



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [Redacted]) ISCR Case No.20-00557
)
 Applicant for Security Clearance)

Appearances

For Government: A. H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

03/26/2021

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on July 22, 2016. On May 20, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline B. The CAF acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on June 24, 2020, and requested a decision on the written record without a hearing. Department Counsel submitted the Government’s written case on December 9, 2020. On December 10, 2020, a complete copy of the file of relevant

material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on January 6, 2021, and submitted a response that was received on February 4, 2021. His response consisted of a narrative, marked as Applicant's Exhibit A; several letters attesting to his good character and performance of duty, marked as Applicant's Exhibits B through Q; and copies of an email exchange with the CAF regarding its failure to send him a copy of the Directive when it sent him the SOR. (AX R.) The case was assigned to me on February 25, 2021.

The FORM included a summary of a personal subject interview (PSI) conducted on March 26, 2015. The PSI summary was not authenticated as required by Directive ¶ E3.1.20. Department Counsel informed Applicant that he was entitled to comment on the accuracy of the PSI summary; make any corrections, additions, deletions or updates; or object to consideration of the PSI summary on the ground that it was not authenticated. Applicant submitted a detailed response to the FORM but did not comment on the accuracy or completeness of the PSI summary, nor did he object to it. I conclude that he waived any objections to the PSI summary. Although *pro se* applicants are not expected to act like lawyers, they are expected to take timely and reasonable steps to protect their rights under the Directive. ISCR Case No. 12-10810 at 2 (App. Bd. Jul. 12, 2016). See ADP Case No. 17-03252 (App. Bd. Aug. 13, 2018) (holding that it was reasonable for the administrative judge to conclude that any objection had been waived by an applicant's failure to object after being notified of the right to object).

The FORM also included a request that I take administrative notice of relevant facts about the People's Republic of China. I granted the request. In addition, on my own motion and without objection, I have taken administrative notice of facts set out in the Department of State document, "*U.S. Relations with China, Bilateral Relations Fact Sheet*," dated August 22, 2018. The facts administratively noticed are set out in my findings of fact.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. His admissions are incorporated in my findings of fact.

Applicant is a 55-year-old software engineer employed by a defense contractor since May 2006. He received a security clearance in October 2006.

Applicant was born in China, and in 1989 he participated in the Tiananmen Square protest against the government of China. After that experience, he decided to "chase [his] freedom" in the United States. He was accepted at a prestigious U.S. university in 1993 and came to the United States on a student visa. He received a doctorate degree in February 1999. He became a U.S. citizen in September 2005.

Applicant married a citizen and resident of China in July 1992. His wife is now a naturalized U.S. citizen and works as a financial analyst for a local transportation authority

in the United States. (GX 3 at 4.) Applicant has two children, ages 18 and 20, who are native-born U.S. citizens.

Applicant's mother was a retired accountant before she passed away in 2006. His 84-year-old father is a citizen and resident of China and is a retired hotel manager. His father married a citizen and resident of China in 2007. His father's 78-year-old second wife is a retired nurse. Applicant's 58-year-old sister is a citizen and resident of China and is a retired technical school teacher.

Applicant and his father have set boundaries on interaction between them. When Applicant's father decided to remarry, Applicant asked him to postpone the wedding until he could attend. His father responded:

Son, I always love you and your mother no matter what happens. However, as both of us are adults, I'm not in the same family with you anymore. We have [our] own separate families and make independent decisions for [our] own families. Yours is in USA, mine is in China. . . We respect each other but never make decisions for each other since you were over 18. . . .

(AX A at 10.)

Applicant and his wife have also set boundaries at home regarding discussion of Applicant's work. His wife and daughters know that he is involved in sensitive work, but the "family rule" prohibits asking him about his job or his long and sometimes unusual working hours. Applicant's father is aware of the "family rule" and respects it. (AX P.)

Applicant's 82-year-old father-in-law is a citizen and resident of China and is a retired senior engineer who worked for a Chinese ship designer. Applicant's 77-year-old mother-in-law is a citizen of China who is a retired researcher who worked at a Chinese observatory. She came to the United States in September 2015 to be closer to Applicant's family, and she is now a permanent resident of the United States. (GX 2 at 30; GX 3 at 5.)

Applicant has visited his family members and in-laws in China two times during the last ten years. He maintains telephonic contact with his parents. He has occasional telephonic contact with his sister, about one or two times a year. He rarely talks to his in-laws.

Applicant and his wife have a combined annual income of about \$200,000. Applicant's parents, sister, and mother-in-law receive pensions and are financially self-sufficient. In accordance with Chinese tradition of "red envelope" gifts, Applicant and his wife send money to their parents on holidays such as the Chinese New Year. In the Chinese culture, the gifts are expressions of affection and respect, and they are not intended as financial support.

During the past ten years, Applicant and his wife have sent the following monetary gifts, which are listed in Applicant's answer to the SOR:

- \$1,000 to Applicant's father on December 16, 2009
- \$1,500 to Applicant's father on February 2, 2011
- \$1,500 to Applicant's mother-in-law on June 15, 2011
- \$2,000 to Applicant's father on January 2, 2012
- \$3,000 to Applicant's father on July 1, 2012
- \$1,800 to Applicant's mother-in-law on October 12, 2015
- \$800 to Applicant's mother-in-law on February 3, 2015
- \$1,500 to Applicant's father on February 3, 2015
- \$2,000 to Applicant's father on March 23, 2017

I have taken administrative notice that China has an authoritarian government dominated by the Communist Party. The government aggressively targets sensitive and protected U.S. technology and military information, using worldwide intelligence operations. It is one of the world's most aggressive practitioners of economic espionage and one of the greatest espionage and cyber-attack threats to the United States. It presents a persistent cyber-espionage threat to the U.S. military and critical infrastructure systems.

The Chinese government uses its intelligence and influence apparatus to shape international views and gain advantages over its competitors, including the United States. It uses multiple government entities to acquire restricted U.S. technologies and it encourages and rewards private individuals who obtain technology on its behalf. Most Chinese cyber operations against U.S. private industry are focused on cleared defense contractors and information-technology and communications companies. It is one of the leading destinations for illegal exports of restricted U.S. technology. The government frequently gathers intelligence by appealing to an individual's desire to help the country. U.S. citizens of Chinese ancestry with family ties to China are prime intelligence targets. It uses a variety of methods to acquire foreign military and dual-use technologies, including access to knowledgeable experts under the guise of civilian research, cyber activity, and exploitation of the access of Chinese nationals, such as students or researchers, to act as agents or intermediaries.

Despite political disagreements, the United States and the China are major economic and trading partners. As of August 2018, China was the third-largest export market for U.S. goods (after Canada and Mexico), and the United States was China's largest export market.

I also have taken administrative notice that China has a poor human rights record. It suppresses political dissent, and it practices arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners. Repression and coercion is focused primarily on organizations and individuals involved in rights advocacy and public interest issues. Efforts to silence and intimidate political activists are common. Travelers to China

can expect to be placed under surveillance, with their hotel rooms, telephones, and fax machines monitored and personal possessions, including computers, searched without their knowledge or consent.

The Chinese government does not recognize dual nationality. Chinese nationals who have settled abroad and been naturalized as foreign citizens lose their Chinese citizenship.

Applicant's software engineering senior manager, who has worked for Applicant's employer for 24 years, submitted a letter that includes the following comments: "The characteristic I value most highly is integrity I can honestly say that, from everything I've seen from him and heard from his colleagues, [Applicant] has always demonstrated the highest level of integrity." (AX B.) Applicant's engineering manager considers him as honest, loyal, and dependable, and a person who sets a high bar of integrity and professionalism for himself. (AX C.)

The U.S. Government representative overseeing defense-related contracts performed by Applicant's employer submitted a letter including the following comments:

In my experience, someone who is reliably truthful in their professional life is merely reflecting the core values they hold dear in all aspects of their life. After 15 years of observing [Applicant's] demeanor, professionalism, respect for the mission, and work ethic, I trust [Applicant] to always do the right thing for our mission and our country. He is careful, consistent, diligent, loyal, and highly skilled. He has always been particularly careful and conscientious in handling any sensitive information. He is a team player and a stellar contributor to our important mission. He is someone we all count on, and has earned my trust.

(AX D.)

Applicant's supervisor from 2013 through 2018 considers him reliable, trustworthy, and completely honest. (AX E.) A co-worker who has worked with Applicant for 15 years and was his supervisor from October 2018 through March 2020 admires him for his dependability, dedication to the mission, technical skill, and unquestionable integrity. (AX F.) Several other co-workers and supervisors submitted letters on his behalf, uniformly expressing their admiration for his hard work, technical skill, dedication, integrity, honesty, and loyalty to the United States. (AX E through N.) One former co-worker, now retired after 37 years, described Applicant as the best example of "doing what is right" that she had ever worked with. (AX K.) A neighbor describes Applicant as an "all around fine citizen." (AX O.)

Policies

"[N]o 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants 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 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. “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 guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. *See ISCR Case No. 15-01253 at 3* (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See ISCR Case No. 02-31154 at 5* (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” *ISCR Case No. 01-*

20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline B, Foreign Influence

The SOR alleges that Applicant’s father, stepmother, sister, father-in-law, and mother-in-law are citizens and residents of China. (SOR ¶¶ 1.a and 1.b). It also alleges that Applicant provided approximately \$2,000 to \$3,000 in annual financial support to his father, mother-in-law and father-in-law, who are citizens of China (SOR ¶ 1.c).

Applicant’s admissions establish SOR ¶¶ 1.a and 1.b. The evidence establishes that Applicant and his wife sent money to Applicant’s father, mother-in-law, and father-in-law in accordance with the Chinese cultural practice of “red envelope” gifts on special occasions. The gifts were a demonstration of affection and respect, and were not financial support as alleged in SOR ¶ 1.c. In the context of Applicant’s annual income, the amounts were consistent with being gifts rather than financial support. Thus, I conclude that SOR ¶ 1.c is not established.

The security concern under this guideline 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 maybe 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 following disqualifying conditions under this guideline are relevant:

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;

AG ¶ 7(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

AG ¶ 7(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.

AG ¶¶ 7(a) and 7(e) require substantial evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in having a family member living under a foreign government. See, e.g., ISCR Case No. 12-05839 at 4 (App. Bd. Jul. 11, 2013).

When family ties are involved, the totality of an applicant’s family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). “[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person’s spouse.” ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002); see also ISCR Case No. 09-06457 at 4 (App. Bd. May 16, 2011).

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

Furthermore, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.” ISCR Case No. 00-0317 (App. Bd. Mar. 29, 2002). Finally, we know 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. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

The vigorous and comprehensive intelligence efforts employed by the Chinese government and its targeting of U.S. citizens of Chinese ancestry, especially those in scientific and technical fields, are sufficient to establish the “heightened risk” in AG ¶¶ 7(a) and 7(e) and raise the potential risk in AG ¶ 7(b). The “red envelope” gifts from Applicant and his wife to their parents in China are indicative of their affection and respect for their parents, but they do not raise any independent disqualifying conditions.

The following mitigating conditions are potentially relevant.

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;

AG ¶ 8(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; and

AG ¶ 8(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.

AG ¶ 8(a) is not established for the reasons set out in the above discussions of AG ¶¶ 7(a), 7(b) and 7(e). The nature of the relationship between Applicant and his family members is one of respect and affection. Consideration of the nature of the country involved is not a consideration of ethnicity, as Applicant suggests in his response to the FORM. It involves consideration of the type of government and the policies and practices of that government. None of Applicant's family members have the technical training or experience to be good conduits of the information related to his job. His family members are all retired and not likely to attract the attention of government officials. However, factors such as an applicant's relatives' obscurity do not provide a meaningful measure of whether an applicant's circumstances post a security risk. ISCR Case No. 07-13696 at 5 (App. Bd. Feb. 9, 2009).

AG ¶ 8(b) is established. Applicant decided to leave China after experiencing governmental oppression and protesting against it in Tiananmen Square in 1989. He has worked for a defense contractor for 15 years and has established a reputation for integrity, dedication, and loyalty. He has held a security clearance since 2006, and his family connections have not significantly changed, except for the death of his mother and remarriage of his father. His wife is a naturalized U.S. citizen, and his daughters are native-born citizens and have spent their entire life in the United States. His mother-in-law has become a permanent U.S. resident. The letters from Applicant's supervisors and co-workers are numerous and unusual with respect to their depth, detail, and underlying tone of outrage that anyone would question Applicant's qualifications for holding a clearance. I am satisfied that Applicant's has such deep and longstanding relationships and loyalties in the United States that he will resolve any conflict of interest in favor of the U.S. interest.

AG ¶ 8(c) is not established. There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). There is also a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. ISCR Case No. 09-06457 at 4 (App. Bd. May 16, 2011). Applicant has not overcome either of these presumptions.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guideline B in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his family connections to China.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge