



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 12-04992
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Eric H. Borgstrom, Esq., Department Counsel  
For Applicant: Zlatko Hadzismajlovic, Esq.

07/24/2014

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**Decision**

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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 February 2, 2012. On November 26, 2013, the Department of Defense (DOD) sent her a Statement of Reasons (SOR) alleging security concerns under Guideline B. The DOD 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) implemented by DOD on September 1, 2006.

Applicant received the SOR on December 4, 2013; answered it on December 19, 2013; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February 13, 2014, and the case was assigned to an administrative judge on February 21, 2014. The Defense Office of Hearings and

Appeals (DOHA) issued a notice of hearing on March 21, 2014, scheduling the hearing to be conducted by video teleconference on April 24, 2014.

On April 21, 2014, Applicant requested that the hearing be postponed until May 30, 2014, or any date thereafter. The hearing was tentatively scheduled for May 30, 2014, with a view toward combining it with other hearings in the same location. The case was reassigned to me on May 20, 2014. On May 27, 2014, DOHA issued a second notice of hearing, scheduling the hearing for July 10, 2014. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified, presented the testimony of three witnesses, and submitted Applicant's Exhibits (AX) A through L, which were admitted without objection. DOHA received the transcript (Tr.) on July 18, 2014.

### **Administrative Notice**

Department Counsel requested that I take administrative notice of relevant facts about the People's Republic of China (PRC). The request and supporting documents are attached to the record as Hearing Exhibits (HX) I. I took administrative notice as requested by Department Counsel. The facts administratively noticed are set out below in my findings of fact.

AX L is a report from the U.S. Census Bureau reflecting statistics on the number of foreign-born persons from the PRC who have been naturalized as U.S. citizens. Rather than admit AX L as an exhibit, I took administrative notice of the information in the exhibit, with the consent of both parties. I have administratively noticed that in 2011, there were 11.6 million foreign-born residents of the United States, of which about 2.2 million were from China. In 2012, about 31,868 native-born Chinese citizens were naturalized as U.S. citizens.

### **Findings of Fact**

In her answer to the SOR, Applicant admitted all the allegations. Her admissions in her answer and at the hearing are incorporated in my findings of fact.

Applicant is a 28-year-old engineer employed by a defense contractor since December 2008. She has never held a security clearance.

Applicant was born in the PRC, came to the United States with her parents in October 1996, and became a U.S. citizen in March 2005, shortly after attaining the age of majority. She has no siblings. She graduated from a U.S. university in July 2008.

Applicant's parents were highly respected educators in the PRC until they became victims of the Cultural Revolution and immigrated to the United States. Her father now works as a cook in a restaurant and her mother is a home care attendant. (Tr. 38, 46-47.) Applicant's father became a U.S. citizen in April 2004, and her mother became a U.S. citizen in December 2005. (AX C.)

Applicant married a native-born U.S. citizen in October 2009. They met in college. They have no children. After Applicant and her husband married, they traveled to the PRC, along with Applicant's parents and parents-in-law, to meet Applicant's family members and celebrate the marriage. (Tr. 38, 47-48.) Applicant visited family members in the PRC in January 2008, June-July 2008, February 2010, and during the Lunar New Year in 2013. (GX 1 at 33-37; Tr. 31-38, 79.)

In Chinese culture, there is an expectation that Applicant remain in contact with family members. She has telephonic contact with her 89-year-old grandfather about once a month. He lives with her youngest aunt, who is a secretary in the public transportation department. She also has a brief conversation with her aunt when she calls her grandfather. Her conversations with her grandfather are short, not more than three minutes, and are intended to "lift his spirit up a little bit," because he is in extremely poor health. Applicant asks her grandfather about his health, and he asks her when she will have children. (Tr. 61-62.)

Applicant has contact with her other two aunts in the PRC, who are both retired, about once a year. (GX 2 at 11.) She exchanges text messages with three of her cousins in the PRC about once a month, using a "group chat" application. One of these cousins is a U.S. citizen living in the PRC, who owns a restaurant. One cousin is a music teacher in an elementary school, and one is a clerk in the police department. Their conversations involve sharing baby pictures, asking about the price of electronics in the United States, and World Cup soccer. Applicant has contact about once a year with three other cousins in the PRC. One is an owner of a paper company, one is an elementary school teacher, and one is unemployed. (GX 2 at 11.) Her six cousins know that she is an engineer, but they don't know that she works for a defense contractor, because they don't discuss work. (Tr. 62-64.) However, Applicant has a Linked-In page that identifies her employer. (Tr. 78.)

Occasionally, Applicant's family members in the PRC ask her and her husband to buy luxury goods that are less expensive in the United States, such as tablets, cell phones, cameras, and purses, and they usually comply with the requests. (Tr. 31-32, 63.) Applicant talks to her family members in Mandarin Chinese, which her husband does not understand. However, her husband has a translation application on his phone, which enables him to follow the conversation and make occasional comments. (Tr. 35.)

Applicant also has two paternal aunts and one paternal uncle who are citizens and residents of the United States. (Tr. 85.) One of her paternal aunts has held a security clearance for many years. (AX E.)

Applicant's father-in-law and mother-in-law are native-born U.S. citizens. Her father-in-law worked as an engineer for a defense contractor before attending law school and held a security clearance. He is now a senior vice-president and chief legal officer for a real estate development and investment management company. He considers Applicant and her husband frugal and financially careful. He describes Applicant as appearing "meek and timid, but underneath that sweet exterior is a steel

backbone with a strong moral compass.” He and his wife consider Applicant as one of their daughters. He testified that he believes Applicant would react to any effort at foreign influence with “a sense of outrage,” and that she would immediately report it to her husband, her supervisor and appropriate security authorities. (Tr. 50-52; AX D.)

Applicant testified that she feels closer to her friends in the United States and her husband’s family, because she has more in common with them. (Tr. 66-67.) A close friend that she met in college nine years ago, a native-born U.S. citizen, rents a room in their house. He testified that Applicant’s friends are American; she watches American programs on the television; and he has seen nothing that would suggest that she would chose the interests of the PRC over the United States. (Tr. 90-94.)

Applicant and her husband work for the same employer and on the same project, designing various components for Navy ships. During their off-duty time, they participate in an “engineering build” club, composed of coworkers, where they exchange ideas about building ship components. Although they discuss work projects, they are not compensated. The president of the engineering-build club submitted an affidavit attesting to Applicant’s leadership and trustworthiness. (AX K.)

After work, Applicant spends her free time watching television or playing with their three cats, and her husband works on his computer. They watch U.S. programming rather than Chinese or ethnic programming. (Tr. 39-42.)

Applicant and her husband own their home and are financially secure. (AX F; AX G.) They have no property or financial assets in the PRC. (Tr. 82-83.) Applicant voted in the last presidential election in 2012 as well as state and local elections. (Tr. 80, 88.)

Using a four-point rating scale, Applicant’s performance appraisals for 2009 through 2013 rated her as either meeting performance requirements (numerical score of 2) or exceeding performance requirements (numerical score of 3). Her narrative reports described her as a fast learner, a team player, highly motivated, intuitive, versatile, and enthusiastic. (AX H.) She received a letter of appreciation from the Navy program manager for her exemplary dedication, commitment, and professionalism. (AX I.) She placed first in an engineering competition in February 2011. She was recognized as an employee of the week in December 2012 and employee of the month in June 2013 and January 2014. (AX J.)

The PRC has an authoritarian government dominated by the Communist Party. The United States and the PRC have been rivals since the Cold War. Despite political disagreements, the United States and the PRC have become major economic and trading partners. The PRC is pursuing a long-term, comprehensive modernization of its military forces to improve its capacity to fight short-duration, high-intensity regional conflicts as well as missions beyond its coastal borders. The PRC 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. It uses multiple government entities to acquire restricted U.S.

technologies and it encourages and rewards private individuals who obtain technology on its behalf. It is one of the leading destinations for illegal exports of restricted U.S. technology.

The PRC usually gathers intelligence by appealing to an individual's desire to help the PRC. U.S. citizens of Chinese ancestry with family ties to the PRC are prime intelligence targets. The Department of Justice has successfully prosecuted numerous naturalized U.S. citizens from the PRC for actual or attempted espionage and illegal export of sensitive technology to the PRC.

In recent years, the United States has sought a "healthy, stable, and reliable military-to-military relationship" with the PRC, as part of a "shared vision for a positive, cooperative, and comprehensive U.S.-China relationship." U.S. Department of Defense, Office of the Secretary of Defense, *Annual Report to Congress, Military and Security Developments Involving the People's Republic of China 2013*, at 1 (Executive Summary), Attachment II to HX I.<sup>1</sup> Pursuant to this goal, the United States and the PRC have engaged in numerous military-to-military exchanges and conducted joint military exercises in counter-piracy, humanitarian and disaster relief, and search and rescue operations. *Id.* at 69-73.

The PRC 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. U.S. Department of State, *Country Reports on Human Rights Practices for 2012: China (includes Tibet, Hong Kong, and Macau)* at 1 (Executive Summary), Attachment I to HX I. Travelers to the PRC 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 PRC does not recognize dual nationality. PRC nationals who have settled abroad and been naturalized as foreign citizens lose their PRC citizenship.

## **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

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<sup>1</sup> Pinpoint citations to these administratively-noticed facts are included in this decision because the basis for my administrative notice is based on the documents included in Department Counsel's request for administrative notice, but these facts were not specifically mentioned in the request.

consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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.” See 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. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

## Analysis

### Guideline B, Foreign Influence

The SOR alleges that Applicant's grandfather is a citizen and resident of China (SOR ¶ 1.a) and that her three aunts and five cousins are citizens and residents of China (SOR ¶ 1.b).

The security concern under this guideline is set out in AG ¶ 6 as follows:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. 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.

Two disqualifying conditions under this guideline are relevant to this case:

AG ¶ 7(a): (contact 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

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 sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information).

AG ¶ 7(a) requires 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. The PRC's aggressive program of targeting U.S. technology and military information establishes the "heightened risk" in AG ¶ 7(a) and the potential conflict of interest in AG ¶ 7(b).

Three mitigating conditions under this guideline 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 U.S;

AG ¶ 8(b): there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, 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

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.

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, 2002 DOHA LEXIS 83 at \*\*15-16 (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).

An applicant with foreign family ties to a country that is hostile to the United States has a very heavy burden of persuasion to show that neither he nor his family members are subject to influence by that country. ISCR Case No. 11-01888 (App. Bd. Jun. 1, 2012), citing ISCR Case No. 07-00029 (App. Bd. Dec. 7, 2007). 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).

In several Guideline B cases involving the PRC that were decided shortly after the current adjudicative guidelines were implemented, the Appeal Board applied the heightened standard for mitigation applicable to countries hostile to the United States. See, e.g., ISCR Case No. 06-24575 (App. Bd. Nov. 9, 2007) ("very heavy burden");



ISCR Case No. 03-09053 (App. Bd. Mar. 9, 2006) (“heavy burden”).<sup>2</sup> These early decisions lumped the PRC in the same category of hostile countries as Iran. However, the description of a country as “hostile” is not immutable and eternal. Several former enemies of the United States are now among our closest allies. Recent U.S. policies regarding trade and military cooperation with the PRC raise the question whether the PRC and Iran should be in the same category for the purpose of Guideline B mitigation.

However, the Appeal Board appears to have adhered to the heightened standard for mitigation in cases involving the PRC. See, e.g., ISCR Case No. 12-04780 (App. Bd. Nov. 13, 2013), 2013 DOHA Lexis 403 at \*2 (“heavy burden” because of Applicant’s family ties in PRC). Accordingly, I have applied the heightened standard for mitigation to this case. I have also applied the recent Appeal Board guidance in ISCR Case No. 09-01652 (App. Bd. Aug. 8, 2011): “Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”

Applying the foregoing considerations, I conclude that AG ¶ 8(a) is not established. The PRC’s aggressive espionage targeting the United States precludes a finding that a conflict of interest is unlikely.

I conclude that AG ¶ 8(b) is established. Applicant’s sense of obligation to her foreign family members is not “minimal.” However, Applicant’s deep and longstanding relationships and loyalties in the United States are sufficient to satisfy her “very heavy burden” of showing that she will resolve any conflict of interest in favor of the U.S. interest. Applicant has lived in the United States since childhood. Her career, friends, and interests are in the United States. She feels that she has nothing in common with her foreign family members. Her spouse, parents, two aunts, and an uncle are citizens and residents of the United States. She is very close to her father-in-law and mother-in-law, who are citizens and residents of the United States. Her father-in-law believes that she would react with “outrage” to an attempt to exploit her foreign family connections.

AG ¶ 8(c) is partially 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). This presumption does not apply to her grandfather, aunts, and cousins, who are not “immediate family members.”<sup>3</sup> Even though it does not apply to her grandfather, the evidence shows that she has a strong sense of obligation to him. This mitigating condition is established for her light-hearted electronic exchanges with her cousins and her polite contacts with her aunts in the PRC. It is not established for her grandfather.

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<sup>2</sup> It is unclear whether the Appeal Board intended to distinguish between a “very heavy burden” and a “heavy burden.”

<sup>3</sup> The current adjudicative guidelines do not define “immediate family members.” However, the previous guidelines defined them as “spouse, father, mother, sons, daughters, brothers, sisters.” Directive ¶ E2.A2.1.3.1. Her security clearance application did not ask her to include grandparents, aunts, uncles, and cousins in the listing of relatives. GX 1 at 26-27.

## 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(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.

I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment. Applicant came to the United States as a young girl and has adopted the ideals and values of the United States. She has become totally immersed in the cultural, educational, and political environment of the United States. While she feels a sense of obligation to her grandfather, she feels that she has nothing in common with her extended family members in the PRC. She was candid, sincere, and credible at the hearing.

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 based on foreign influence. Accordingly, I conclude she has carried her heavy burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

### 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.b:	For Applicant

## **Conclusion**

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman  
Administrative Judge