



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 ---) ISCR Case No. 19-02255
)
 Applicant for Security Clearance)

Appearances

For Government: Moira Modzelewski, Esquire, Department Counsel
For Applicant: *Pro se*

12/17/2019

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding foreign influence. Eligibility for a security clearance is granted.

Statement of the Case

On November 22, 2015, Applicant applied for a security clearance and submitted a Questionnaire for National Security Positions (SF 86). On August 29, 2019, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (AG) (December 10, 2016), for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, effective June 8, 2017.

The SOR alleged security concerns under Guideline B (Foreign Influence), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn statement, dated September 20, 2019, Applicant responded to the SOR, and he elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by the Defense Office of Hearings and Appeals (DOHA) on October 16, 2019, and he was afforded an opportunity after receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on October 29, 2019. His response was due on November 28, 2019. Applicant timely submitted a one-page response to the FORM which was accepted without objection. The case was assigned to me on December 10, 2019.

Rulings on Procedure

Department Counsel requested that I take administrative notice of certain enumerated facts pertaining to the People's Republic of China (PRC) appearing in 19 U.S. Government publications, which were identified, but only fragments of extracts of those publications were attached to the request. Facts are proper for administrative notice when they are easily verifiable by an authorized source and relevant and material to the case.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986); 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)). The most common basis for administrative notice at ISCR proceedings is to notice 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). Requests for administrative notice may utilize authoritative information or sources from the internet. See, e.g. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (citing internet sources for numerous documents). In this instance, although Department Counsel has selected only certain pages of facts appearing in the identified publications, I have not limited myself to only those facts, but have considered the publications in their entirety.

The eight press releases from the U.S. Department of Justice were presented apparently to substantiate that the PRC actively pursues collection of U.S. economic and propriety information, and, therefore, Applicant's relationships with his various family members in the PRC raises suspicion of him. The cases cited do not involve Applicant personally, nor do they involve espionage through any familial relationship. The anecdotal evidence of criminal wrongdoing of other U.S. citizens or foreign nationals is of decreased

relevance to an assessment of Applicant's security suitability, especially where there is no evidence that Applicant, or any member of his family, was ever involved in any aspect of the cited cases or ever targeted by any PRC intelligence officials. Furthermore, the press releases are little more than self-congratulatory public relations products issued by a public relations office, with the collateral effect of deterring other criminals contemplating possible attacks on our national security.

After weighing the reliability of the source documentation and assessing the relevancy and materiality of the facts proposed by the Government, pursuant to Rule 201, *Federal Rules of Evidence*, I take administrative notice of certain facts, as set forth below under the PRC subsection. However, while I do not reject the facts set forth in the press releases, the inference that somehow Applicant and/or his family participated in criminal activity was not alleged or argued, and is specifically rejected.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with one relatively brief comment, all of the factual allegations pertaining to foreign influence (SOR ¶¶ 1.a. through 1.e.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Background

Applicant is a PRC-born, naturalized U.S. citizen, whose parents are PRC citizen-residents. He entered the United States in 1985, and he was naturalized in 2001. He is a 61-year-old employee of a defense contractor. He has been serving as a senior enterprise software architect with his current employer since November 2015. He received his primary education from PRC schools, as well as a bachelor's degree from a PRC university in 1982. He received a doctorate in 1991 from a respected university in the United States. He has never served with the U.S. military or any other military. It is unclear if he ever held a security clearance. He was married in the PRC in 1988 to a PRC-born U.S. citizen. He has one child, born in the United States in 1994.

Foreign Influence

To protect his privacy, general source information pertaining to Applicant and his family members discussed below can be found in the following exhibits: Item 3 (SF 86); and Item 4 (Enhanced Subject Interview).

Applicant and his wife have lived in the United States for over three decades, and his adult daughter has resided here her entire life. As noted above, Applicant's parents are PRC citizen-residents. His nearly 100-year-old father was, before his retirement in the early 1980s, a PRC military officer; and his mother, also in her 90s, was an employee of a provincial broadcasting bureau. Applicant has two brothers and a sister, all of whom are PRC citizen-residents: one brother, in his 60s, is an employee of an electrical company; his other brother, nearly in his 60s, is an employee in the technical department of the

provincial broadcasting bureau; and his sister, in her 60s, was, before her retirement, a laboratory technician with an industrial institute. He also has a half-sister, in her 70s, who is a PRC citizen-resident, and she was employed by a natural resource institute affiliated with a state university. None of Applicant's family members have had any affiliation with the PRC government, military, security, defense industry, or intelligence services, except as described above. In November 2015, Applicant reported monthly to quarterly telephone or e-mail contact with them. (Item 3, at 26-36; Item 2, at 2)

Over a decade ago, Applicant provided approximately \$2,000 to his mother. (Item 3, at 38) He has no foreign assets or foreign financial interests controlled by him or on his behalf. (Item 3, at 38)

Applicant has taken two trips to the PRC: In 2009, he visited his family for between 11 and 20 days, and in 2014, he did so again for the same purpose and duration. (Item 3, at 41-45) His sister visited the United States in 2016 to attend his daughter's college graduation. (Item 4, at 2) In describing the relationships that he has with his family, Applicant stated the following:

The nature of my relationships with my family members in China are such that it is unlikely that I will be in a position of having to choose between the interests of my family members in China and the interests of the United States.

There is no conflict of interest because my sense of loyalty and obligation to my family members in China is so minimal compared to my deep and longstanding relationships and loyalties to my immediate family in the United States that I can be expected to resolve any conflict of interest in favor of the United States.

My contact and communication with my family members in China are so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

I understand the current US-China relations, and I am completely on the United States side. In fact, my political views have been so different from the Chinese government's standings for decades.

(Response to the FORM, dated November 21, 2019)

PRC

The PRC is an international bully without regard for democracy or civil rights. It has an authoritarian Communist government, with powerful military forces, including strategic nuclear weapons and missiles. It is geographically vast and has a population of over a billion people. It has significant resources and an economy that in recent years has expanded substantially. In the PRC, reported human rights problems include suppression

of political dissent, arbitrary arrest and detention, forced confessions, disappearance, torture and mistreatment of prisoners, and arbitrary or unlawful deprivation of life. The PRC also monitors telephone conversations, facsimile transmissions, e-mail, text messaging, and internet communications, and sometimes nonconsensual monitoring with listening devices and surreptitious searching of hotel guestrooms.

The PRC has been characterized as “the most aggressive country conducting espionage against the United States, focusing on obtaining U.S. information and technologies beneficial to the [PRC’s] military modernization and economic development.” Those activities include economic espionage, theft of trade secrets, export control violations, and technology transfer. It actively collects military, economic and proprietary industrial information about the United States of the following types, including: information and communications technology; military technologies, particularly marine systems, aerospace and aeronautics; civilian and dual-use technologies, especially clean technologies, advanced materials and manufacturing techniques, healthcare, pharmaceuticals, and related technologies, and agricultural technology; and business information, especially energy and other natural resources and macroeconomic information. Americans of Chinese ancestry are considered prime intelligence targets by the PRC. “The crux of the [PRC] approach is not to try to exploit a perceived vulnerability but to appeal to an individual’s desire to help [the PRC] out in some way . . . ethnic targeting to arouse feelings of obligation is the single most distinctive feature of [the PRC’s] intelligence operations.” The PRC’s pursuit of intellectual property, sensitive research and development plans, and U.S. Person data, remains a significant threat to the U.S. government and private sector. U.S. Immigration and Customs Enforcement officials have characterized PRC’s espionage and industrial theft activities as the leading threat to the security of U.S. technology.

While there have been a number of criminal incidents involving individuals, companies, and PRC’s intelligence officers improperly acquiring U.S. economic intelligence and proprietary information, there is no direct or indirect connection to, or involvement with, Applicant or his family.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)) As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.)

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief

introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence." "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)) "Substantial evidence" is "more than a scintilla but less than a preponderance." (See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994))

The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005))

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials." (*Egan*, 484 U.S. at 531)

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." (See Exec. Or. 10865 § 7) Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for

issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline B, Foreign Influence

¶ 6. 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 conditions that could raise security concerns under AG ¶ 7:

(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 parents and siblings are citizen-residents of PRC. His nearly 100-year-old father was a PRC military officer, but he retired over three decades ago; his mother, also in her 90s, was an employee of a provincial broadcasting bureau; his brother, in his 60s, is an employee of an electrical company; his other brother, nearly in his 60s, is an employee in the technical department of the provincial broadcasting bureau; his sister, in her 60s, was, before her retirement, a laboratory technician with an industrial institute; and his half-sister, in her 70s, was employed by a coal institute affiliated with a state university. None of Applicant's family members have had any affiliation with the PRC government, military, security, defense industry, or intelligence services, except as described above.

When foreign family ties are involved, the totality of an applicant's family ties to a foreign country as well as each individual family member must be analyzed. (ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003)) If only one relative lives in a foreign country, and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. (See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 at 12 (App. Bd. Feb. 8, 2001))

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. Moreover, Guideline B is not limited to countries hostile to the United States. (ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004) ("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."). Furthermore, "even friendly countries can have profound disagreements with the United States over matters they view as important to their vital interests or national security." (ISCR Case No. 00-00317 at 6 (App. Bd. Mar. 29, 2002))

Friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, 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. It is reasonable to presume that a contentious relationship, or the absence of a democratic government, is not determinative, but it may make it more likely that a foreign government would attempt to exploit a U.S. citizen through relatives or associates in that foreign country. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. (See ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006))

In this instance, as noted above, there is substantial evidence to reflect that the PRC aggressively engages in economic espionage or military intelligence activity directed toward the United States, and that it sponsors acts of attempted destabilization or actual terrorism toward other countries. The activities of PRC authorities are sufficient to establish a potential "heightened risk" – a risk that is greater than the normal risk inherent in having a family member living under a foreign government. AG ¶¶ 7(a) and 7(b) have been established as they pertain to Applicant's parents and siblings.

The guideline also includes examples of conditions that could mitigate security concerns arising from foreign influence 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.

AG ¶¶ 8(a) and 8(b) apply. In reaching this conclusion, I have considered the totality of Applicant's ties to the PRC, as well as to his family members still residing there. In addition, there are his immediate family members who are U.S. citizen-residents.

The Government has submitted facts to reflect that the PRC engages in economic espionage and/or military intelligence activity directed toward the United States. It also seeks to intimidate its own citizens. All PRC citizens become potential victims of PRC "terrorism," as much as the residents of Hong Kong; the Uyghur Muslims of the Xinjiang region; and the people of Tibet have become the victims of PRC's activities. However, while there is significant nefarious activity generated by the PRC, they can only go so far without either modifying their practices or facing the wrath, and trade tariffs, of the U.S. Government.

With relatively low-profile parents and siblings, some of whom are significantly elderly, there is a very low potential of the PRC government forcing Applicant to choose between the interests of the United States and those of the PRC, or those family members. Since arriving in the United States in 1985, Applicant has seen his parents, two brothers, and sister on only two occasions, during his visits to the PRC in 2009 and 2014. That computes to two meetings in 35 years. He saw his sister on one additional occasion when she attended his daughter's college graduation in 2016. The PRC may be a destabilizing factor to the world, but there is little evidence of any continuing close relationship between Applicant's parents and siblings with the PRC that would raise a heightened risk.

While Applicant's ties to the PRC, essentially only to his elderly parents and his siblings, remain, they are outweighed by his deep and long-standing relationships and loyalties in the United States. His life, immediate family, home, assets, and professional career are in the United States. His deep relationship with the United States is such that I find that it is unlikely that Applicant will be placed in a position of having to choose between the interests of the United States and the interests of the PRC. He can be expected to resolve any conflict of interest in favor of the U.S. interest.

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 SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); see also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

There is some evidence against mitigating Applicant's situation. The PRC is considered the most aggressive country conducting espionage against the United States, focusing on obtaining U.S. information and technologies beneficial to the PRC's military modernization and economic development. The PRC's pursuit of intellectual property, sensitive research and development plans, and U.S. Person data, remains a significant threat to the U.S. government and private sector. U.S. Immigration and Customs Enforcement officials have characterized PRC's espionage and industrial theft activities as the leading threat to the security of U.S. technology. Applicant's parents and siblings are citizen-residents of the PRC.

Applicant was born, raised, and substantially educated in the PRC. His parents and siblings are citizen-residents of PRC. His nearly 100-year-old father was a PRC military officer, but he retired over three decades ago; his mother, also in her 90s, was an employee of a provincial broadcasting bureau; his brother, in his 60s, is an employee of an electrical company; his other brother, nearly in his 60s, is an employee in the technical department of the provincial broadcasting bureau; his sister, in her 60s, was, before her retirement, a laboratory technician with an industrial institute; and his half-sister, in her 70s, was employed by a natural resource institute affiliated with a state university. None of Applicant's family member have had any affiliation with the PRC government, military, security, defense industry, foreign movement, or intelligence services, except as described above.

The mitigating evidence under the whole-person concept is simply more substantial. Applicant entered the United States nearly 35 years ago, and he was

naturalized in 2001. He received a doctorate in 1991 from a respected university in the United States. He is a 61-year-old employee of a defense contractor. He has been serving as a senior enterprise software architect with his current employer since November 2015. He was married in 1988. He and his wife have lived in the United States for over three decades, and his adult native-born daughter, a graduate of a U.S. university, has resided here her entire life. He described his relationship with the elderly PRC branch of his family as casual and infrequent. Since arriving in the United States in 1985, he has seen his parents, two brothers, and sister on only two occasions, in 2009 and 2014, or two meetings in 35 years. He saw his sister on one additional occasion in 2016.

Overall, the evidence leaves me without any questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has mitigated the security concerns arising from his foreign influence. See SEAD 4, App. A, AG ¶¶ 2(d)(1) through 2(d)(9).

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: FOR APPLICANT

Subparagraphs 1.a. through 1.e.: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

ROBERT ROBINSON GALES
Administrative Judge