



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



In the matter of:)
)
) ISCR Case No. 18-02308
)
Applicant for Security Clearance)

Appearances

For Government: Brittany White, Esq., Department Counsel
For Applicant: Jeffrey Billet, Esq.

07/10/2019

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline B, foreign influence. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On November 15, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence. DOD CAF acted under Executive Order 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), effective within the Department of Defense on June 8, 2017.

Applicant answered (Ans.) the SOR on December 14, 2018. He requested a hearing before an administrative judge. The case was assigned to me on April 17, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on

April 24, 2019, with a hearing date of May 29, 2019. The hearing was convened as scheduled. The Government offered exhibits (GE) 1 and 2. GE 1 was admitted into evidence without objection, but GE 2 was objected to and withdrawn by Department Counsel. An exhibit list was marked as hearing exhibit (HE) I and the Government's discovery letter was marked as HE II. The Government's request to take administrative notice of certain facts about the People's Republic of China (PRC) was marked as HE III. Applicant testified, presented two witnesses, and offered exhibits (AE) A-F, which were admitted without objection. DOHA received the hearing transcript (Tr.) on June 10, 2019.

Procedural Ruling

Department Counsel moved to amend the SOR by withdrawing SOR ¶ 1.a. The motion was granted and my formal findings will reflect that allegation was withdrawn. Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the PRC. Applicant did not object and the request was granted. The request and the attached documents were not admitted into evidence but were included in the record as HE III. The facts administratively noticed are set out in the Findings of Fact, below. (Tr. 8-9)

Findings of Fact

The SOR alleged Applicant's mother-in-law, father-in-law, and extended family members are citizens and residents of China (PRC). It also alleged that Applicant has one friend who is a citizen of Nigeria, but a resident of the PRC, and other friends who are citizens and residents of the PRC.

In Applicant's answer to the SOR, he admitted the SOR allegations, with explanations. The admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 27 years old. He was born in the United States. He went to high school and college in the United States. He received his bachelor's degree in chemistry in 2013. He began working for a defense contractor in information systems in January 2017. (Tr. 24-25, 28-29; GE 1)

In September 2013, Applicant took a position teaching English at a university in the PRC. He remained in the position until January 2016 when his contract ended. He was paid by the university. Applicant learned Mandarin Chinese, both written and spoken, in high school and college. Applicant met his wife (W) in December 2013 while in the PRC working. They met through a computer-dating-application. They dated and then in 2014 decided to marry. They married in February 2016 in the United States. W was born in the PRC. She is a college graduate with a degree in economics from a PRC university. She came to the United States in 2016 on a fiancée Visa (K1) and has recently obtained her resident alien (green card) status. She intends to seek U.S.

citizenship when she is eligible. She works two jobs as a server in two restaurants in the United States. One of the restaurants is owed by Applicant's parents. W testified that she is close to her parents, but closer to her in-laws with whom she and her husband live. (Tr. 29-31, 34-42; Answer; GE 1)

Applicant's father and mother are U.S. citizens and residents. W has several family members who are citizens of and reside in the PRC. Those family members include:

W's father (F) and mother (M). F is a retired music teacher. He continues to teach music. M is retired from her position at a local television station. According to Applicant, neither have any PRC government affiliations. Both F and M know Applicant works in the IT field. Applicant sees F and M on a yearly basis, either by going to the PRC or having his in-laws come to the United States. Applicant intends to keep this schedule in the future. Applicant's other contact with them is by video chats that W sets up. His and W's contact through this communication is approximately two to three times a month. (Tr. 43-45, 67-69; 101-102; Ans.)

W's sister (S). S is a piano teacher at a university in the PRC. Applicant stated that he communicates with S monthly. W stated that she communicates with S "often" using social media platforms. Both Applicant and W acknowledged that S is a current member of the Communist Party. W believes S joined the party to advance her career. (Tr. 45, 69-70, 85, 105-106; GE 1)

W's other relatives in the PRC. The SOR did not specifically list by name or relationship any other of W's relatives living in the PRC. The evidence does not support that there is a sufficient connection between Applicant (through W) and these unnamed relatives to cause a concern. (Tr. 45, 103-104; GE 1)

Applicant's friend (F) living in the PRC, a citizen of Nigeria. Applicant met F while working in the PRC from 2013 to 2106. He invited F to his second wedding ceremony, which was held in the PRC in 2017. Applicant's last contact with F was about three months ago. He has monthly contact with F through social media. (Tr. at 47-48; Ans.; GE 1)

Applicant's other friends and associates who are citizens and residents of the PRC. The SOR did not specifically list by name or relationship any other of Applicant's friends and associates living in the PRC. The evidence does not support that there is a sufficient connection between Applicant and these unnamed relatives to cause a concern. (Tr. 52-53, 73-74; Ans.; GE1)

Job Performance, Financial, and Character Evidence

Applicant's 2017 and 2018 job appraisals rated him as "exceeds expectations." He received two promotions in approximately two years. He also received an outstanding achievement award. He does not own a home, but lives with his parents.

He is a registered voter in his home county and he has paid into Social Security. His monthly budget shows a net remainder of approximately \$1,196. He testified that he has approximately \$10,000 in a retirement account. Applicant's mother testified that he is a loyal U.S. citizen and a wonderful son. Applicant presented sworn declarations by supervisors, coworkers, and friends on both his and W's behalf. They express faith that Applicant will properly handle classified information and recommended that he be granted a security clearance. (Tr. 125; Answer (attached exhibits A-K); AE A-F)

People's Republic of China

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. Repression and coercion, particularly against organizations and individuals involved in rights advocacy and public interest issues, are routine.

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. As recently as March 2017, a state department employee was charged with failing to report repeated contacts with PRC foreign intelligence agents who provided her and her family with thousands of dollars' worth of gifts and benefits over five years. (HE III)

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 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, these guidelines are applied 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(a), the entire process is a careful weighing 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, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 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

¶ 7: The security concern relating to the guideline for foreign influence is set out in AG

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 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, considerations such as whether it is known to target U.S. 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. Three 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; and

(e) shared 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.

Applicant's father-in-law, mother-in-law, and sister-in-law are citizens and residents of the PRC. His sister-in-law is currently a member of the Communist Party. The PRC is a communist country with a poor human rights record. It is one of the world's most aggressive nations in the collection of U.S. intelligence and sensitive economic information. Because of the PRC's posture in these areas, Applicant's in-laws' connection to the PRC, and his sister-in-law's Communist Party affiliation, there exists a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion. The same situation also creates a potential conflict of interest for Applicant. AG ¶¶ 7(a) and 7(b) have been raised by the evidence. Applicant's marriage to W and her connections to her family in the PRC cause the application of AG ¶ 7(c). Applicant's connection to his friend who is a resident of the PRC, but a citizen of Nigeria has little security significance, thus alleviating any heightened risk or potential conflict of interest. SOR ¶ 1.e is resolved in Applicant's favor, as is SOR ¶ 1.f.

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 United States; and

(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 United States, that the

individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

Based upon the documented action of the PRC in attempting to gain intelligence from U.S. sources, the evidence does not support that it is unlikely that Applicant could be placed in a position to choose between the interests of his in-laws in the PRC and those of the United States. Additionally, his sister-in-law's Communist Party affiliation places Applicant in a susceptible position. The evidence supports that he has a deep and longstanding relation with the United States, however, he also spent over two years working in the PRC and married W who has extensive ties to the PRC. Applicant could be put into a situation where he has to choose between the interests of his in-laws in the PRC and the United States. The evidence does not unequivocally support that he would resolve all conflicts in favor of the United States. As stated above, the protection of the national security is the paramount consideration and any doubt must be resolved in favor of national security. I am unable to find either of the mitigating conditions to be fully applicable. Despite the presence of some mitigation, it is insufficient to overcome the significant security concerns that exist.

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) 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.

The PRC has an authoritarian government, a bad human rights record, and a very aggressive espionage program aimed at the United States. The nature of a nation's government, its relationship with the United States, 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 United States. There is no reason to

question Applicant's loyalty and devotion to this country. However, he has not overcome the vulnerability to pressure, coercion, exploitation, and duress created by W's relatives living in the PRC.

Applicant has done nothing whatsoever to question his loyalty and devotion to this country. However, he has simply been unable to overcome the heavy burden of showing that he is not subject to influence by the PRC. His vulnerability to foreign pressure, coercion, exploitation, or duress remains a concern.

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:	Withdrawn
Subparagraphs 1.b – 1.d:	Against Applicant
Subparagraphs 1.e – 1.f:	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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge