



**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. 15-01709

**Appearances**

For Government: Douglas Velvel, Esquire, Department Counsel

For Applicant: Sheldon I. Cohen, Esquire

07/21/2016

**Decision**

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

**Statement of the Case**

On September 5, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B (Foreign Influence) and Guideline C (Foreign Preference). 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 dated September 22, 2015, Applicant admitted two of the three allegations raised under Guideline B, denied both allegations set forth under Guideline C, and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. I was assigned the case on December 1, 2015. A hearing originally scheduled for January 26, 2016, by notice dated December 8, 2015, was postponed due to inclement weather. By notice of February 19, 2016, the hearing was reset for February 25, 2016. The hearing was convened as scheduled.

The Government offered one document and a request for administrative notice concerning facts regarding the People's Republic of China (China) and including seven attachments. The proffered documents were accepted into the record without objection as Exhibit (Ex.) 1 and Hearing Exhibit (HE) A, respectively. Applicant gave testimony,

presented four witnesses, and offered 13 documents, which were accepted into the record without objection as Exs. A-M. Also introduced was Applicant's request for administrative notice, including 30 attachments, concerning United States relations with China, which was accepted without objection as HE A. As a preliminary matter, the Government withdrew the allegation raised under Guideline C at SOR 2.a.(2), incorrectly alleging that Applicant had used a Chinese passport for travel after becoming a naturalized United States citizen. After the conclusion of the hearing, the record was closed. Based on a thorough review of the case file, I find that Applicant failed to carry her burden in mitigating security concerns under Guideline B.

### **Request for Administrative Notice**

Both Department Counsel and the Applicant submitted a Request for Administrative Notice regarding certain facts about the nation 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. Both requests and their respective attachments were reviewed and considered. Various facts pertaining to China were specifically derived from the offered requests and their attachments, including those noted below.

China's government is authoritarian and controlled by the Communist Party. The nation has a poor human rights record, curbs political dissent, conducts arbitrary arrests, forces involuntary confessions, and conducts torture. China commits a significant portion of its industrial and domestic production to its enormous military force and nuclear arsenal. China, however, 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 levels. China has targeted the United States 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 pose a substantial threat to U.S. national security.

### **Findings of Fact**

The applicant in this matter is a 44-year-old electrical engineer. She has worked within the defense community for the past 12 years. During that time, she rose from a junior research scientist to a divisional director. She is married and has one young child.

Applicant was born and raised in China, where her education culminated in a master's degree. While still in China, she married a fellow student from her academic field. Applicant came to the United States in early 1999 to pursue a doctoral degree,

where she accepted a full scholarship that paid for her education and living expenses. Her husband accepted a similar academic scholarship and joined her several months later to pursue doctoral studies. During their respective programs, they worked for the university as researchers and by providing academic assistance.

After completing their degrees, the couple decided to remain in the United States. Applicant earned a doctorate in computer engineering in 2004 and quickly found a job. She obtained a green card in 2008. (Tr. 75)

Applicant received a new, valid passport from China in April 2009. It had an expiration date in April 2019. She became a naturalized United States citizen in the summer of 2013. (Ex. B) Since becoming a United States citizen, Applicant has not used her Chinese passport. While submitting her application for a security clearance in 2014, she relinquished her foreign passport to her company's general counsel, who destroyed it. (Tr. 36-37; 100-101; Ex. A) Applicant does not consider herself to be a dual citizen. She noted that her citizenship with China was automatically forfeited when she became a United States citizen because China does not recognize dual citizenship. (Tr. 101; Ex. K) She received a United States passport in late August 2013. (Ex. M) Neither she nor her family members have been approached by foreign interests regarding her work.

Applicant and her husband have a joint annual income of about \$300,000. They purchased their current home in 2014. They have over \$400,000 in equity invested in their house, which is valued at about \$1.2 million. (See Ex. G and Ex. I) Their former home, a townhouse worth approximately \$370,000, is currently used as a rental property. They have a net worth of approximately \$1,522,000. (Ex. G) Applicant has no foreign assets. (Tr. 79) She and her husband are active within their professional community and at their community social club. Their child attends a local preschool.

Remaining in China are Applicant's mother, father, and two brothers, all of whom are citizens and residents of China. Applicant's mother is a 73 year old retiree, a former private sector accountant. Her husband, who is 80 years old, is a retired public school teacher. They derive their income from savings and a private retirement insurance plan.<sup>1</sup> (Tr. 84) They visited Applicant in 2011 and 2015. Applicant generally visits her parents every year or two, and usually sees her brothers while she stays with her parents. (Tr. 86-87). Although they feel isolated in China, Applicant's parents do not speak English and feel they are too old to move to the United States. Applicant speaks with her parents about every two weeks, usually about their health and grandchild. They know little of Applicant's work except that she conducts research.

Applicant's two brothers are middle aged, have college degrees, and live in the same town as Applicant's parents. Applicant's eldest brother works for a private sector law firm and has a generalized family practice. Her other older brother owns a small business. Applicant and her brothers seldom correspond. (Tr. 99) They have physical

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<sup>1</sup> Applicant is unsure whether her father derives any income from the Chinese government for his former public employment. (Tr. 100)

contact about every year or two, when Applicant visits China. Neither brother has a nexus to the Chinese government or military. They only know that Applicant works in the area of research. (Tr. 98) Applicant does not keep in contact with any former friends or colleagues in China. (Tr. 106)

Applicant's in-laws are retired. Applicant's 63-year-old mother-in-law was a private sector manager. Applicant's 70-year-old father-in-law is a retired traffic policeman. Both remain citizens of China, but each became a permanent United States resident in May 2014, has a green card, and lives with Applicant.<sup>2</sup> (Tr. 91; Ex. C and Ex. D) Like Applicant's parents, they live off of savings and private retirement insurance proceeds. They have minimal contact with any relatives in China, and have not visited China since coming to the United States. (Tr. 116)

The executive vice president and co-founder of Applicant's company, who holds a security clearance, testified on Applicant's behalf. She has known Applicant for nearly a dozen years. She testified that Applicant is an "absolutely outstanding" employee, who is precise, dedicated, and always happy. (Tr. 19-23)

The company's general counsel, who also maintains a security clearance, testified that she has never received any negative feedback regarding Applicant. She described Applicant as a dedicated and valuable employee who has a good work ethic, is a fine citizen, and is one who always follows the rules. (Tr. 34-38) The general counsel stated that when Applicant applied for a security clearance in 2014, she was given Applicant's Chinese passport. That witness testified that she personally "chopped [the passport] up with a paper chopper, and then put the pieces in the shredder box," noting that she did not first make a copy of the document. (Tr. 36-37; Ex. A)

Applicant's company's senior vice president holds a security clearance and is Applicant's direct supervisor. He described Applicant as an excellent, careful, detail-oriented, and diligent employee. (Tr. 45) He considers Applicant to be "one of the best" in terms of following organizational rules and performing her function. (Tr. 46) Similarly, the vice president of research, who maintains a security clearance as well, finds Applicant to be hardworking, responsible, and ethical. (Tr. 56-58)

## **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

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<sup>2</sup> The SOR incorrectly alleges at ¶ 1.c that Applicant's parents-in-law are citizens *and* residents of China.

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include 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 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, [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 at issue, 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 here: "(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 contact with her brothers in China is minimal and irregular. News regarding the siblings, when raised, generally comes from Applicant's mother. Applicant's brothers are professionals working in the private sector with no ties to the Chinese government or military.

Of lessened, but still significant, concern is Applicant's relationship to her Chinese in-laws. There is a rebuttable presumption that a person has ties of affection for, or obligation to, 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)) The facts that they are now permanent United States residents, holding green cards, and living with Applicant and her husband, however, are notable.

In contrast, Applicant has regular and frequent contact with her parents, with whom she speaks about twice a month and visits in China every year or two. This is significant. For example, if intelligence agents or government officials in those countries wanted to expose Applicant to coercion, they could exert pressure on her relatives residing in China. Applicant could then be subject to coercion through her relatives and classified information could potentially be compromised. Applicant's possession of close family ties with her family members living in China, 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 her and her spouse's relationships with family members living in China do not pose a security risk. Applicant should not be placed into a position where she might be forced to choose between loyalty to the United States and a desire to assist relatives abroad.

There is no evidence that intelligence operatives from any foreign country seek or have sought classified or economic information from or through Applicant or her relatives abroad. Nevertheless, it is not possible to rule out such a possibility in the future. Applicant's relationships with family members living in China create a potential conflict of interest because these relationships are sufficiently close to raise a security concern about her desire to assist them by providing sensitive or classified information. Department Counsel produced substantial evidence of Applicant's contacts and relationships with family living in China. Department Counsel has raised the issue of potential foreign pressure or attempted exploitation by the government of China. AG ¶¶ 7(a), 7(b), and 7(d) are thus established, and further inquiry is necessary about the 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 granting 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 those concerns. (*See Directive ¶ E3.1.15*) The standard applicable in security clearance decisions 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) do not apply. It is notable that none of the kin at issue have a current nexus with the Chinese military, but it remains unknown whether Applicant's father or father-in-law, former government employees, receive any form of government pension from China. Applicant's in-laws no longer live in China and are now living in the United States with Applicant as permanent United States residents. It is also notable that Applicant's contact with her siblings is generally during her visits to China every year or two, although the depth of their relationships was unexplored.

While there is no evidence Applicant provides financial support to her parents, siblings, or in-laws, Applicant has regular and frequent contact with her parents in China, both by telephone and in person. Applicant's loyalty and connections to family are positive character traits. However, for security clearance purposes, those same connections with relatives living in foreign countries negate the possibility of mitigation under AG ¶¶ 8(a) and 8(c), and Applicant failed to fully meet her burden of showing there is "little likelihood that [her relationships with her relatives who are living in foreign countries] could create a risk for foreign influence or exploitation."

In contrast, AG ¶ 8(b) partially applies. A key factor in an AG ¶ 8(b) analysis is Applicant's relationships and loyalties in this country. Applicant's relationship with the United States must be weighed against the potential conflict of interest created by her relationships with family living in foreign countries, especially her parents.

There is no evidence that the Chinese government, or those conducting espionage, have approached or threatened Applicant, her spouse, or their families to coerce Applicant for classified or sensitive information. As such, there is a reduced possibility that Applicant or her family living in a foreign country would be specifically selected as targets for improper coercion or exploitation.

While the U.S. Government does not have any burden to prove the presence of such evidence, if such record evidence were present, Applicant would have a heavier evidentiary burden to mitigate foreign influence security concerns. It is important to be mindful of the United States' sizable financial and diplomatic investment in China. Applicant's family living abroad could become potential targets of intelligence agents because of Applicant's support for the United States, if disclosed, and Applicant's potential access to classified information could theoretically add some risk to Applicant's family living in China.

As noted, Applicant's foreign connections and loyalties are clearly represented by her parents and two brothers. These family members live in China, a country known for its efforts to collect technological information from the United States. Applicant visits them every year or two in China, her parents have visited the United States, and they speak by phone about every two weeks. They are clearly close. In contrast, Applicant has lived in this country for 17 years. During that time, she completed a doctoral program, found stable employment, had a child, bought homes, excelled at work, and became a naturalized United States citizen. She destroyed her Chinese passport upon submission of her security clearance application. She and her husband jointly generate about \$300,000 a year in employment earnings. They have about \$400,000 in equity on their current home and maintain a townhouse valued at \$370,000. Their current net value is about \$1.5 million. Applicant helps care for her elderly in-laws. She considers herself to be an American only. In no way has she manifested any patriotism, loyalty, or fidelity to any other country but the United States.

In sum, Applicant and her spouse have significant ties to the United States, both in terms of their family life, professions, and investments. Despite these tethers,



Applicant maintains a clearly loving, dutiful, and understandably close relationship with her parents, as well as a natural nexus to her brothers. Their relationships sustain foreign influence security concerns inasmuch as they potentially compromise both Applicant and her family should any actions by China's authoritarian government be implemented to acquire classified information. Applicant's present situation, however, is fluid and may change. Moreover, this conclusion in no way suggests Applicant is not a loyal United States citizen. I conclude at this time, however, that Foreign Influence security concerns under Guideline B remain unmitigated.

### **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.

The Government noted that Applicant possessed a valid passport issued by China with an expiration date in 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 in 2009, before she became a naturalized United States citizen in 2013. Upon application for a security clearance in 2014, she tendered that document to her company's general counsel, who destroyed it and did not retain a copy. Therefore, Mitigating Condition AG ¶ 11(e) (the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated) applies. Foreign Preference security concerns are mitigated.

### **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 guidelines at issue in my whole-person analysis. Most of the factors in AG ¶ 2(a) were addressed under the above guidelines, but some warrant additional comment.

There are facts supporting denial or revocation of Applicant's access to classified information. Applicant's parents and brothers are citizens and residents of China. Her in-laws are Chinese citizens, although currently they are permanent United States residents. Applicant regularly visits and communicates with her parents, has daily contact with her in-law, and maintains contact with her brothers in China. Moreover, 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 has an authoritarian government; is a leading collector of industrial and technological information; competes with the United States militarily, diplomatically, and through trade; and violates human rights. China has a history of espionage targeting U.S. military and industrial secrets.

The weight of the evidence against granting or continuing Applicant's access to classified information is greater than the evidence in favor of the granting or continuation of a security clearance. As a witness, Applicant was credible and sincere. She came to the United States 17 years ago to study. After completing their doctoral degrees, she and her husband decided to stay in the United States permanently. They eventually started the process for becoming naturalized United States citizens. In the interim, Applicant's career blossomed, she had a child, and the couple settled in a home. They have a net worth of about \$1.5 million and no financial holdings abroad. Applicant tendered her Chinese passport to her security officer, and now travels on a United States passport. She considers the United States to be her home.

However, Applicant maintains telephonic contact with her parents in China about every two weeks, visits them in China every year or two, and has hosted them in this country twice in the past few years. Their relationship is obviously, and understandably, very close. While the depth of her relationships with her brothers was not explored, they do visit every year or two when Applicant visits China. Meanwhile, her in-laws, who are now permanent United States citizens and live with Applicant and her husband, remain citizens of China. Such familial ties to citizens of China pose potential risks that could lead to the compromise of classified information.

As previously noted, any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security. I have carefully applied that dictate and 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 these facts and circumstances in the context of the whole person. While I find that Applicant mitigated Foreign Preference security concerns, I conclude Applicant failed to mitigate 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
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline C:	FOR APPLICANT
Subparagraph 2.a(1):	For Applicant
Subparagraph 2.a(2):	Withdrawn

### **Conclusion**

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

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Arthur E. Marshall, Jr.  
Administrative Judge