



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



In the matter of: )  
)  
) ISCR Case No.: 15-06603  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Andre M. Gregorian, Esq., Department Counsel  
For Applicant: *Pro se*

10/05/2016

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**Decision**

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CERVI, Gregg A., Administrative Judge:

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

**Statement of the Case**

Applicant completed a Questionnaire for National Security Positions (SF 86)<sup>1</sup> on April 9, 2015. On November 24, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline B, Foreign Influence.<sup>2</sup>

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<sup>1</sup> Also known as a Security Clearance Application (SCA).

<sup>2</sup> The action was taken 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 the DOD on September 1, 2006.

Applicant responded to the SOR on December 12, 2015, and elected to have the case decided on the written record in lieu of a hearing. The Government's written brief with supporting documents, known as the File of Relevant Material (FORM), was submitted by Department Counsel on February 1, 2016.

A complete copy of the FORM was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on February 5, 2016. He did not file a response to the FORM within the time allowed, nor did he assert any objections to the Government's evidence.

The case was assigned to me on July 1, 2016. The Government's exhibits included in the FORM (Items 1 to 3) are admitted into evidence without objection.

### **Procedural Ruling**

#### **Administrative Notice**

I took administrative notice of facts concerning China and India. Department Counsel provided supporting documents that verify, detail, and provide context for the requested facts. The specific facts noticed are included in the Findings of Fact. The Government's request and the supporting background documents are re-marked as hearing exhibits (HE) 1 and 2. Administrative or official notice is the appropriate type of notice used for administrative proceedings.<sup>3</sup> Usually administrative notice in ISCR proceedings is accorded to facts that are either well known or derived from government reports.<sup>4</sup>

### **Findings of Fact**

The SOR alleges Applicant's spouse and stepdaughter are citizens of China, his in-laws are residents and citizens of China, and his parents are residents and citizens of India. He is also alleged to have traveled to India. In his answer to the SOR, Applicant admitted all the factual allegations, however noted that his mother-in-law passed away in 2015 (SOR 1.c).

Applicant is a 45-year-old software engineer employed by a defense contractor since March 2015. He was born in India, immigrated to the United States in 1982 and naturalized as a U.S. citizen in 2000. He attended an American university and graduated with a bachelor's degree in 1993. He was previously granted a security clearance in 2006. Applicant's parents are citizens and residents of India. His father is a retired foreign bank executive and his mother is not employed. Applicant has weekly

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<sup>3</sup> See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986).

<sup>4</sup> See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

contact by phone and annual contact in person with his parents. At the time of his background investigation, Applicant had traveled to India in 2009 and 2011.

Applicant married a Chinese national in 2010, whom he met in approximately 2004. He reported that she was born in China in 1970 and is listed on the SF 86 as a U.S. registered alien, but the date of entry, circumstances of their meeting, and her ties to China are not provided in the record. Applicant has a stepchild, born in China in 1996. Applicant sponsored her entry into the United States in 2012 because he and his spouse wanted her to be closer to her mother while she attended high school. She is now 20 years old, but her current residency, immigration status, and ties to China are not available in the record. Applicant's father-in-law is a retired Chinese business executive. He stated that he has not met his father-in-law, and only spoke to him once. His mother-in-law passed shortly before issuance of the SOR.

China is the most aggressive collector of U.S. economic information and technology. China's intelligence service, 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 or governmental networks to steal sensitive or classified information. The Chinese government has conducted large-scale cyber espionage against the United States and compromised a range of U.S. networks. Additionally, China's communist government represses and coerces organizations and individuals involved in civil and political rights advocacy, ethnic minorities and law firms representing individuals involved in sensitive cases. The government regularly violates the individual and human rights of its citizens, and surveils and monitors foreign visitors to China without their knowledge or consent.

India is a multi-party, federal, parliamentary democracy. The president, elected by an electoral college, is the chief of state and the prime minister is the head of the government. Recent elections were generally considered free and fair. However, India is among the most active countries involved in economic and industrial espionage. They are also among the most active in U.S. trademark counterfeiting and copyright piracy. India continues to experience terrorist and insurgent activities that may affect U.S. citizens, especially in the Indian states of Jammu and Kashmir. Anti-western terrorist groups are active in India, including Islamist extremist groups that target public places frequented by westerners. Indian police and security forces are known for human rights abuses including extrajudicial killings, torture, rape, corruption and other abuses.

### **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. 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.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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.” See Exec. Or. 10865 § 7. 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.

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. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Guideline B, Foreign Influence**

The Applicant's spouse and stepdaughter, are Chinese citizens. His father-in-law is a citizen and resident of China. His parents are citizens and residents of India. Applicant has traveled to India to visit his parents.

The security concern under this guideline is set out in AG ¶ 6 as follows:

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

Three disqualifying conditions under this AG ¶ 7 are relevant:

- (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
- (c) 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.

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, "even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national

security.” ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at \*\*15-16 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation’s government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an applicant’s family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

AG ¶ 7(a) requires substantial evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in having a family member living under a foreign government. I am satisfied that the intelligence collection activities and human rights abuses by India and China are sufficient to establish the “heightened risk” in AG ¶ 7(a) and the potential conflict of interest in AG ¶ 7(b).

The following mitigating conditions under AG ¶ 8 are potentially relevant:

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

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

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

Applicant has close and continuing ties of affinity to his spouse and stepdaughter. He sponsored his stepdaughter for U.S. resident status. His father-in-law is a retired Chinese business executive who is a citizen and resident of China. Although Applicant stated that he has little contact with his father-in-law, his spouse and stepdaughter’s relationship is unknown. Additionally, since Applicant requested a clearance decision without a hearing, I am unable to inquire into his spouse’s and stepdaughter’s ties to China. I do not know when and how his spouse entered the

United States, how Applicant and his spouse met and their relationship before marrying, her education and employment background, and the extent of her personal ties to China. I also do not know the circumstances surrounding his stepdaughter's life in China and entry into the United States, and her current immigration status. Mitigating condition ¶ 8(a) applies to Applicant's ties to India, but no mitigation is warranted regarding his ties to China. Travel to a foreign country may be a factor to consider in Guideline B cases, but is not an independent disqualifying condition.

### **Whole-Person Concept**

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. In applying the whole-person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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

I have incorporated my comments under Guideline B in my whole-person analysis. After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his foreign family connections to China. Accordingly, overall I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant or continue his eligibility for access to classified information.

### **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 and 1.b:	For Applicant
Subparagraphs 1.d – 1.f:	Against Applicant

Subparagraph 1.c and 1.g:

For Applicant

**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.

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Gregg A. Cervi  
Administrative Judge