



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 15-03255
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: John Bayard Glendon, Esq., Department Counsel  
For Applicant: Leon J. Schachter, Esq.

10/13/2017

**Decision**

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MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on May 17, 2011 (SCA-1), and another on August 16, 2011 (SCA-2). On May 6, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent her a Statement of Reasons (SOR) alleging security concerns under Guidelines B and E. The DOD CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006 (2006 AG).

Applicant answered the SOR on May 26, 2016, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 6, 2016. The case was assigned to me on March 1, 2017. I granted Applicant's motion to delay the hearing. On May 18, 2017, the Defense Office of Hearings and Appeals (DOHA)

notified Applicant that the hearing was scheduled for July 20, 2017. I convened the hearing as scheduled.

At the hearing, I admitted Government Exhibits (GE) 1 and 2 into evidence without objection. I marked, for identification purposes only, GE 3. Applicant testified and submitted Applicant's Exhibits (AX) 1 through 29, which were admitted without objection. GE 3 was admitted, in part, as AX 29. I appended Government's exhibit list to the record as Hearing Exhibit (HE) I, and its request for administrative notice of relevant facts about the People's Republic of China (China) as HE II. Applicant noted no objection to HE II. I appended Applicant's exhibit list to the record as HE III.<sup>1</sup> At Applicant's request, I left the record open for the parties to submit written closing arguments on or before August 21, 2017. After receipt of each party's closing argument, I closed the record on August 24, 2017. After the close of the record, Applicant made three separate motions, as addressed more fully below. DOHA received the transcript (Tr.) on July 28, 2017.

On June 8, 2017, the DOD implemented new AG (2017 AG).<sup>2</sup> Accordingly, I have applied the 2017 AG.<sup>3</sup> However, I have also considered the 2006 AG, because they were in effect on the date the SOR was issued. I conclude that my decision would have been the same under either version.

### **Rulings on Post-Hearing Motions**

#### **Post-Hearing Motions A and B (Closing Rebuttal and Additional Evidence)**

On August 22, 2017, the parties timely submitted written closing arguments. On August 24, 2017, after the Government advised that it would not submit any rebuttal to Applicant's closing argument, I closed the record. That same day, Applicant noted an objection to my closing the record without giving her an opportunity to reply to the Government's closing argument, citing "some material errors that may not be obvious to the judge" (Motion A). On August 25, 2017, Applicant filed her reply, including the submission of additional evidence.

On August 31, 2017, I reminded the parties of my ruling at the hearing that either party who wishes to respond to the other party's closing argument would have to make

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<sup>1</sup> I, *sua sponte*, appended HE III to the record after discovering that I inadvertently failed to do so at the hearing. Applicant noted that HE III did not contain a reference to AX 28. (Tr. at 26-28).

<sup>2</sup> On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD 4), establishing a "single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position." (SEAD 4 ¶ B, *Purpose*). The SEAD 4 became effective on June 8, 2017 (SEAD 4 ¶ F, *Effective Date*). The National Security Adjudicative Guidelines (AG), which are found at Appendix A to SEAD 4, apply to determine eligibility for initial or continued access to classified national security information. (SEAD 4 ¶ C, *Applicability*).

<sup>3</sup> ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DOD policy and standards).

a motion for me to consider it. As such, I construed Applicant's August 24<sup>th</sup> objection as such motion and provided the Government with an opportunity to respond.

On September 7, 2017, the Government timely objected to Motion A. That same day, Applicant moved to correct the Government's characterization of DOD Manual 5200.02 in its objection (Motion B). On September 11, 2017, the Government objected to Motion B. On September 15, 2017, I advised the parties that I would rule on Motions A and B in my decision.

I do not find any good-cause reason to allow for Applicant's rebuttal to the Government's closing argument or to submit additional evidence. Motions A and B are denied. In rendering my decision, I did not consider any of the arguments contained in either Motion A or B, Applicant's additional evidence, or the Government's replies thereto. However, even if I were to have considered them, I conclude that my decision would have been the same.

#### Post-Hearing Motion C (Expedited Decision)

On September 15, 2017, I advised the parties of my practice to render decisions on a first-in, first-out basis. At that time, there were several cases on my docket that had priority over this matter. On October 2, 2017, I granted Applicant's motion to expedite my decision after she established a good-cause reason.

#### **Findings of Fact<sup>4</sup>**

Applicant is 58 years old. She has been married to her husband for 32 years. They have one adult child. In 1983, she received her Bachelor of Science degree in computer science from a publicly funded computer institute in China. From 1983 through 1989, Applicant was employed as a research assistant by that institute to develop software. In 1993, she received her Master's degree in computer science from a U.S. university. Since then, Applicant has been employed as a database administrator.<sup>5</sup>

Applicant, her husband, and her child were Chinese citizens by birth. They immigrated to the United States in pursuit of a better quality of life and employment opportunities. Her husband arrived first in 1988 or 1989 on an educational visa. She followed six months later, in 1989. She and her husband attained permanent residence status in 1995 or 1996 through a special program benefitting U.S. students following the Tiananmen Square protests. They were naturalized as U.S. Citizens in 2001. They have no intent to ever reside again in China.<sup>6</sup>

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<sup>4</sup> Unless otherwise indicated by citation to another part of the record, I extracted these facts from Applicant's SOR answer and her SCA (GE 1).

<sup>5</sup> See also AE A; AX 29 at 7-11, 23-24; Tr. at 72-77, 80-82, 94.

<sup>6</sup> AX 29 at 6-7; Tr. at 31-34; 77-81.

Applicant has been affiliated with the same defense contractor since 2003 (first as an employee, and then, beginning in 2008, as an independent contractor). She has held a secret-level security clearance since 2009, without incident. The investigation underlying this case was initiated for her to obtain a top secret-level clearance. However, her duties no longer require her to maintain a top secret-level clearance.<sup>7</sup> Applicant's work performance and character are highly regarded by her colleagues.<sup>8</sup>

#### Guideline B

Applicant's mother, brother, and three sisters are citizens of and residents in China (SOR ¶ 1.a). Her mother, age 87, retired as an accountant employed by a factory. Her brother, age 64, retired as an economist employed by the Chinese government. Her brother's wife (Sister-in-law (SIL) A) retired in 2013 as a professor employed by a university. Her brother, who holds a doctorate degree, provided policy advice on the development of China's transportation infrastructure.<sup>9</sup>

Sister 1, age 66, retired as a pharmacist. Sister 1's husband (Brother-in-law (BIL A) retired from self-employment in the hotel industry. Sister 2, age 62, retired from self-employment in the technology recycling business. Sister 2 previously worked in a library with her ex-husband (BIL B) from whom she has been divorced since a date before November 2011 that is not specified in the record. Sister 3, age 60, retired as a sales associate employed by a bookstore, where she worked with her husband (BIL C), who is now also retired. In China, females retire at age 55, and males at age 60.<sup>10</sup>

Applicant's husband's parents are citizens of and residents in China (SOR ¶ 1.b). Her mother-in-law, age 87, and father-in-law, age 92, each retired as an administrative executive employed by the Chinese government. Her husband has two sisters. One sister-in-law (SIL B) passed away in 2016. She was employed by an unknown company in sales. The employment position of SIL B's husband (BIL D) is not specified in the record. The other sister-in-law (SIL C) and her husband (BIL E) are citizens of and residents in Canada. SIL C and BIL E are employed as medical doctors.<sup>11</sup>

Applicant travels to China about once every 12 to 18 months to visit family, most recently in 2016, and at least one time between 2013 and 2016. Previous visits included 7 days in 2013 (her husband and child accompanied her), 10 days in 2011, 10 days in 2009, 19 days in 2008 (her husband was residing there), 19 days in 2006 (her husband accompanied her), and 21 days in 2005. She usually stays with her mother but, on at

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<sup>7</sup> See also AE A; AX 28; AX 29 at 7-11, 23-24; Tr. at 72-74, 76, 94.

<sup>8</sup> AX 1, 7, 28, and AX 29 at 10.

<sup>9</sup> See also AE 29 at 12-13, 27-29; Tr. at 39, 40-49, 52-56, 84-86, 114-116. Her father passed away in 1985 (AE 29 at 13).

<sup>10</sup> See also AE 29 at 12-13, 27-29; Tr. at 39, 40-49, 52-56, 84-86, 114-116.

<sup>11</sup> AE 29 at 13-15, 27-29; Tr. at 48-49, 86-91.

least one occasion, stayed at an apartment owned by Sister 2. Her husband travelled alone to China in early 2014 to visit his family.<sup>12</sup> Applicant plans to return to China to visit her family, all of whom reside in Beijing.<sup>13</sup>

When she visits China, Applicant has in-person contact with her mother, brother, three sisters, and in-laws, not always together or at the same time. Sister 2 visited the United States once in 2012. Outside of those visits, Applicant does not communicate with her brother, Sister 1, Sister 3, or her in-laws. She communicates with her mother by phone once per week, and with Sister 2 via Skype once every two to four weeks.<sup>14</sup> Since immigrating to the United States, other than with her family members, Applicant has had no contact with any Chinese nationals, including anyone affiliated with the institute where she earned her college degree.<sup>15</sup>

Applicant's husband received his Bachelor of Science degree in computer science from the same computer institute in China from which she received hers. He received his Master's degree in artificial intelligence from a U.S. university. In 1997, Applicant's husband incorporated a technology start-up company in the United States (Company A). In 2007, he registered a subsidiary of Company A in China to develop software (Sub-Company 1). He chose to do so in China because labor and other costs were less expensive than in the United States.<sup>16</sup>

From 2008 through 2012, he travelled back and forth between the United States and China to run Sub-Company 1. He alternated residing two to three months at a time in each locale. In China, he lived with his parents at their home. He rented office space in China from a business incubator, owned by a locality within the Chinese government, which gave incentives for office-rental costs to technology start-up companies. He hired two Chinese-national graduate students, who replied to a help-wanted ad that he placed on a job-listing site, to help him with coding for the software.<sup>17</sup>

In October 2012, Applicant's husband relocated the operations of Sub-Company 1 to, and resumed full-time residence in, the United States. Since then, he has not had any contact with Sub-Company 1's two Chinese-national employees. In November 2015, he hired a Chinese accounting firm to dissolve Sub-Company 1. However, due the "time-consuming" process, his accountant advised him to transfer the company

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<sup>12</sup> AX 29 at 13-14, 15-16, 20, 21, 29-30; Tr. at 91-97.

<sup>13</sup> AX 29 at 8; Tr. at 113.

<sup>14</sup> AE 29 at 12-15, 27-28; Tr. at 91-98, 102, 112.

<sup>15</sup> AX 29 at 7 and 8; Tr. at 79.

<sup>16</sup> AX 3, AX 8, AX 9, AX 29 at 11-12, 20, 24-25; Tr. at 56, 119-122.

<sup>17</sup> AX 3, AX 8, AX 9, AX 29 at 11-12, 20, 24-25; Tr. at 56, 119-122.

instead. In September 2016, he transferred all of Sub-Company 1's shares to the owners and founders of another Chinese start-up company.<sup>18</sup>

In 2008, Applicant's husband began consulting part time for Chinese-national friends that owned technology start-up companies in China. As of July 2017, Applicant's husband had ceased all business activities in China and expressed his intent not to resume them. Since August 2016, he has worked exclusively, as a full-time employee, for a U.S. technology company.<sup>19</sup>

Applicant does not maintain any assets in China, nor does she expect to receive any property or other inheritances from either her or her husband's parents.<sup>20</sup> She does not provide any financial support to any family in China.<sup>21</sup> Applicant and her husband maintain all of their assets in the United States, which are valued at approximately \$2,792,294.<sup>22</sup> They are both registered to vote in the United States.<sup>23</sup>

#### Guideline E

In May 2011, Applicant signed SCA-1 certifying that the statements made therein were "true, complete, and correct to the best of [her] knowledge and belief and [were] made in good faith." In August 2011, she signed SCA-2 certifying same. The questions in SCA-1 and SCA-2, and Applicant's responses thereto, are identical.<sup>24</sup> She was interviewed in connection with her 2011 security-clearance investigation in November 2011 (Interview 1) and December 2011 to discuss, among other things, the contents of SCA-1 and SCA-2. She was interviewed again in March 2014 to provide updated information since the completion of her prior, 2011, investigation. She completed at least one prior SCA in connection the investigation underlying her 2009 secret clearance.<sup>25</sup>

The SOR alleged that Applicant deliberately falsified the same three questions in SCA-1 and SCA-2 by failing to report Sister 1, Sister 3, the two sisters-in-law (SIL A and SIL B) and three brothers-in-law (BIL A, BIL C, and BIL D), who were then citizens of and residents in China, her brother's work for the Chinese government, and her husband's contact with the Chinese government.

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<sup>18</sup> AX 3, AX 8, AX 9, AX 29 at 11-12, 20, 24-25; Tr. at 56, 119-122.

<sup>19</sup> AX 8; AX 29 at 26.

<sup>20</sup> AX 29 at 16.

<sup>21</sup> AX 29 at 21.

<sup>22</sup> AX 4; AX 14-27; and AX 29 at 17-18.

<sup>23</sup> AX 6.

<sup>24</sup> The record is silent as to why she completed two SCAs in 2011.

<sup>25</sup> Tr. at 146-147.

In section 18 (Relatives) of SCA-1 and SCA-2, Applicant reported her mother, brother, and Sister 2, but not Sister 1 and Sister 3. (SOR ¶ 2.a).<sup>26</sup> She admitted that she intentionally omitted Sister 1 and Sister 3 from this question. She averred various explanations and excuses for doing so, as follows:

- During Interview 1: Because she did not have either sister's address.
- In her SOR answer: Because she did not have either sister's "new" address and was not aware that she could simply list their names without the contact information.
- At the hearing: Because her husband did not provide their addresses to her as requested; and because she did not believe that she needed to report them since she was not as close to them as she was to her mother and Sister 2.<sup>27</sup>

In section 19 (Foreign Contacts) of SCA-1 and SCA-2, Applicant answered "No" to whether she had "close and/or continuing contact with foreign nationals" within the last 7 years with whom she or her spouse "are bound by affection, influence, and/or obligation? Include associates, as well as relatives, not already listed in Section 19. (A foreign national is defined as any person who is not a citizen or national of the U.S.)." She did not otherwise report her two sisters-in-law (SIL A and SIL B) and three brothers-in-law (BIL A, BIL C, and BIL D). (SOR ¶ 2.b). Applicant also did not report Sister 1 or Sister 3.<sup>28</sup> Without admitting any intentional omissions from this question, she averred various explanations and excuses for doing so, as follows:

- During Interview 1: Due to "unintentional oversight."
- In her SOR answer: Because she "simply did not understand the 'affection, influence, and/or obligation' language," was "confused by the convoluted wording of the question," and had "inadvertently provided an incorrect answer."
- At the hearing: Because she believed that she did not have to list them in light of the absence of any reference in section 18 to brothers-in-law or sisters-in-law.<sup>29</sup>

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<sup>26</sup> GE 1 at 18-22; GE 2 at 18-22.

<sup>27</sup> AX 29 at 13-15; Tr. at 58-63, 104-108, 109-111.

<sup>28</sup> GE 1 at 22; GE 2 at 22. Since Applicant's failure to report Sister 1 and Sister 3 in response to this question was not alleged in the SOR, I will consider it only to evaluate mitigation and whole person.

<sup>29</sup> AX 29 at 14-15; Tr. at 63-68.

In section 20B (Foreign Business, Professional Activities, and Foreign Government Contracts) of SCA-1 and SCA-2, Applicant answered “No” to whether

In the last 7 years, she or any of her immediate family members had any contact with a foreign government, its establishment (embassies, consulates, agencies, or military services), or its representatives, whether inside or outside the U.S.? . . . Answer “No” if the contact was for routine visa applications or border crossings related to either official U.S. Government travel or foreign travel listed below [in section 20C of SCA-1 or SCA-2]. If contact was outside of the official U.S. Government business, provide an entry for each contact.

She did not otherwise report the contacts that her brother, as an employee, and husband, through his business, had with the Chinese government. (SOR ¶ 2.c).<sup>30</sup> Without admitting any intentional omissions from this question, she averred various explanations and excuses for doing so, as follows:

- During Interview 1: Due to “unintentional oversight.”
- In her SOR answer: Because she did not consider her brother to be either a “representative” of the Chinese government or an “immediate family.” Because she believed that her husband’s contacts were “incidental” and akin to “the mere act of handing a foreign customs official a passport.”
- At the hearing: Because they were not worth mentioning since she believed that: 1) “everyone” in China works for the government so she did not believe her brother’s position required a “special mention;”<sup>31</sup> and 2) her husband was a “pure” entrepreneur who had nothing to do with the Government except to fill out a form.<sup>32</sup>

Throughout her hearing testimony, Applicant acknowledged that she made mistakes by omitting certain information from SCA-1 and SCA-2, but averred that she had no intent to deceive the Government. She further asserted that she should be absolved of those mistakes because she self-reported the omitted information during

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<sup>30</sup> GE 1 at 23-24; GE 2 at 23-24.

<sup>31</sup> Applicant mentioned this concept at two different times at the hearing. First, she stated her belief that “work[ing] for the Chinese government” means something different in the United States than in China. She further averred that “everything” is owned by the Chinese government, including all the hospitals, schools, and even the bookstore where Sister 3 works. Then, she stated that “everyone” worked for the government in China, including Sister 3, who worked at a bookstore. She further averred that China does not have a “private sector.” (Tr. at 40, and 68-69).

<sup>32</sup> See *also* AX 29 at 15; Tr. at 40, and 68-71.



Interview 1. She also claimed that she knew at the time that she filled out SCA-1 and SCA-2 that she would have the opportunity to provide any omitted information.<sup>33</sup>

### **Administrative Notice (China)**

I have taken administrative notice of the U.S. Government's pronouncements concerning China, as outlined in HE II and the documents appended thereto, to which Applicant neither objected nor offered any rebuttal, including the following:

- China is an authoritarian state in which the Chinese Communist Party (CCP) is the paramount authority. CCP members hold almost all top government and security apparatus positions.
- In 2011, the U.S. Office of the National Counterintelligence Executive reported that China is one of the two most aggressive collectors of U.S. economic information and technology. It also reported that China's intelligence services, as well as private companies and other entities, frequently seek to exploit Chinese citizens or persons with family ties to China who can use their insider access to corporate networks to steal trade secrets using removable media devices or e-mail.
- In 2012, the U.S. Office of the Secretary of Defense reported that China is the world's most active and persistent perpetrators of economic espionage. It also reported that China is likely to remain an aggressive and capable collector of sensitive U.S. economic information and technologies, particularly in cyberspace, and that its collection attempts will continue at a high level and will represent a growing and persistent threat to U.S. economic security. The nature of the cyber threat will evolve with continuing technological advances in the global information environment.
- In 2013, the U.S. Office of the Secretary of Defense reported that China is using its computer network exploitation capability to support intelligence collection against the U.S. diplomatic, economic, and defense industrial base sectors that support U.S. national defense programs. The information targeted could potentially be used to benefit China's defense industry, high technology industries, policymaker interest in U.S. leadership thinking on key China issues, and military planners building a picture of U.S. defense networks, logistics, and related military capabilities that could be exploited during a crisis.
- In 2014, the U.S.-China Economic and Security Review Commission reported that, since at least the mid-2000s, the Chinese government

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<sup>33</sup> See e.g. Tr. at 58-71, 104-126, 133-135, and 145-146.

has conducted large-scale cyber espionage against the United States, and has compromised a range of U.S. networks, including those of DoD, defense contractors, and private enterprises. It also reported that Chinese students attending U.S. universities have the potential to collect information, whether wittingly or unwittingly, on sensitive U.S. technology on behalf of the Chinese government or military. China's material incentives for continuing this activity are immense.

- In 2015, the U.S. Office of the Secretary of Defense reported that China continues to leverage state-sponsored industrial and technical espionage to increase the level of technologies and expertise available to support military research, development, and acquisition. There continue to be instances of Chinese nationals located in the United States acting as procurement agents and intermediaries to obtain sensitive or export-restricted U.S. equipment and technologies with military applications. China uses its intelligence services and employs other illicit approaches that violated U.S. laws and export controls to obtain key national security and export-restricted technologies, controlled equipment, and other materials not readily obtainable through commercial means or academia.
- In 2015, as in previous years, Chinese citizens did not have the right to change their government and had limited forms of redress against official abuse.
- In 2015, China had significant human rights abuses, including alleged extra-judicial killings, executions without due process, prolonged illegal detentions at unofficial holding facilities, lack of due process in judicial proceedings, and extrajudicial disappearances of Chinese and foreign citizens.
- In 2015, Chinese authorities often did not respect the privacy of their citizens despite it being protected by law. For example, they monitored telephone calls, text messages, faxes, e-mail, instant messaging, and other digital communications intended to remain private. They also opened and censored domestic and international mail. Security services routinely monitored and entered residences and offices to gain access to computers, telephones, and fax machines. The Beijing Municipal Public Security Bureau announced that it had "covered every corner of the capital with a video surveillance system." The CCP continued to increase efforts to monitor internet use, control content, restrict information, block access to foreign and domestic websites, encourage self-censorship, and punish those who ran afoul of political sensitivities.
- In 2015, the U.S. State Department warned that citizens of the United States have been interrogated or detained for reasons said to be

related to “state security,” and that U.S. citizens of Chinese heritage may be at higher risk of facing such special scrutiny. It also warned that security personnel carefully watch foreign visitors and may place them under surveillance.

- In 2016, a U.S. man was convicted of conspiring to acquire and export fighter jet engines and drones to a “technology spy” in China who worked on behalf of the Chinese military.

## **Policies**

“[N]o one has a ‘right’ to a security clearance.”<sup>34</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.”<sup>35</sup> The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”<sup>36</sup>

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”<sup>37</sup> Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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<sup>34</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>35</sup> *Egan* at 527.

<sup>36</sup> EO 10865 § 2.

<sup>37</sup> EO 10865 § 7.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR.<sup>38</sup> “Substantial evidence” is “more than a scintilla but less than a preponderance.”<sup>39</sup> The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.<sup>40</sup> Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.<sup>41</sup> An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.<sup>42</sup>

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”<sup>43</sup> “[S]ecurity clearance determinations should err, if they must, on the side of denials.”<sup>44</sup>

## **Analysis**

### **Guideline B (Foreign Influence)**

The security concern under Guideline B (Foreign Influence) is set out in AG ¶ 6, as follows:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

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<sup>38</sup> See *Egan*, 484 U.S. at 531.

<sup>39</sup> See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

<sup>40</sup> See ISCR Case No. 92-1106 at 3 (App. Bd. Oct. 7, 1993).

<sup>41</sup> Directive ¶ E3.1.15.

<sup>42</sup> See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

<sup>43</sup> ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

<sup>44</sup> *Egan*, 484 U.S. at 531; See also AG ¶ 2(b).

The following disqualifying conditions under this guideline are potentially relevant:

AG ¶ 7(a): contact, regardless of method, 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;

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

AG ¶ 7(e): shared 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 direct ties to her mother, brother, three sisters, and in-laws establish AG ¶¶ 7(a) and 7(b). Her husband's contact with the Chinese government, through his business, as well as the indirect ties Applicant has to her parents-in-law through her husband, establish AG ¶ 7(e). Her husband's contact with Chinese nationals and Chinese technology start-up companies also establishes AG ¶ 7(e). A heightened risk is associated with the Chinese government, an authoritarian government dominated by the Communist Party, because it conducts espionage against the United States and has a poor human rights record.

The following are potentially relevant mitigating conditions under this guideline:

AG ¶ 8(a): the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States;

AG ¶ 8(b): there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

AG ¶ 8 (c): contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

Applicant maintains close ties to her mother, brother, and three sisters. While not as frequent as with her mother and Sister 2, Applicant's contacts and communications with her brother, Sister 1, and Sister 3 are not casual. Similarly, either directly or through her husband, they are not casual as to her in-laws. She has no present security-significant contact with BIL B or BIL D. Given the absence of details in the record about the "administrative executive" positions that Applicant's parents-in-law held with the Chinese government, or whether they receive a pension, I do not find sufficient evidence to conclude that their positions, from which they have long retired, present a current security concern.

Applicant's brother held a security-significant position within the Chinese government. Even though he is now retired, the nature of that position establishes an ongoing security concern. Her husband had security-significant contact with the Chinese government, Chinese nationals, and Chinese technology start-up companies. While his choice of venue to launch Sub Company 1 would otherwise be considered an innocuously smart business move, it is problematic in this context.

I considered that, during the last 28 years, Applicant and her husband have established strong ties to the United States, where they have made their home. However, they are not strong enough to overcome their close familial ties in China, which are exacerbated by additional connections and dealings with the Chinese government and with Chinese nationals and businesses, especially because they involve the technology sector. These concerns create vulnerabilities for her family, who are susceptible to a government that conducts espionage against the United States and commits serious human rights violations against its citizens. Under these circumstances, I cannot conclude that it is unlikely that Applicant will be placed in a position of having to choose between the interests of her family and that of the United States, or that Applicant has met her heavy burden to mitigate the Guideline B concern.

## **Guideline E, Personal Conduct**

The concern under Guideline E is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation

with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

If deemed deliberate, Applicant's omission of security-significant information on her SCA, including her failure to report Sister 1, Sister 3, and her in-laws, as well as the contact that her brother, through his employment, and her husband, through his business, had with the Chinese government could establish the following disqualifying condition under Guideline E:

AG ¶ 16(a): deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove a deliberate falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission.<sup>45</sup> An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate.<sup>46</sup>

Applicant's various explanations and excuses for failing to report security-significant information on SCA-1 and SCA-2 undermine her credibility. At every stage of the process, she quibbled over details in an apparent attempt to justify her deliberate omission of information that was particularly material and relevant to the investigatory process since it involved China. That quibbling further damaged her credibility. Not only is Applicant highly intelligent, but she had experience with the process by the time she completed SCA-1 and SCA-2, having held a security clearance for which she had competed a SCA. Given these facts, I find substantial evidence of an intent on the part of the Applicant to omit security-significant facts from SCA-1 and SCA-2. Therefore, AG ¶ 16(a) is established.

The following are potentially relevant mitigating conditions under this guideline:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

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<sup>45</sup> See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

<sup>46</sup> ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

An applicant's completion of a security questionnaire is the initial step in requesting a security clearance and the investigative process is contingent upon the honesty of the applicant. Beginning with an applicant's responses in the application,

The security clearance investigation is not a forum for an applicant to split hairs or parse the truth narrowly. The Federal Government has a compelling interest in protecting and safeguarding classified information. That compelling interest includes the government's legitimate interest in being able to make sound decisions (based on complete and accurate information) about who will be granted access to classified information. An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program.<sup>47</sup>

While I credit Applicant with self-reporting the omitted information during Interview 1, it is insufficient to establish mitigation of Guideline E given the nature of her omissions.

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guidelines B and E in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying

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<sup>47</sup> ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002).



and mitigating conditions under Guidelines B and E, and evaluating all the evidence in the context of the whole person and the heightened risk associated with China, I conclude that Applicant has not mitigated her close familial ties to citizens of and residents in China, and her brother's and husband's connections and dealings with the Chinese government and with Chinese nationals and businesses in the technology sector; or her deliberate omission of security-significant facts from SCA-1 and SCA-2. Accordingly, I conclude that she has not carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence): AGAINST APPLICANT

Subparagraphs 1.a – 1.e: Against Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraphs 2.a – 2.c: Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine  
Administrative Judge