



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 14-05983
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Ross Hyams, Esq., Department Counsel  
For Applicant: *Pro se*

06/27/2016

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

**Statement of the Case**

On January 20, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline C (Foreign Preference) and Guideline B (Foreign Influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In a letter notarized May 18, 2015, Applicant admitted all allegations raised and requested a hearing. I was assigned the case on October 28, 2015. On November 19, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a notice setting the hearing for December 8, 2015. The hearing was convened as scheduled.

The Government offered three documents, which were accepted into the record without objection as exhibits (Exs.) 1-3. In addition and without objection, it offered a potential hearing exhibit regarding the Peoples Republic of China (China), which was accepted as Ex. 4. Applicant gave testimony and the record was held open until January 5, 2016, for the submission of any additional materials. On December 9, 2015, Applicant forwarded a packet of materials, which was accepted into the record as Ex. A.

The transcript (Tr.) was received on December 16, 2015. With nothing further forthcoming, the record was then closed on January 5, 2016. Based on a thorough review of the case file, I find that Applicant carried his burden in mitigating security concerns arising under Guideline C and Guideline B.

### **Request for Administrative Notice**

Department Counsel submitted Requests for Administrative Notice regarding certain facts about the nation of the People's Republic of China. Administrative or official notice is the appropriate type of notice used for administrative proceedings. See 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)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings is to notice facts that are either well known or from Government reports. Various facts pertaining to this nation were derived from the offered request and its attachments.

People's Republic of China (China): China's government is authoritarian and controlled by the Communist Party. The country has a poor human rights record, curbs political dissent, conducts arbitrary arrests, forces involuntary confessions, and conducts torture. China commits most of its industrial and domestic production to its enormous military force and nuclear arsenal. China is a major trading partner with the United States. Both countries worked together in counter-terrorism efforts after September 11, 2001. On the other hand, China directly competes with the United States on several geopolitical and economic 8 levels. China has targeted the U.S. with legal and illegal intelligence gathering operations. The country is a leading collector of military, economic, industrial, and technological information from the United States. Recent examples of China's attempts to collect technological information suggest that the country's collection efforts are at a level that poses a substantial threat to U.S. national security.

### **Findings of Fact**

Applicant is a 44-year-old senior electronic engineer who has worked for his present employer for nearly four years. He was born in China, where he earned a PhD degree. He earned a post-doctoral degree after moving to the United States. He came to the United States in 1999 to work in an academic field. Around that same time, he met and married a fellow immigrant. The couple initiated the naturalization process to become United States citizens. Four years later, Applicant was hired by a start-up company. He and his wife became naturalized United States citizens in 2013. They have two minor children who were born in the United States.

Before he became a United States citizen, Applicant was issued a Chinese passport in March 2009 that was set to expire in 2019. It replaced a Chinese passport issued in 1999 that was destroyed because it had expired. In early 2015, he applied for and eventually received a United States passport. He subsequently used that passport

to travel to China along with a visa. (Tr. 18) Applicant was initially unaware that when he applied for the visa, the Chinese embassy wrote "cancelled" on the four pages following the page with his picture on his Chinese passport. (Ex. A) He initially kept his Chinese passport because he understood that it was deemed cancelled by the Chinese government when he travelled through China on a United States passport as a United States citizen. (Tr. 14, 18-19) He stated that he had been told by friends that by using his United State passport for travel within China, he effectively renounced his Chinese citizenship. (Tr. 19) He has no need for the Chinese passport and is willing to surrender it to Chinese authorities or to his security manager. (Tr. 19) After the hearing, he discovered the cancellations in his Chinese passport, noted that the corners of those pages were cut, and he forwarded copies of the appropriate pages indicating its cancellation to Department Counsel. (Government Exhibits, preface to exhibits, email dated December 9, 2015)

Applicant's mother and father remain citizens and residents of China. They are in their mid-70s and comfortably retired. There is no evidence suggesting either is connected with or dependent on the Chinese government or military. Applicant's mother was a medical doctor in a private hospital. His father was a manager in a factory that was privatized before he retired. (Tr. 20) Applicant speaks with his parents through Skype every few weeks. (Tr. 30) Applicant's brother lives with the elderly couple. He works for a communications company, is married to an education specialist, and has two young children. There is no evidence suggesting he is connected with the Chinese government or military. Applicant's father-in-law is retired, almost 90 years old, and in poor health. Many years ago, he was the chairman of a company. He speaks with his daughter about once a month by telephone. He has no plans to visit the United States. As with Applicant's other relatives in China, there is no evidence suggesting he is connected with or dependent on the Chinese government or military. Applicant does not provide financial support to his family in China.

Applicant has multiple uncles and aunts, but he does not maintain contact with them. (Tr. 23-24) He has no contact with any cousins and maintains no relationships with past friends or associates. (Tr. 24) In sum, Applicant only has contact with four individuals in China. (Tr. 24) They have a general sense of the type of science Applicant studies, but they know no specifics about his job.

In China, Applicant has no assets or holdings. His parents' home, where they live with Applicant's brother and his family, is worth around \$100,000. Applicant is unaware of any other assets of significance they might possess. He has no inheritance expectations from his family. Applicant visits his kin about every other year. His parents occasionally visit Applicant in the United States, when their health will permit travel.

Applicant has built and established a very successful career and family life in the United States. He owns a home valued at \$1 million dollars, in which Applicant presently has approximately \$800,000 in equity. He has substantial retirement and savings accounts based here in the United States. His wife works in a highly specialized area of the teaching profession. His children enjoy the benefits of the local schools.

Their family socializes with their neighbors and are a part of their community. Applicant has no contact with the Chinese government or military. He has no intention of moving back to China for any reason. (Tr. 26)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

### Guideline C - Foreign Preference

AG ¶ 9 sets out the security concern relating to Foreign Preference:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

Appellant renewed a passport from China in 2009 that is set to expire in March 2019. This fact is sufficient to raise:

Disqualifying Condition AG ¶ 10(a)(1):

. . . exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (5) possession of a current foreign passport.

Applicant had a Chinese passport issued to him before he became a United States citizen. It was set to expire in 2019. In early 2015, after becoming a naturalized United States citizen, Applicant applied for and eventually received a United States passport. He subsequently used that passport to travel to China along with a visa. He took his Chinese passport with him as well. He believed the act of offering it to Chinese officials while traveling on his United States passport in China effectively would cancel the Chinese document. In fact, unbeknownst to Applicant at the time he traveled to China, Chinese authorities had stamped his Chinese passport as cancelled and had cut the corners off some pages, effectively invalidating the document. In the end, the cancelled document was given to his security officer. These facts are sufficient to raise Mitigating Condition AG ¶11: (b) the individual has expressed a willingness to renounce dual citizenship; and (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

### Guideline B, Foreign Influence

Foreign Influence AG ¶ 6 explains the security concern about “foreign contacts and interests” stating: [I]f the individual has divided loyalties or foreign financial interests, [he or she] 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.

AG ¶ 7 indicates three conditions that could raise a security concern and may be disqualifying: (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; (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; and (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.

Applicant was born and educated in China. He moved to the United States to further his educational opportunities, while his parents and brother continued their lives in China as citizens and residents. Applicant married and decided to make the United States his full-time home. He and his wife became naturalized United States citizens. They had children. Applicant obtained a United States passport. They built a home and became a part of their community.

Applicant has regular contact with his parents about twice a month on Skype. He also converses with his brother who, with his own family, lives with Applicant parents. Such contact would be deemed frequent.

In Western terms, Applicant's retired parents would be considered affluent – his mother is a medical doctor and his father was a company manager. They own their own home in China. None of his kin has a nexus with the Chinese government or military.

Applicant provided scant information about his spouse's father, who is a citizen and resident of China. The man is a retired manager who is now 90 years old and in poor health. He cannot travel. There is no evidence suggesting he has a nexus with the Chinese government or military. He lives quietly. He speaks with his daughter about once a month by telephone. There is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. See generally ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at \*8 (App. Bd. Feb. 20, 2002). Applicant has ties of affection and obligation to his spouse, and she is close to her parent. "[A]s a matter of common sense and human experience, 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. 07-17673 at 3 (App. Bd. Apr. 2, 2009) (citing ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002)). This concept is the basis of AG ¶ 7(d). Thus, an indirect, but important tie remains between Applicant and his in-law living in China. Such indirect influence could result in a security concern.

In addition, Applicant has ties of affection to his parents, as shown by his frequent communications with them. Applicant's relationships with residents of a foreign country create a concern about Applicant's "obligation to protect sensitive information or technology" and his desire to help his relatives, who live in those countries. For example, if intelligence agents or government officials in those countries wanted to

expose Applicant to coercion, they could exert pressure on his relatives residing in those locations. Applicant would then be subject to coercion through his relatives and classified information could potentially be compromised. Applicant's and his spouse's possession of close family ties with their families living in a foreign country, are not, as a matter of law, disqualifying under Guideline B. However, if an applicant or their spouse has a close relationship with even one relative living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See Generally ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99- 0424 (App. Bd. Feb. 8, 2001).

The nature of a nation's government, its relationship with the United States, its history of intelligence gathering, and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion or inducement. 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 collection operations against the United States. The relationship of China with the United States places the burden of persuasion on Applicant to demonstrate that his (and his spouse's) relationships with family living in China do not pose a security risk. Applicant should not be placed into a position where he might be forced to choose between loyalty to the United States and a desire to assist relatives living abroad.

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, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at 15-16 (App. Bd. Mar. 29, 2002).

While there is no evidence that intelligence operatives from any foreign country seek or have sought classified or economic information from or through Applicant or his relatives living in a foreign country, nevertheless, it is not possible to rule out such a possibility in the future. Applicant's and his spouse's relationships with family members living in China creates a potential conflict of interest because these relationships are sufficiently close to raise a security concern about his desire to assist relatives in foreign countries by providing sensitive or classified information. Department Counsel produced substantial evidence of Applicant's and his spouse's contacts and relationships with family living in the PRC. Department Counsel has raised the issue of potential foreign pressure or attempted exploitation; AG ¶¶ 7(a), 7(b), and 7(d) are established; and further inquiry is necessary about potential application of any mitigating conditions.

AG ¶ 8 lists three conditions that could mitigate foreign influence security concerns including: (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.; (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 (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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows: 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. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate concerns. See Directive ¶ E3.1.15. The standard applicable in these proceedings is that articulated in *Egan*, *supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶¶ 8(a) and 8(c) have limited applicability. While there is no evidence Applicant provides financial support to his parents or father-in-law, he has frequent contact with his parents and is attributed a similar level of contact with his father-in-law. Applicant's loyalty and connections to family are positive character traits. However, for security clearance purposes, those same connections with relatives living in China negate the possibility of mitigation under AG ¶¶ 8(a) and 8(c), and Applicant failed to fully meet his burden of showing there is "little likelihood that [his relationships with his relatives who are living in China] could create a risk for foreign influence or exploitation."

In contrast, AG ¶ 8(b) fully applies. A key factor in an AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S." Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationships with family living in foreign countries. In that area of consideration, it is notable that neither Applicant nor his family members have been detained or notably monitored by China, and Applicant's sentiments toward that country are diminished.

Applicant has multiple significant connections to the United States and much fewer, more limited connections to China. Applicant has lived in this country for 17 years. During that time, he completed a post-doctoral program, started a career, married, decided to settle permanently in the United States and start a family, became a naturalized United States citizen, built about \$800,000 in equity in the family's million

dollar home, has seen his wife settle in her professional career, put two children into the local public schools, and became active in their community. He surrendered his cancelled Chinese passport. He supports the U.S. Government as a contractor. In no way has he manifested any patriotism, loyalty, or fidelity to any other country but the United States. These connections stand in strong contrast to distant residual ties to a brother and to both his parents and father-in-law, three elderly retirees with ill health.

In sum, Applicant and his spouse's connections to family living in China are significant. Applicant and his wife frequently communicate with their respective parents. Other than occasional trips to China, no other tethers bind them, such as financial support or inheritance issues. Security concerns are not analyzed in a piecemeal assessment. Instead, the overall situation must be considered. Applicant's 17 years of U.S. residence, his significant U.S. financial investments, and his family settled comfortably in the United States constitute much stronger connections to the United States than to China. I am confident that if foreign elements seek information from Applicant, he will immediately report that contact and request to security officials. Foreign influence security concerns under Guideline B are mitigated. Even if they were not mitigated under Guideline B, they would be mitigated under the whole-person concept, *infra*.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I incorporated my comments under the three guidelines at issue in my whole-person analysis. Most of the factors in AG ¶ 2(a) were addressed under the above guideline, but some warrant additional comment.

There are some facts supporting denial or revocation of Applicant's access to classified information. Applicant's parents, brother, and father-in-law are citizens and residents of China. He regularly communicates with these kin. He visits them every few years. His parents used to visit the United States. A Guideline B decision concerning a foreign country must take into consideration the geopolitical situation and dangers in that country including from intelligence agents. The danger of coercion from China is more likely than in many other countries. China competes with the United States militarily, diplomatically, and through trade. China has a history of espionage targeting U.S. military and industrial secrets.

The weight of the evidence supporting granting Applicant's access to classified information is greater than the evidence against granting his security clearance. Applicant immigrated to the United States 17 years ago. He met a woman he later married. He decided to stay in the United States permanently. The couple started the process for becoming naturalized United States citizens. In the interim, Applicant's career blossomed; he bought a million dollar home; he saved for his future with a savings account and retirement plan; built a family of his own; and became involved in his community. He renounced his Chinese citizenship and, after the hearing, provided evidence that his Chinese passport was cancelled by Chinese government officials. Today, he travels on a U.S. passport. He considers the United States to be his home.

Applicant's demeanor, sincerity, honesty, and statements about his connections to the United States and limited connections to China at his hearing are important factors militating towards approval or continuation of his access to classified information. I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude Applicant has mitigated the foreign influence security concerns.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline C:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 1.a-1.c:	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 a security clearance. Eligibility for access to classified information is granted.

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Arthur E. Marshall, Jr.  
Administrative Judge