



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 13-00838

**Appearances**

For Government: Chris Morin, Esquire, Department Counsel

For Applicant: W. Brad English, Esquire

04/07/2014

**Decision**

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding foreign influence. Eligibility for a security clearance and access to classified information is granted.

**Statement of the Case**

On July 18, 2013, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).<sup>1</sup> On October 18, 2013, the Department of Defense (DOD) Central Adjudication Facility (CAF) issued a Statement of Reasons (SOR) to her under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline B

<sup>1</sup> GE 1 ((SF 86), dated July 18, 2013).

(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.

Applicant received the SOR on October 25, 2013. In a sworn statement, dated November 4, 2013, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. On November 26, 2013, Department Counsel indicated the Government was prepared to proceed. The case was assigned to me on January 17, 2014. A Notice of Hearing was issued on February 3, 2014. I convened the hearing, as scheduled, on February 27, 2014.

During the hearing, one Government exhibit (GE 1) and seven Applicant exhibits (AE A through AE G) were admitted into evidence without objection. Applicant and four other witnesses testified. The transcript (Tr.) was received on March 7, 2014.

### **Rulings on Procedure**

At the commencement of the hearing, Department Counsel requested that I take Administrative Notice of certain enumerated facts pertaining to the People's Republic of China (hereinafter PRC), appearing in a written submission of the request. Facts are proper for Administrative Notice when they are verifiable by an authorized source and relevant and material to the case. In this instance, the source information relied upon by the Government was included in publications of the Department of State;<sup>2</sup> the Department of Defense;<sup>3</sup> the Office of the National Counterintelligence Executive;<sup>4</sup> the U.S. Department of Justice;<sup>5</sup> and the U.S.-China Economic and Security Review Commission.<sup>6</sup>

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<sup>2</sup> U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *China (includes Tibet, Hong Kong, and Macau) Country Reports on Human Rights Practices for 2012*, undated.

<sup>3</sup> U.S. Department of Defense, Annual Report to Congress, *Military and Security Developments Involving the People's Republic of China 2013*, undated; U.S. Department of Defense, Annual Report to Congress, *Military and Security Developments Involving the People's Republic of China 2012*, undated; U.S. Department of Defense, Annual Report to Congress, *Military and Security Developments Involving the People's Republic of China 2011*, undated (extract only); Defense Security Service, *Targeting U.S. Technologies: A Trend Analysis of Reporting From Defense Industry 2011*, undated (extract only).

<sup>4</sup> National Counterintelligence Center, *Report to Congress on Foreign Economic Collection and Industrial Espionage, 2009-2011*, dated October, 2011.

<sup>5</sup> U.S. Department of Justice, U.S. Attorney, District of Colorado, Press Release: *Chinese National Pleads Guilty to Illegally Exporting Radiation-Hardened Computer Circuits Used in Satellite Communications to China*, dated September 6, 2013; U.S. Department of Justice, *Summary of Major U.S. Export Enforcement, Economic Espionage, Trade Secret and Embargo-Related Criminal Cases (January 2007 to the present: updated Jan. 4, 2013)*, dated January 2013; U.S. Department of Justice, U.S. Attorney, District of New Jersey, Press Release: *Former Employee of New Jersey Defense Contractor Convicted of Exporting Sensitive Military Technology to China*, dated September 26, 2012; U.S. Department of Justice, U.S. Attorney, Central District of California, Press Release: *Former Boeing Engineer Sentenced to Nearly 16 Years in Prison for Stealing Aerospace Secrets for China*, dated February 8, 2010; U.S. Department of Justice, Press Release: *Virginia Physicist Sentenced to 51 Months in Prison for Illegally Exporting Space Launch Data to China and Offering Bribes to Chinese Officials*, dated April 7, 2009; U.S. Department of Justice, U.S. Attorney, Central District of California, Press Release: *Chinese Man Found Guilty of Illegally Exporting Thermal-Imaging Technology to China*, dated February 23, 2009; U.S. Department of Justice, U.S. Attorney, Central District of California, Press Release: *Chinese Resident Pleads Guilty to Having Export Controlled Thermal-Imaging*

The press releases were presented apparently to substantiate that the PRC actively pursues collection of U.S. economic and propriety information, and, therefore, Applicant's relationships with her family members and extended family members in the PRC raise suspicion about her. None of the cases cited involves Applicant personally or involved espionage through any familial relationship. The anecdotal evidence of criminal wrongdoing of companies, foreign citizens, or other U.S. citizens, is of decreased materiality to an assessment of Applicant's security suitability, especially where there is no evidence that Applicant, or any member of her family or extended family, was ever involved in any aspect of the cited cases or ever targeted by any Chinese intelligence official.

After weighing the reliability of the source documentation and assessing the relevancy and materiality of the facts proposed by the Government, I take administrative notice of the facts and events described in the various reports and U.S. Department of State publications. However, while I do not reject the facts set forth in the various press releases, the inference that somehow Applicant and/or her family, or her extended family, participated in criminal activity was not argued during the hearing and is specifically rejected. Pursuant to Rule 201, *Federal Rules of Evidence*, I take administrative notice of certain facts,<sup>7</sup> as set forth below under the PRC subsection.

### Findings of Fact

In her Answer to the SOR, Applicant admitted, with extensive explanations, all of the factual allegations pertaining to foreign influence (¶¶ 1.a. through 1.e.) of the SOR. 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:

Applicant is a 49-year-old employee of a defense contractor who, since September 2012, has served as a software engineer III.<sup>8</sup> She was previously employed as a product integrator, software engineer, software engineer II, and waitress. She was unemployed from April 2011 until September 2012, and from December 2009 until

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*Cameras Sent to China*, dated July 17, 2008; U.S. Department of Justice, Press Release: *Chinese Agent Sentenced to Over 24 Years in Prison for Exporting United States Defense Articles to China*, dated March 24, 2008.

<sup>6</sup> U.S.-China Economic and Security Review Commission, *2012 Report to Congress*, dated November 2012 (extract only); U.S.-China Economic and Security Review Commission, *2009 Report to Congress*, dated November 2009 (extract only).

<sup>7</sup> 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).

<sup>8</sup> GE 1, *supra* note 1, at 12.

October 2010.<sup>9</sup> Applicant has never served in the U.S. military or in the military of any foreign country.<sup>10</sup> She has never held a security clearance.<sup>11</sup> Applicant's earlier application for a security clearance was previously dealt with by DOHA when Administrative Judge Kathryn Moen Braeman issued a decision favorable to Applicant in September 2003.<sup>12</sup> That decision was reversed on appeal by the DOHA Appeal Board in April 2004.<sup>13</sup>

## Foreign Influence

Applicant was born in the PRC.<sup>14</sup> She completed her primary and secondary education, as well as two years of college study of photography, in the PRC.<sup>15</sup> After working at a local photography studio for two years, she went to Japan where she studied Japanese for another two years. In 1990, Applicant moved to the United Kingdom where, for about 18 months, she studied English.<sup>16</sup> In 1991, Applicant returned to the PRC and married a former middle school classmate who was a graduate student in the United States.<sup>17</sup> One month after they were married, Applicant accompanied her husband when he returned to his studies in the United States.<sup>18</sup> Their daughter, currently a pre-pharmacy student at a major U.S. university, was born in the United States in January 1994.<sup>19</sup> Following the birth of her daughter, Applicant returned to school, and in 1998, she received an associate's degree from a local community college. She continued her studies, and in 2001, she received a bachelor's degree in computer science from a state university.<sup>20</sup> In order to improve her work skills, Applicant took additional graduate studies in 2003 and 2004.<sup>21</sup>

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<sup>9</sup> GE 1, *supra* note 1, at 13-14.

<sup>10</sup> GE 1, *supra* note 1, at 17.

<sup>11</sup> GE 1, *supra* note 1, at 42-43.

<sup>12</sup> See ISCR Case No. 02-15339 (September 26, 2003); AE A (Decision downloaded from Internet).

<sup>13</sup> See ISCR Case No. 02-15339 (App. Bd. April 29, 2004); AE B (Decision downloaded from Internet). For reasons whose significance will become more apparent below, as noted in the Appeal Board decision and reversal order, Administrative Judge Braeman's favorable findings and conclusions about Applicant's parents and one sister, as well as to her deceased father-in-law and her mother-in-law, were not appealed, and thus, were not addressed by the Appeal Board, allowing those findings and conclusions to stand undisturbed. See ISCR Case No. 02-15339 at fn 2 (App. Bd. April 29, 2004).

<sup>14</sup> GE 1, *supra* note 1, at 6.

<sup>15</sup> Tr. at 22-23.

<sup>16</sup> Tr. at 24-26.

<sup>17</sup> Tr. at 27; GE 1, *supra* note 1, at 19-20.

<sup>18</sup> Tr. at 28, 42-43.

<sup>19</sup> Tr. at 28; GE 1, *supra* note 1, at 25.

<sup>20</sup> Tr. at 29-30.

<sup>21</sup> GE 1, *supra* note 1, at 11.

Applicant became a naturalized U.S. citizen in January 2001.<sup>22</sup> When she did so, she took the normal citizenship oath.<sup>23</sup>

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same. . . .

In November 2013, Applicant stated: “To me, my family, my career, my future life are in the United States, nothing can change my mind and heart towards this land which has provided me and my family with so many great opportunities.”<sup>24</sup>

Applicant’s husband was also born in the PRC.<sup>25</sup> He became a naturalized U.S. citizen in September 1999.<sup>26</sup> He is a senior scientist with a local pharmaceutical company.<sup>27</sup> Applicant and her husband reside in a home in the United States worth an estimated \$500,000. They have substantial assets in the United States, including bank accounts worth approximately \$200,000, and 401(k) accounts for both of them. Applicant’s 401(k) has about \$100,000 in it.<sup>28</sup> Applicant and her husband do not have any property or financial interests in any foreign country.<sup>29</sup>

Applicant’s parents were born in what was then known as the Republic of China before the revolution resulted in the establishment of the PRC.<sup>30</sup> They were both citizens and residents of PRC. Before their respective retirements they were employees of different elementary schools.<sup>31</sup> Applicant’s father is deceased.<sup>32</sup> While remaining a Chinese citizen, since about 2005, her mother has held a U.S. Permanent Resident Card (USCIS Form I-551), formerly known as an Alien Registration Card, and informally known as a green card, attesting to her status as a permanent resident-alien in the

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<sup>22</sup> GE 1, *supra* note 1, at 7-8.

<sup>23</sup> Applicant’s Response to the SOR, at 4.

<sup>24</sup> Applicant’s Response to the SOR, at 4.

<sup>25</sup> GE 1, *supra* note 1, at 19.

<sup>26</sup> ISCR Case No. 02-15339, *supra* note 12, at 2.

<sup>27</sup> Applicant’s Response to the SOR, at 4.

<sup>28</sup> Tr. at 78-79.

<sup>29</sup> Applicant’s Response to the SOR, at 4.

<sup>30</sup> GE 1, *supra* note 1, at 21-23.

<sup>31</sup> GE 1, *supra* note 1, at 21-23.

<sup>32</sup> GE 1, *supra* note 1, at 22.

United States.<sup>33</sup> She resides with Applicant.<sup>34</sup> Neither parent was ever affiliated with the PRC government, military, defense industry, foreign movement, or intelligence service.<sup>35</sup>

Applicant has one sister who was born in the PRC, and she remains a citizen and resident of PRC (SOR ¶ 1.a.).<sup>36</sup> She is an employee of a foreign private company, and has never been affiliated with the PRC government, military, defense industry, foreign movement, or intelligence service.<sup>37</sup> Applicant's sister is married to a citizen-resident of the PRC (SOR ¶ 1.c.) who is employed by another foreign private company. He has never been affiliated with the PRC government, military, defense industry, foreign movement, or intelligence service.<sup>38</sup> Applicant's sister has one young school-age child who is also a PRC citizen-resident (SOR ¶ 1.b.).<sup>39</sup> Applicant's sister, brother-in-law, and nephew have been sponsored by Applicant for U.S. permanent resident status, and their family immigrant visa petition is currently on a list of completed cases awaiting the availability of visa numbers.<sup>40</sup> Based on her sister's Priority Date, Applicant estimated that it "will not be too long before she becomes a permanent resident of the U.S."<sup>41</sup> Applicant generally speaks with her sister (about their respective children) once every three months, or as characterized by Applicant as casually and infrequently, and on occasion, her brother-in-law will get on the phone and simply say hello.<sup>42</sup>

Applicant's 83-year-old mother-in-law, her husband's mother, was born in the Republic of China before the establishment of the PRC (SOR ¶ 1.e.).<sup>43</sup> Before her retirement, she was an employee of a private bank.<sup>44</sup> She has never been affiliated with the PRC government, military, defense industry, foreign movement, or intelligence service.<sup>45</sup> Since about 2002, she has held a U.S. Permanent Resident Card attesting to

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<sup>33</sup> GE 1, *supra* note 1, at 21; Tr. at 43-44.

<sup>34</sup> GE 1, *supra* note 1, at 9-10, 21.

<sup>35</sup> GE 1, *supra* note 1, at 21-23.

<sup>36</sup> GE 1, *supra* note 1, at 23-24.

<sup>37</sup> GE 1, *supra* note 1, at 23-24; Tr. at 47.

<sup>38</sup> Tr. at 48-49.

<sup>39</sup> Tr. at 49.

<sup>40</sup> AE C (U.S. Department of State Email, dated October 2, 2012). The Priority Date for the petition is December 18, 2001. Because the demand for family immigrant visas is generally higher than the supply for such visas available, some foreign nationals with approved family immigrant petitions must wait in line until their priority date becomes current.

<sup>41</sup> Applicant's Response to the SOR, at 1, 6. Applicant noted that as of November 2013, the visa cut-off date had reached August 22, 2001, and she estimated the visa Priority Date would be reached in about four months.

<sup>42</sup> Tr. at 50-51; Applicant's Response to the SOR, at 1.

<sup>43</sup> GE 1, *supra* note 1, at 25-26.

<sup>44</sup> Tr. at 52-53.

her status as a permanent resident-alien in the United States.<sup>46</sup> Applicant's mother-in-law returned to the PRC at some unspecified point, and because of substantial age-related health issues with her heart, hip, and eyes, as well as frequent fainting spells, it became too difficult for her to travel back to the United States.<sup>47</sup> Since her return to the PRC, Applicant and her mother-in-law have contact only once or twice a year during the Chinese New Year and birthdays.<sup>48</sup>

Applicant's brother-in-law, her husband's brother, was born in the PRC (SOR ¶ 1.c.).<sup>49</sup> He was previously a self-employed importer, and has never been affiliated with the PRC government, military, defense industry, foreign movement, or intelligence service.<sup>50</sup> His ex-wife and son reside in the United States.<sup>51</sup> Since April 2012, he has held a U.S. Permanent Resident Card attesting to his status as a permanent resident-alien in the United States.<sup>52</sup> However, after his mother returned to the PRC and was unable to care for herself, Applicant's brother-in-law returned to the PRC to assist her.<sup>53</sup> He intends to return to the United States as soon as his mother's health permits him to do so.<sup>54</sup> When her brother-in-law was in the United States, they frequently spoke with each other, but since he returned to the PRC to assist his mother, Applicant has had no contact with him.<sup>55</sup>

Applicant's sister-in-law, her husband's sister, was born in the PRC, and she remains a citizen and resident of PRC (SOR ¶ 1.d.).<sup>56</sup> She is a magazine editor, and has never been affiliated with the PRC government, military, defense industry, foreign movement, or intelligence service.<sup>57</sup> In the over 22 years since Applicant has been married, Applicant has met her sister-in-law a few times for very short periods of time,

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<sup>45</sup> GE 1, *supra* note 1, at 26-27.

<sup>46</sup> Tr. at 51-52.

<sup>47</sup> Tr. at 52.

<sup>48</sup> Tr. at 53.

<sup>49</sup> GE 1, *supra* note 1, at 29.

<sup>50</sup> GE 1, *supra* note 1, at 30; Tr. at 57.

<sup>51</sup> Tr. at 55-56.

<sup>52</sup> Tr. at 54; GE 1, *supra* note 1, at 29.

<sup>53</sup> Tr. at 54-55.

<sup>54</sup> Tr. at 55.

<sup>55</sup> Tr. at 56.

<sup>56</sup> GE 1, *supra* note 1, at 27-28; Tr. at 57.

<sup>57</sup> GE 1, *supra* note 1, at 28; Tr. at 58.

and when they do have contact, it is generally only once a year during the Chinese New Year.<sup>58</sup>

## **People's Republic of China**

The PRC 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 [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 and 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 [PRC] out in some way . . . ethnic targeting to arouse feelings of obligation is the single most distinctive feature of PRC intelligence operations." U.S. Immigration and Customs Enforcement officials have characterized the 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 intelligence officers improperly acquiring U.S. economic intelligence and proprietary information, there is no direct or indirect connection to, or involvement with, Applicant, her husband, her family, or her husband's family.

## **Character References and Work Performance**

Applicant's direct supervisor, a program manager, has been working with her for over two years. She has been described as an excellent employee and team contributor (and one of his better employees) whose significant skill is forensic problem-solving.

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<sup>58</sup> Applicant's Response to the SOR, at 3; Tr. at 58.



Based on his knowledge of her family, her skills, and the program in which they are both working, he fully supports Applicant's application for a security clearance.<sup>59</sup> The director of security, who is also the facility security officer for Applicant's employer, has known her since about 2001. Although Applicant has not had a security clearance, she has been periodically briefed regarding possible duties and responsibilities. He considers her to be very security conscious and concerned. Based on his knowledge of her, as well as the issues involved in this security clearance review process, he has no hesitation regarding granting her a security clearance.<sup>60</sup>

Another program manager with the same employer has known Applicant for over ten years. While they work at different locations, he is aware of her work and also knows her informally as well through their church. He has characterized her as honest and trustworthy, with integrity, and demonstrating a state of complete mental and social well-being.<sup>61</sup> A professor (a retired lieutenant colonel), who is a family friend for over ten years, has socialized with Applicant and her family at church, in their respective homes, and elsewhere in the community. He noted her active community involvement. He characterized her as reliable and one of the most trustworthy persons he has ever met. He gives her his highest recommendation for a security clearance.<sup>62</sup> A retired professor who is also an elder at Applicant's church, has known her since 1994. Based on his knowledge of Applicant's family and her community activities, he considers Applicant to be a person of integrity and professional ethics, who is also a "sweet, reliable, faithful, and dedicated person."<sup>63</sup>

## 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."<sup>64</sup> 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."<sup>65</sup>

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<sup>59</sup> AE D (Character Reference, dated November 4, 2013); Tr. at 96-100.

<sup>60</sup> Tr. at 83-91.

<sup>61</sup> AE F (Character Reference, undated); Tr. at 92-95.

<sup>62</sup> AE E (Character Reference, dated November 1, 2013); Tr. at 104-107.

<sup>63</sup> AE G (Character Reference, dated November 4, 2013).

<sup>64</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>65</sup> 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 AG. In addition to brief introductory explanations for each guideline, the AG 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."<sup>66</sup> 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.<sup>67</sup>

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."<sup>68</sup>

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."<sup>69</sup> Thus, nothing

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<sup>66</sup> "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 (4<sup>th</sup> Cir. 1994).

<sup>67</sup> See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

<sup>68</sup> *Egan*, 484 U.S. at 531

<sup>69</sup> See Exec. Or. 10865 § 7.

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

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 6:

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.

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. However, 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.<sup>70</sup>

The guideline notes several conditions that could raise security concerns. Under 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* is potentially disqualifying. Similarly, under 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* may raise security concerns. Also, AG ¶ 7(d), *sharing 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* may raise security concerns as well. The evidence is sufficient to establish AG ¶¶ 7(a), 7(b), and

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<sup>70</sup> 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).

7(d). However, the security significance of these identified conditions requires further examination of Applicant's respective relationships with her sister, brother-in-law, and nephew, who are citizen-residents of the PRC, as well as her husband's mother, brother, and sister, all of whom are citizens of the PRC, and two of whom are permanent resident-alien of the United States temporarily residing in the PRC, and one of whom remains a citizen-resident of the PRC, to determine the degree of "heightened risk" or potential conflict of interest.

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. The complicated, competitive relationship of the PRC with the U.S. places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that her relationship with her sister, brother-in-law, and nephew, as well as her husband's mother, brother, and sister, does not pose a security risk and she is not in a position to be forced to choose between loyalty to the United States and those family and extended family members.<sup>71</sup>

With its mixed human rights record, and other political, economic and military rivalry with the U.S., it is not inconceivable that PRC would target any citizen in an attempt to gather valuable information from the United States. On the other hand, there are some indications that the position of the U.S. is not as inflexible towards PRC as might be initially surmised. In 2000, despite the purported concerns over the PRC's

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<sup>71</sup> The Appeal Board has articulated a "heightened risk" or "very heavy burden" because of the PRC's hostility to the United States. ISCR Case No. 06-24575 at 4 (App. Bd. Nov. 7, 2007) (articulating "very heavy burden" standard and reversing grant of clearance in case involving family members living in the PRC). For example in ISCR Case No. 07-02485 at 4-5 (App. Bd. May 9, 2008), the Appeal Board stated, "Given the PRC's interest in U.S. intelligence, Applicant's foreign relatives pose a real, rather than merely theoretical, risk that Applicant could be targeted for manipulation or induced into compromising classified information." In ISCR Case No. 07-02485 at 4-5 (App. Bd. May 9, 2008) the Appeal Board described what facts supported reversal of the Administrative Judge's decision to grant that Applicant with connections to PRC a clearance:

The fact that Applicant lives with a PRC citizen, her husband; that her husband maintains contact with his own father who is a citizen and resident of the PRC; that Applicant's brother is a citizen and resident of the PRC; that Applicant speaks with her brother over the telephone "several times a year;" that the PRC targets U.S. citizens of PRC ancestry for intelligence gathering purposes; and that the PRC monitors telephone and other communications of its citizens constitute significant record evidence of security significant foreign contacts and interest. As such, Applicant's evidence as to her good job performance and her ties to the U.S. are not sufficient to mitigate those concerns. It is not to question Applicant's patriotism to acknowledge that the record in her case raises the reasonable concern that she could be placed in a position of having to choose between her ties to the U.S. and her obligations to her foreign family members. The evidence which Applicant has provided is not sufficient to mitigate the Government's security concerns. The Board holds that the Judge's favorable decision is not sustainable on this record.

See *also* ADP Case No. 05-17812 (App. Bd. June 11, 2007); ISCR Case No. 05-10467 (App. Bd. May 8, 2007) (both reversing favorable clearance decisions for PRC-related Applicants); ISCR Case No. 06-23453 (App. Bd. Nov. 14, 2007); ISCR Case No. 06-21622 (App. Bd. Oct. 15, 2007) (both remanding favorable clearance decisions for PRC-related Applicants).

continuing intelligence gathering, the U.S. permanently extended the most-favored-nation status provision to PRC-U.S. commercial treaties binding the signatories to extend trading benefits equal to those accorded any third state. Furthermore, while there is the “heightened risk” standard, the U.S. Government has not established a “*per se*” rule against granting a security clearance to an individual with family members who are PRC citizen/residents, and there is no general prohibition regarding casual or personal travel to the PRC by U.S. citizens who possess a security clearance.

The guideline also includes examples of conditions that could mitigate security concerns arising from foreign influence. Under AG ¶ 8(a), the disqualifying condition may be mitigated where *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.* Similarly, AG ¶ 8(b) may apply where the evidence shows *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.* Also, AG ¶ 8(c) may apply where *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.*

At the outset of this analysis, it is important to note that none of the family or extended family members have ever been affiliated with the PRC government, military, defense industry, foreign movement, or intelligence service. Applicant has vastly differing relationships and frequency of contacts with her sister, brother-in-law, and nephew, as well as her husband’s mother, brother, and sister. Applicant’s father is deceased, and her mother is a permanent resident-alien in the United States, residing with Applicant. Her mother’s status is of little concern to the government as there is no SOR allegation pertaining to her.

On the other hand, the status of Applicant’s sister, brother-in-law, and nephew is different, and they are focused upon in the SOR. They have been sponsored by Applicant for U.S. permanent resident status, and their family immigrant visa petition is currently on a list of completed cases awaiting the availability of visa numbers. Based on her sister’s Priority Date, Applicant estimated that it “will not be too long before she becomes a permanent resident of the U.S.” Applicant generally speaks with her sister once every three months, and on occasion, her brother-in-law will get on the phone and simply say hello. Serving as the family’s immigration sponsor, Applicant’s relationship to them is neither casual nor infrequent. While there may be some degree of risk associated with their citizenship and residency status, that risk will be substantially eliminated when they receive their visas to enter the United States.

The same is true for Applicant’s mother-in-law and other brother-in-law. Both of them are already permanent resident-alien in the United States, temporarily residing in the PRC due to the health circumstances of Applicant’s mother-in-law, who is

apparently too infirm to travel back to the United States at this time. Her brother-in-law, who is attending to his mother's needs, has an ex-wife and a son residing in the United States, and he intends to return here as soon as his mother's health permits him to do so. Applicant now speaks with her mother-in-law only once or twice a year, and to her brother-in-law, not at all since he left for the PRC. Her relationship to them is more distant and casual than the relationship she has with her sister. While there may be some degree of risk associated with their citizenship and temporary residency status, in light of their permanent resident-alien status in the United States, that risk will also be substantially eliminated when they return to the United States.

Applicant's relationship with her husband's sister is very different. As a PRC citizen-resident, she requires the most scrutiny. Applicant's relationship with her is, for the most part, non-existent. In the over 22 years since Applicant has been married, she has met her sister-in-law a few times for very short periods of time, and when they do have contact, it is generally only once a year during the Chinese New Year. Applicant's relationship with her sister-in-law is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

As noted above, there is no evidence that these relatives have been political activists, challenging the policies of the PRC Government. There is no evidence these relatives currently work for or have ever worked for the PRC Government, military, or intelligence service. Likewise, there is no evidence that terrorists or the PRC Government have approached or threatened Applicant or her relatives or husband's relatives for any reason. And, there is no evidence that those family members in the PRC currently engage in activities which would bring attention to them or that they or other PRC elements are even aware of Applicant's work. As such, there is a reduced possibility that these relatives would be targets for coercion or exploitation.<sup>72</sup>

In assessing whether there is a heightened risk because of an applicant's relatives or associates in a foreign country, it is necessary to consider all relevant factors, including the totality of an applicant's conduct and circumstances, including the realistic potential for exploitation. One such factor is the potential for pressure, coercion,

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<sup>72</sup> The Appeal Board has ruled that in the analysis of countervailing evidence, it is legal error to give significant weight to any of the following facts or factors: applicant's ties to the United States (ISCR Case No. 02-13595 at 5 (App. Bd. May 10, 2005)); lack of prominence of relatives living in a foreign country (*Id.*); "family members' low-key and noncontroversial lifestyle, and the fact that the foreign government has not contacted them about Applicant" (ISCR Case No. 04-12500 at 4 (App. Bd. Oct. 26, 2006)); one relative living in a foreign country may be sufficient to negate FIMC 1 (ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006)); a foreign relative's fragile health (ISCR Case No. 02-29403 at 4 (App. Bd. Dec. 14, 2004)), advanced age (ISCR Case No. 02-00305 at 7 (App. Bd. Feb. 12, 2003), financial independence (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005), or lack of financial dependency upon applicant (ISCR Case No. 03-15205 at 4 (App. Bd. Jan 21, 2005)); foreign relatives spend part of each year in the U.S. (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the lack of any connection between the foreign relative and the foreign government in question (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the absence of any attempt at exploitation in the past (ISCR Case No. 03-15205 at 4 (App. Bd. Jan. 21, 2005)); and a foreign country's friendly relationship with the U.S., its stable, democratic government, or its extensive foreign military agreements with the United States (ISCR Case No. 02-22461 at 5-6 (App. Bd. Oct. 27, 2005)). Notwithstanding the Appeal Board's position, I conclude that many of these factors are pertinent to the analysis in this case under the whole person concept; however, I will give limited weight to such factors in compliance with the Appeal Board's jurisprudence.

exploitation, or duress. In that regard, it is important to consider the character of the foreign power in question, including the government and entities controlled by the government, within the relevant foreign country. Nothing in Guideline B suggests it is limited to countries that are hostile to the United States.<sup>73</sup> In fact, the Appeal Board has cautioned against “reliance on overly simplistic distinctions between ‘friendly’ nations and ‘hostile’ nations when adjudicating cases under Guideline B.”<sup>74</sup> Nevertheless, the relationship between a foreign government and the U.S. may be relevant in determining whether a foreign government or an entity it controls is likely to attempt to exploit a resident or citizen to take action against the U.S. through the Applicant. 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.

Applicant’s infrequent, indirect contacts and rather distant relationship with her husband’s sister have a low potential of forcing her to choose between the United States and the PRC. As far as Applicant’s relationships with her sister, brother-in-law, and nephew, as well as her mother-in-law and other brother-in-law, she met her burden of showing there is little likelihood that her relationships with these relatives could create a risk for foreign influence or exploitation. Her contacts and communications, to the extent there are any, with most of these relatives are still somewhat infrequent. Her sister, brother-in-law, and nephew are expected shortly to become permanent resident-alien in the United States. Her mother-in-law and other brother-in-law are already permanent resident-alien in the United States, but temporarily residing in the PRC, mainly due to her mother-in-law’s poor health. Nevertheless, because of the PRC’s efforts at espionage, there is a “heightened risk” of foreign exploitation, inducement, manipulation, pressure, or coercion.

Applicant’s deep relationship with the United States weighs against a security concern for these relationships. She is a naturalized U.S. citizen who has such deep and longstanding family, financial, and employment relationships and loyalties in the U.S., she can be expected to resolve any conflict of interest in favor of the U.S. interest. She and her husband have resided together in the U.S. since 1991, and their daughter has resided here her entire life. Her mother resides in the United States. In the not-too-distant future, her sister, brother-in-law, and nephew will join her in the United States. Soon, too, her mother-in-law and brother-in-law will return to the United States. Applicant’s values are U.S. values. I find AG ¶¶ 8(a) and 8(c) partially apply in this case, and AG ¶ 8(b) fully applies.

### **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

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<sup>73</sup> See ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002); ISCR Case No. 00-0489 at 12 (App. Bd. Jan. 10, 2002).

<sup>74</sup> ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002).

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. 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.<sup>75</sup>

There is some evidence against mitigating Applicant's situation, because her sister, brother-in-law, and nephew, along with her sister-in-law are all citizens and residents of the PRC. Likewise, her mother-in-law and brother-in-law are citizens and temporary residents of the PRC. Because they are physically in the PRC, there is a "heightened risk" of foreign exploitation, inducement, manipulation, pressure, or coercion from the PRC government, or other unspecified organizations. (See AG ¶ 2(a)(8).)

The mitigating evidence under the whole-person concept is more substantial. Applicant's deep relationship with the United States weighs against a security concern for these relationships. She is a naturalized U.S. citizen who has such deep and longstanding family, financial, and employment relationships and loyalties in the U.S., that she can be expected to resolve any conflict of interest in favor of the U.S. interest. She and her husband have resided together in the U.S. since 1991, and their daughter has resided here her entire life. Her mother resides in the United States. Her sister, brother-in-law, and nephew will shortly join her in the United States as permanent resident-alien. Soon, too, her mother-in-law and brother-in-law will return to the United States where they are already permanent resident-alien. Applicant's values are U.S. values. These circumstances increase the probability that Applicant will recognize, resist, and report any attempts by a foreign power, terrorist group, or insurgent group to coerce or exploit her.<sup>76</sup> With the majority of her family and extended family members permanently residing in the United States, there is less risk of foreign exploitation, inducement, manipulation, pressure, or coercion than there would be if close family members such as her husband, mother, or child lived in the PRC. Under the evidence presented, I have no questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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<sup>75</sup> 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).

<sup>76</sup> See ISCR Case No. 07-00034 at 2 (App. Bd. Feb. 5, 2008).



## 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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 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.

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ROBERT ROBINSON GALES  
Administrative Judge