



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



In the matter of:)
)
) ISCR Case No. 15-03801
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

04/19/2017

Decision

RIVERA, Juan J., Administrative Judge:

Applicant was born in the People's Republic of China (China). In 1990, when he was 16 years old, he entered the United States. He became a naturalized U.S. citizen in 2002. He married a Chinese citizen in 2012, and she is now a U.S. resident. His wife has frequent contact with her immediate relatives, who are citizens and residents of China. Foreign influence security concerns are not mitigated. Access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 3, 2014. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) on November 24, 2015, issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline B (foreign influence).¹ Applicant answered the SOR on December 9, 2015, and requested a hearing before an

¹ DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

administrative judge. The case was assigned to another administrative judge on April 12, 2016, and reassigned to me on June 20, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 24, 2016, scheduling a hearing for July 27, 2016.

At the hearing, the Government offered three exhibits (GE 1 through 3). GE 3 is a request for administrative notice concerning the government of China. Applicant testified, and submitted two exhibits (AE) 1 (comprised of Tabs A through I), and AE 2 (a request for administrative notice concerning China). All exhibits were admitted into the record as evidence without objections, except for GE 3 and AE 2, which were admitted for the limited purpose of taking administrative notice. DOHA received the hearing transcript (Tr.) on August 4, 2016.

Procedural Ruling

Department Counsel and Applicant requested I take administrative notice of facts concerning the government of China. (GE 3, and AE 2) There were no objections, and I took administrative notice as requested. The noted facts are incorporated in my findings of fact.

Findings of Fact

In his response, Applicant admitted the SOR allegations and submitted evidence in mitigation and extenuation. Applicant's admissions are incorporated into my findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact:

Applicant is a 43-year-old senior software developer. He has worked for federal contractors since 2010. He received a secret clearance in 2011 that he has possessed to present. Applicant was hired by his current employer and clearance sponsor in 2014.

Applicant was born, raised, and educated in China until age 16. A U.S. university hired his father to work as a scientist (researcher) and professor at the university, and he moved his wife and two children with him to the United States. Applicant attended middle school, high school, and college in the United States. He received a bachelor's degree from a U.S. university in 2006. He became a naturalized U.S. citizen in 2002.

Applicant's father was a scientist and professor in China before coming to the United States. He became a naturalized U.S. citizen in 2002. Applicant's father passed away a week before his hearing. Applicant's mother worked as a veterinarian in China. She immigrated to the United States shortly after her husband. She has a U.S. green card, but has not applied for U.S. citizenship because of her concerns about her English language proficiency. Applicant's older brother immigrated to the United States about a year after his parents. He stayed in China under his grandfather's care until his parents settled in the United States. He is a U.S. green card holder, and owns a restaurant. He is married to a Chinese woman and they have a family.

Applicant's father took Applicant to China in 2010 to introduce him to his now wife. His father had met Applicant's wife online through a Chinese scientists' website. At the time, she was a PhD student at the Chinese National Science University. Applicant visited China again in 2011. During both visits, Applicant met his wife and visited with his extended family members and friends in China. In 2012, a prestigious U.S. health research facility sponsored Applicant's wife into the United States as a student and scientist. She completed a PhD in the United States. She applied for her U.S. green card a week before Applicant's clearance hearing. (Tr. 51) Applicant has not visited China since 2011. Applicant married his wife in 2013, and they have a two-year-old son.

Applicant's parents-in-law, wife's siblings, and other relatives are residents and citizens of China. His wife maintains contact with her relatives in China at least once a month. After the birth of Applicant's son, his mother-in-law came to visit and stay with Applicant and his wife for an extended period (2014). Applicant claimed his last contact with his parents-in-law was in 2014. Before 2014, he used to have daily contact with his parents-in-law. Now he has contact with his in-laws only one or twice a year during the holidays. His in-laws know that Applicant is a computer scientist.

In his 2014 SCA, Applicant disclosed friends and relatives in China with whom he maintained frequent contact. At his hearing, Applicant claimed he no longer communicates or corresponds with them. After Applicant became aware of the security concerns raised by his contacts with Chinese citizens, he has curtailed his contacts with relatives and friends living in China.

Applicant purchased a house in 2010 for about \$250,000. He now uses it as a vacation home. He and his wife purchased their home in 2014 for about \$600,000, with a current estimated value of \$650,000. Additionally, Applicant's assets in the United States include bank accounts (\$40,000); retirement accounts (\$220,000); his yearly income of about \$125,000, and his wife's yearly income of about \$65,000. Applicant testified that he and his wife do not have any financial or property interests in China.

Applicant considers himself a proud American. He professed his loyalty to the United States over China. He believes being an American in the United States is his dream come true.

At his hearing, Applicant presented the testimony of three witnesses and submitted 12 reference letters. His references included the president of his company, his facility security officer, several of his managers and supervisors, co-workers, and friends. The gist of their testimony is that Applicant is an exemplary employee who makes important contributions to his employer. He is considered to be honest, reliable, positive, dedicated, diligent, conscientious, knowledgeable, professional, and trustworthy. (AE G) Their statements support approval of his security clearance. His performance evaluations indicate Applicant consistently exceeds expectations and is considered one of his company's top performers. (AE E)

China

I take administrative notice of the following facts concerning China: The National Counterintelligence Executive has identified China and Russia as the most aggressive collectors of U.S. economic information and technology. 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 secrets using removable media devices or email.

In assessing the military and security developments in China, the U.S. Department of Defense has reported that:

- Chinese actors are the world's most active and persistent perpetrators of economic espionage. Chinese attempts to collect U.S. technological and economic information 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.
- China uses its intelligence services and employs other illicit approaches that violate 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.
- China is using its computer network exploitation (CNE) 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, 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.
- China uses state-sponsored industrial and technical espionage to increase the level of technologies and expertise available to support military research, development, and acquisition.
- The organizational network of China's military-industrial complex is such that the People's Liberation Army (PLA) is able to access sensitive and dual-use technologies or knowledgeable experts under the guise of civilian research and development.
- China has in place a long-term, comprehensive military modernization program designed to improve its armed forces' capacity to fight short-duration, high-intensity regional conflicts and, as China's global footprint and international interests grow, its military modernization program has become

progressively more focused on investments for a range of missions beyond China's periphery.

In assessing the national security implications of the bilateral trade and economic relationship between the U.S. and China, the U.S.-China Economic and Security Review Commission has reported:

- Since at least the mid-2000s, the Chinese government has conducted large-scale cyber espionage against the United States. China has compromised a range of U.S. networks, including those of DoD, defense contractors, and private enterprises. China's material incentives for continuing this activity are immense and unlikely to be altered by small-scale U.S. actions.
- China's progress modernizing its defense industry is due in large part to China's substantial and sustained investment in defense research and development (R&D). China's large-scale, state-sponsored theft of intellectual property and proprietary information also has allowed China to fill knowledge gaps in its domestic defense and commercial R&D.
- Since the 1990s, China has promoted civil-military integration to facilitate the transfer of commercial technologies for military use. As part of this effort, China has encouraged civilian enterprises to participate in military R&D and production, sponsored research into dual-use science and technology, and developed common military and civilian technical standards.
- With the emergence of a more modern and able domestic defense industrial base, China is gradually shifting its focus from purchasing complete foreign systems to procuring foreign military and dual-use subsystems and components via open sources, trade, and traditional and nontraditional espionage. Among China's most effective methods used to acquire sensitive U.S. technology are cyber espionage, witting and unwitting collection by Chinese students, scholars, and scientists; joint ventures; and foreign cooperation.

With respect to human rights concerns observed in China in 2014, the U.S. Department of State reported:

- The Peoples Republic of China (PRC) 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.
- Repression and coercion were routine, particularly against organizations and individuals involved in civil and political rights advocacy and public interest issues, ethnic minorities, and law firms that took on sensitive cases.

- Human rights concerns that were observed during 2014 also included a wide variety of human rights violations from extrajudicial killings to various violations of due process.

The U.S. Department of State warns visitors to China that they may be placed under surveillance. Hotel rooms (including meeting rooms), offices, cars, taxis, telephones, Internet, usage, and fax machines may be monitored onsite or remotely, and personal possessions in hotel rooms, including computers, may be searched without knowledge or consent.

Policies

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

[I]f the individual has divided loyalties or foreign financial interests, [he or she] may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

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

Applicant was born, raised, and educated in China, up to age 16. Applicant’s mother, brother, and wife are citizens of China residing in the United States. His in-laws, his and his wife’s extended families, and his friends are residents and citizens of China.

Applicant last visited his extended family and friends living in China in 2011. One of his uncles visited him in the United States in 2014. He claimed that he no longer maintains contact with his extended family and friends in China because he does not want to raise security concerns. His wife is close to her parents, siblings, and relatives living in China. His mother-in-law stayed with Applicant during an extended period after the birth of his son in 2014. Applicant claimed to have infrequent or no contact with his extended relatives and friends living in China.² However, his wife maintains contact with her parents and siblings living in China at least once a month.

² See ISCR Case No. 09-03114 at 2-3 (App. Bd. Oct. 22, 2010) (contact once a month is considered to be “frequent” under AG ¶¶ 7 and 8).

There is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. See *generally* ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Feb. 20, 2002). Applicant has ties of affection for his mother, brother, and wife. Through his wife, he also has ties of affection or obligation to her immediate family in China. The closeness of the relationship is established by her frequent contacts and his mother-in-law's visit when Applicant's son was born.

Applicant's relationships with residents of China create a concern about Applicant's "obligation to protect sensitive information or technology" and his desire to help his relatives, who live in China. For example, if intelligence agents or government officials in China wanted to expose Applicant to coercion, they could exert pressure on his relatives and friends residing in China. Applicant would then be subject to coercion through his relatives and classified information could potentially be compromised.

An applicant's possession of close family ties with their family living in a foreign country are not, as a matter of law, disqualifying under Guideline B. However, if an applicant 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, and China's "history of conducting espionage against the United States puts a heavy burden of proof on Applicant" to demonstrate that her relationships with family members living in China do not pose a security risk. See ISCR Case No. 12-04780 at 3 (App. Bd. Nov. 13, 2013). Applicant should not be placed into a position where he might be forced to choose between loyalty to the United States and a desire to assist relatives living in China.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

There is no evidence that intelligence operatives from any foreign country seek or have sought classified or economic information from or through Applicant or his relatives living in China. 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 his desire to assist relatives in China by providing sensitive or classified information. Department Counsel produced substantial evidence of Applicant's contacts or relationships with family living in China, raising the issue of potential foreign pressure or attempted exploitation. AG ¶¶ 7(a) and 7(b) are established and further inquiry is necessary about potential application of any mitigating conditions.

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

- (a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;
- (b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and
- (c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate 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) have limited applicability. Applicant, directly or through his wife, has frequent contact with his in-laws who are citizens and residents of China. Applicant has close contact with his wife, mother, and brother. He claimed his contacts with his extended family and friends living in China are infrequent; however, his mother and wife continue to have contacts with their relatives in China.

Applicant's (directly or through his wife) connections to family living in China are positive character traits. However, for security clearance purposes, those same connections negate the possibility of mitigation under AG ¶¶ 8(a) and 8(c), and Applicant failed to fully meet his burden of showing there is "little likelihood that [his relationships with family living in China] could create a risk for foreign influence or exploitation."

AG ¶ 8(b) partially applies. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S." Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationships with family living in China.

There is no evidence that the Chinese government or those conducting espionage have approached or threatened Applicant or his family to coerce Applicant for classified or sensitive information. 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 in China could become potential targets of intelligence agents because of Applicant's support for the United States, and Applicant's potential access to classified information could theoretically add some risk to Applicant's family living in China.

Applicant has significant connections to the United States and more limited connections to China. Notwithstanding, taken together, his and his wife's connections to their family and friends living in China are significant. Security concerns are not analyzed in a piecemeal assessment. Instead, the overall situation must be considered. Applicant's close relationship to his mother, wife, and in-laws in China, who are vulnerable to potential Chinese coercion, outweighs his connections to the United States in the security analysis. Foreign influence security concerns under Guideline B are not mitigated.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. (AG ¶¶ 2(a) and 2(c)) I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG were addressed under that guideline, but some warrant additional comment.

There are some facts supporting a grant of Applicant's access to classified information. He entered the United States in 1990, at age 16, and attended middle school, high school, and a U.S. university. He was awarded a bachelor's degree in the United States. He has no investments in China. Applicant was naturalized as a U.S. citizen in 2002. He has successfully worked for government contractors since 2010. He has curtailed his contact with his extended relatives and friends living in China to avoid any possible security concerns.

A Guideline B decision concerning a foreign country must take into consideration the geopolitical situation and dangers in that country including from intelligence agents.³ The danger of coercion from the Chinese government or intelligence agents is more likely than in many other countries. China competes with the United States militarily, diplomatically, and through trade. China has a history of espionage targeting U.S. military and industrial secrets.

The weight of the evidence supports denial of Applicant's access to classified information. Applicant's mother and wife are citizens of China residing in the United States. Both have relatives with whom they have close ties of affection or obligation who are residents and citizens of China. Applicant has close ties of affection and obligation to his mother and wife. "It is not to question Applicant's patriotism to acknowledge that the record in [Applicant's] case raises the reasonable concern that [he] could be placed in a position of having to choose between [his] ties to the U.S. and [his] obligations to [his] foreign family members." ISCR Case No. 07-02485 at 5 (App. Bd. May 9, 2008) (reversing grant of security clearance because of Chinese connections). Applicant should not be placed into a position where Chinese government or intelligence officials could coerce his mother, wife, or Applicant, to attempt to obtain classified information. I conclude Applicant has failed to mitigate the foreign influence security concern.

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

³ See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).

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 eligibility for a security clearance. Eligibility for access to classified information is denied.

JUAN J. RIVERA
Administrative Judge