



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



In the matter of: )  
)  
) ISCR Case No. 11-10097  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Daniel F. Crowley, Esq., Department Counsel  
For Applicant: *Pro se*

03/08/2013

**Decision**

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline B, foreign influence. Applicant’s eligibility for a security clearance is denied.

**Statement of the Case**

On August 20, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence. DOD acted 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 Department of Defense on September 1, 2006.

Applicant answered the SOR on September 7, 2012, and elected to have his case decided on the written record. Department Counsel submitted the Government’s File of Relevant Material (FORM) on December 17, 2012. The FORM was mailed to Applicant and he received it on January 8, 2013. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant

declined to submit any additional information. The case was assigned to me on February 25, 2013.

### **Procedural Ruling**

Department Counsel requested administrative notice of facts concerning the country of The People's Republic of China (PRC).<sup>1</sup> Department Counsel provided supporting documents that verify, detail, and provide context for these facts in the Administrative Notice request. See The PRC section of the Findings of Fact of this decision, *infra*, for the material facts from Department Counsel's submissions on the PRC.

Administrative or official notice is the appropriate type of notice used for administrative proceedings.<sup>2</sup> Usually administrative notice in ISCR proceedings is accorded to facts that are either well known or from government reports.<sup>3</sup>

### **Findings of Fact**

Applicant admitted to all the allegations stated in the SOR. Those allegations stated that his mother, father, brother, mother-in-law, father-in-law, and sister-in-law were all residents and citizens of China. These admissions are adopted as findings of fact. I make the following additional findings of fact.

Applicant is a 43-year-old research scientist for a defense contractor. He has worked for the same company since 2003. He was born in Tianshui, China in 1969. He came to the United States in 1996 to pursue employment opportunities in the area of scientific research. He was naturalized as a U.S. citizen in 2008. He has a doctorate degree in physics. He has never held a security clearance. He married his wife in April 1996. She is a naturalized U.S. citizen who was also born in China. They have one son who was born in the United States in 2005.<sup>4</sup>

Applicant originally came to the United States because Chinese students were encouraged by their government to seek opportunities in advanced foreign countries because Chinese research lagged behind. There was then an expectation that the students would return to China, bringing back a broader knowledge in these scientific areas. Applicant received a post-doctoral fellowship at a national laboratory in this country. He spent three years in this position before moving to a research associate

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<sup>1</sup> FORM p. 3-4; Item 6.

<sup>2</sup> 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)) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)).

<sup>3</sup> See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

<sup>4</sup> Items 4-5.

position at a university. He was in this country on a temporary work visa (H-1) at this time. In 2001, he received his permanent resident status.<sup>5</sup>

No information is provided about Applicant's wife's current occupation or the nature of her relationship with her Chinese parents and sister. Likewise, no information is contained in the record concerning Applicant's relationship with his Chinese parents and brother, or their occupations in China. Applicant visited his parents in China in 2008. He did not travel to China before that date because he was afraid he would not be able to come back to the United States due to visa delays. He renounced his Chinese citizenship when he became a U.S. citizen. Applicant stated the following when asked why he wanted to become a U.S. citizen:<sup>6</sup>

I became a U.S. citizen, because I like [sic] United States and there are benefits to be a U.S. citizen. For instances [sic], I want to work on Government funded job as my work is scientific and not commercial. The government projects allow me to do fundamental studies in order to improve the efficiency of the products.<sup>7</sup>

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

The PRC is a large and economically powerful country, with a population of over a billion people and an economy growing at about 10% per year. The PRC has an authoritarian government, dominated by the Chinese Communist Party. The PRC has a poor record with respect to human rights, suppresses political dissent, and its practices include arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners.<sup>8</sup>

The PRC is one of the most aggressive countries in targeting sensitive and protected U.S. technology, and economic intelligence. It has targeted the U.S. with active intelligence gathering programs, both legal and illegal. In China, authorities have monitored telephone conversations, facsimile transmissions, e-mail, text messaging, and internet communications. Authorities opened and censored mail. The security services routinely monitored and entered residences and offices to gain access to computers, telephones, and fax machines. All major hotels had a sizable internal security presence, and hotel guestrooms were sometimes bugged and searched for sensitive or proprietary materials.<sup>9</sup>

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<sup>5</sup> Item 5.

<sup>6</sup> Items 4-5.

<sup>7</sup> Item 5.

<sup>8</sup> Item 6.

<sup>9</sup> Item 6.

## Policies

When evaluating an applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be 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, Administrative Judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense 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, past and present, favorable and unfavorable, 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

Section 7 of Executive Order 10865 provides that adverse 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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

### Guideline B, Foreign Influence

The security concern relating to the guideline for foreign influence is set out in AG ¶ 7:

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 guideline notes several conditions that could raise security concerns under AG ¶ 7. Three are potentially applicable in this case:

- (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's parents, brother, and in-laws are all citizens and residents of the PRC. There is no record evidence regarding their relationship with the communist party. China is a communist country with a poor human rights record. It is one of the world's most aggressive nations in the collection of U.S. intelligence and sensitive economic information. Applicant's relatives create a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion. Applicant's wife is in the same position with her relatives. They also create a potential conflict of interest. Applicant received all his formal education in China, through his doctoral degree. He left for the United States to take advantage of research opportunities, with the expectation from his government that he would return and share what he learned. AG ¶¶ 7(a), 7(b), and 7(d) have been raised by the evidence.

Conditions that could mitigate foreign influence security concerns are provided under AG ¶ 8. The following are relevant in this case:

(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.

Applicant failed to present any information concerning what his relatives do in China, whether they are members of the communist party, or whether they have any other government affiliation. All we know is that they are citizens and residents of an oppressive communist regime that seeks to obtain intelligence from the United States. Although Applicant has ties to the United States, they do not constitute "longstanding relationships". As stated above, the protection of the national security is the paramount consideration and any doubt must be resolved in favor of national security. Doubts remain about Applicant because of his connection to his and his wife's relatives in China. Because of Applicant's close ties to his relatives and the nature of the government of China, I am unable to find any of the mitigating conditions to be applicable.

### **Whole-Person Concept**

Under the whole-person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at 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.

Applicant and his wife have been U.S. citizens since 2008. Both of their parents and siblings reside in and are citizens of China. Applicant originally came to this country to further his knowledge in the area of scientific research with an expectation he would return to China and share what he had learned. The PRC has an authoritarian government, a bad human rights record, and has a very aggressive espionage program aimed at the United States. 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. Applicant has not overcome the vulnerability to pressure, coercion, exploitation, and duress created by his relationship to his relatives and in-laws living in China.

I considered all of Applicant's evidence. He has done nothing whatsoever to question his loyalty and devotion to this country. However, he has simply been unable to overcome the "very heavy burden" of showing that he, his wife, or their family members in the PRC are not subject to influence by that country.<sup>10</sup> His vulnerability to foreign pressure, coercion, exploitation, or duress remains a concern.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not 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 B:	AGAINST APPLICANT
Subparagraph s 1.a – 1.b:	Against Applicant

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<sup>10</sup> ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007).

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Robert E. Coacher  
Administrative Judge