wife has contact by telephone with her mother, in China, once a week. She owns no property or bank accounts in PRC.

Applicant disclosed in section 26 of his SCA that he had back surgery in July 2005 and he lost significant income as he was out of work for a period of time. Applicant was unemployed from January 2002 to April 2003, and he had other shorter periods of unemployment after that. He avers that his unemployment combined with his 2012 divorce and uncovered medical expenses for himself, his current wife, and his children, caused his financial problems.

Applicant stated in his answer to the SOR that the federal-tax-lien in the amount of \$2,482 at SOR ¶ 1.a would be paid by December 2018. No explanation of how this

¹ Unless otherwise stated, the basis for these findings of fact is Applicant's Questionnaire for National Security Positions (SCA) dated April 13, 2016, (Item 3) and the summary of his clearance interview by a clearance investigator on May 15, 2017. (Item 4)

² Item 3.

tax lien arose, or documentation showing that it was paid, was provided. The federal tax lien imposed in 2014 in the amount of \$194,839 arose from tax years (TYs) 2007 and 2008 when Applicant inherited valuable stocks, which he sold to buy a home. Inexplicably, Applicant did not file his federal income tax returns timely for those TYs and the Internal Revenue Service (IRS) assumed that the money from the converted stocks was ordinary income.³ Thus, he owed additional income taxes. He attached IRS Forms 1040 (income tax returns) for TYs 2007 and 2008, to his answer. Both were signed and submitted on August 24, 2018. His problems were exacerbated when he received duplicate W-2 forms from his employer in 2012. Applicant claims (without substantiation) that he contacted the IRS and hired a tax attorney to help sort this out. It is unclear, what was done by the attorney, but the tax lien in SOR ¶ 1.b still stands.

In 2014 – 2015, Applicant was out of work for several months each year, and he struggled to keep up with the \$525 per month payments on his family vehicle. It was voluntarily repossessed, sold at auction, and a \$10,866 deficiency resulted, as reflected in SOR ¶ 1.c. While Applicant claims to be making payments pursuant to a plan on this debt, in the amount of \$100 per paycheck for two years, no evidence of actual payments was provided. Similarly, he claims that the medical debt for \$85 in SOR ¶ 1.o has been paid in full, but provided no evidence of payment.

In SOR ¶ 1.d, Applicant has disputed the debt in the amount of \$1,756 since 2013. He claims to have made payment in full and returned the two devices to a telecommunications provider. However, he provided no correspondence with the creditor documenting the dispute. The remainder of the delinquencies alleged in SOR ¶¶ 1.e through 1.o are for medical debts that were not covered by health insurance. In his answer, Applicant stated he made a commitment to pay the remaining medical debts by December 2018. He provided no documentary evidence that he has done so. He contends that his ex-wife was ordered by the court to pay for half of the children's medical expenses. Applicant has been working with her to pay some of the medical debts and he attached a few receipts evidencing payment of some random moving expenses, consumer loans, pay-day loans, and medical bills to his answer. It is unclear which SOR debts these documents pertain to, if any.

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

³ Answer to SOR.

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.”

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

Guideline F, Financial Considerations

The security concern relating to financial considerations is set out in AG ¶18:

Failure to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance abuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

AG ¶ 19 provides conditions that could raise security concerns. The following apply here:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual federal, state, or local income tax returns or failure to pay annual federal, state, or local income tax as required.

Applicant's federal-tax-liens and delinquent debts alleged in the SOR are confirmed by his credit reports and answer to the SOR. The Government produced substantial evidence to support the disqualifying conditions in AG ¶¶ 19(a), 19(b), 19(c), and 19(f), thereby shifting the burden to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts.⁴ Applicant has not met that burden. The tax liens and delinquent debts alleged in the SOR have not been adequately addressed.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control . . . , and the individual acted responsibly under the circumstances;
- (c) the individual has received, or is receiving financial counseling for the problem from a legitimate and credible source, such as non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

⁴ Directive ¶ E3.1.15. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep 22, 2005) (An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government).

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant endured back surgery, a divorce, and periods of unemployment several years ago. Arguably, these conditions were beyond his control. Yet, despite his knowledge three years ago that his tax liens and delinquencies might affect his eligibility for a security clearance when he completed his SCA, and then reinforcing his intention to make payment arrangements two years ago in his PSI, he has done nothing demonstrable to resolve these federal-tax-liens and delinquent accounts. He has produced no relevant or responsive documentation either with his Answer to the SOR, or in response to the FORM. He has not demonstrated that he acted responsibly under the circumstances. Applicant has the burden to provide sufficient evidence to show that his financial problems are under control, and that his debts were incurred under circumstances making them unlikely to recur.

Guideline B, Foreign Influence

The security concern for foreign influence is set out in AG ¶ 6:

Foreign contacts and interests, including, but not limited to business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way that is inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. The following are potentially applicable in this case:

(a) contact, regardless of method, 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 classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology.

Applicant's mother-in-law and father-in-law are citizens and residents of the PRC. PRC is continuously engaged in cyber-espionage against the United States, economic espionage, and human rights abuses. Applicant's foreign contacts may create a potential conflict of interest and a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion, both directly and through his family members. AG ¶¶ 7(a) and 7(b) have been raised by the evidence.

Conditions that could potentially mitigate foreign influence security concerns are provided under AG ¶ 8. The following are potentially applicable:

(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 United States;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the 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

(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.

I considered the totality of Applicant's foreign contacts and interests. Guideline B is not limited to countries hostile to the United States:

The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.⁵

⁵ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

The distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly. Furthermore, friendly nations can have profound disagreements with the U.S. over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. The nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing whether 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, the country is known to conduct intelligence operations against the U.S., or the foreign country is associated with a risk of terrorism.

Applicant was born in the United States and he is a U.S. citizen. He is married to a former Chinese national, who renounced her Chinese citizenship, and applied for U.S. citizenship. She dutifully telephones her mother in China a few times a week. There is no indication that Applicant speaks Chinese, or speaks to his mother-in-law at all during these phone calls. His father-in-law has terminal stage dementia and doesn't speak. Applicant never traveled to PRC, nor does he plan to. He holds no accounts or property there. He has longstanding relationships and loyalties here in the U.S. Although his wife has parents in the PRC, which is an authoritarian regime, her contact with them is *de-minimis*. Applicant's contact is virtually non-existent. There is no indication that his in-laws are affiliated with the Chinese government or intelligence services. Applicant is committed to his life here. AG ¶¶ 8(a), (b), and (c) are applicable to the PRC family members contacts, which are alleged in SOR ¶¶ 2.a. Because Applicant's ties to the PRC are minimal and inconsequential, I find that all foreign influence concerns have been mitigated.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (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) the 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines F and B in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has mitigated foreign influence but not the financial considerations 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 F:	AGAINST Applicant
Subparagraphs 1.a – 1.o:	Against Applicant
Paragraph 2, Guideline B:	FOR Applicant
Subparagraph 2.a:	For Applicant

Conclusion

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

Robert J. Kilmartin
Administrative Judge