



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



In the matter of:)
)
) ISCR Case No. 15-06934
)
Applicant for Security Clearance)

Appearances

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

10/17/2017

Decision

GARCIA, Candace Le'i, Administrative Judge:

The Government failed to establish foreign preference security concerns raised by Applicant's Canadian passport. Applicant did not mitigate the foreign influence security concerns raised by his family in the People's Republic of China (China). Eligibility for access to classified information is denied.

Statement of the Case

On August 11, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline B (foreign influence). The action was taken under Executive Order (Exec. Or.) 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, 2006.¹

¹ I decided this case using the AG implemented by DOD on June 8, 2017. However, I also considered this case under the previous AG implemented on September 1, 2006, and my conclusions are the same using either set of AG.

Applicant responded to the SOR on August 24, 2016, and elected to have the case decided on the written record in lieu of a hearing. The Government's written case was submitted on October 26, 2016. A complete copy of the file of relevant material (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, and his response from November 2016 is marked as Applicant's Exhibit (AE) A. The case was assigned to me on July 1, 2017.

Procedural and Evidentiary Rulings

Evidence

The Government's documents identified as Items 1 through 4 and 6, and AE A, are admitted in evidence without objection.

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts about China. The request was included in the record as Item 5. Applicant did not object. The request is not admitted in evidence, but I have taken administrative notice of the facts contained in Item 5. The facts administratively noticed are summarized in the Findings of Fact, below.

SOR Amendment

In its FORM, the Government amended the SOR, pursuant to ¶ E3.1.17 of the Directive, to add two Guideline C allegations. In so doing, the Government requested that Applicant provide answers to the amended allegations in his response to the FORM. Should Applicant not do so, the Government requested the Administrative Judge construe his silence as denials. Applicant did not admit or deny the amended allegations in his November 2016 response to the FORM. Accordingly, I have taken his lack of response to mean that he has denied SOR ¶¶ 2.a. and 2.b.²

Findings of Fact

Applicant admitted SOR allegation ¶ 1.a and denied SOR allegations ¶¶ 1.b, 2.a, and 2.b. He is a 54-year-old scientist employed by a defense contractor since November 2000. He has never held a DOD security clearance.³

Applicant was born in China. He obtained a bachelor's degree and a master's degree from a Chinese university in 1984 and 1987. He immigrated to Canada and obtained a doctorate degree from a Canadian university in 1996. He became a Canadian citizen in June 2000. He immigrated to the United States in November 2000.

² AE A.

³ Items 1-4, 6; AE A.

He was naturalized as a U.S. citizen in January 2010 and obtained a U.S. passport in February 2010. He is married to a dual, Chinese-born, Canadian and U.S. citizen. He has an adult child who is also a dual, Chinese-born, Canadian and U.S. citizen residing in the United States. He and his wife have owned their home in the United States since November 2014.⁴

In December 2014, Applicant surrendered his Canadian passport that was issued to him in March 2010 with an expiration date of March 2015 to his company's facility security officer. He did so because his company security office told him that he was required to use his U.S. passport to travel if he wanted to obtain a security clearance. He indicated during his January 2015 interview with an Office of Personnel Management investigator that he planned to use his U.S. passport for all future travel. In November 2015, Applicant picked up his expired Canadian passport from his company's security office so that he could renew it. He was issued a new Canadian passport in December 2015, with an expiration date in December 2025, and turned this Canadian passport into his security office in January 2016.⁵

Applicant's mother, father, sister, brother-in-law and sister-in-law are citizens and residents of China. Applicant's mother is 70 years old and his father is 76 years old. Applicant has weekly telephone contact with them. He sees them when he travels to China once every two years. His mother is a retired cook. His father is retired from an electric power management company. Applicant provided \$3,000 in financial support to his father yearly, to assist with his parent's living expenses, until 2015. He stated that after he filed his Questionnaire for Investigations Processing (SF 86) in December 2014, his family in China no longer needed his financial support. His father receives retirement income. He stated that his mother and father are not affiliated with the Chinese government or military, and they are unaware he is seeking a security clearance.⁶

Applicant's sister is 48 years old. Applicant has weekly to monthly telephone and electronic contact with her. He also sees her when he travels to China once every two years. He knows she works in finance, but he does not know her employer. Applicant stated that his sister is not affiliated with the Chinese government or military, and she is unaware he is seeking a security clearance.⁷

Applicant's brother-in-law is 48 years old and his sister-in-law is 53 years old. These are his wife's only contacts in China, as her parents are deceased. Applicant has telephone contact with his brother-in-law once every month to two months, and he has quarterly telephone and electronic contact with his sister-in-law. He also sees them once every two to three years when he travels to China. Applicant knows that his

⁴ Items 1-4, 6; AE A. Applicant stated that since China does not recognize dual citizenship, he was no longer a Chinese citizen once he became a Canadian citizen. Items 3-4.

⁵ Items 3-4, 6.

⁶ Items 1-4, 6; AE A.

⁷ Items 1-4, 6; AE A.

brother-in-law works for an electrical company, but he does not know his brother-in-law's employer. Applicant knows that his sister-in-law is retired, but he does not know her prior employer. Applicant provided \$1,500 in financial support to his sister-in-law yearly, to assist with her living and medical expenses, until 2015. As previously mentioned, he stated that his family in China no longer needed his financial support after he filed his SF 86 in December 2014. He stated that his brother-in-law and sister-in-law are not affiliated with the Chinese government or military. He also stated that they are unaware he is seeking a security clearance, and his wife is aware he is seeking a security clearance.⁸

China

The Office of National Counterintelligence Executive has identified China as one of 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. The U.S. DOD 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. China is using its cyber capabilities to support intelligence collection against 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, and provide China insights into U.S. leadership perspectives on key China issues.

There are numerous examples of individuals who have been convicted of conspiring to violate federal export control laws by illegally exporting defense equipment to China. In June 2016, a California resident was convicted in federal district court of conspiring to illegally export fighter jet engines, unmanned aerial vehicles, and related technical data to China, in violation of the Arms Export Control Act.

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 reported that 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. Among China's most effective methods of acquiring sensitive U.S. technology are cyber espionage, witting and unwitting collection by Chinese students, scholars, and scientists, joint ventures, and foreign cooperation.

The U.S. Department of State observed the following human rights concerns in China in 2015: as China is an authoritarian state in which the Chinese communist party

⁸ Items 1-4, 6; AE A.

is the paramount authority, the party's members hold almost all the top government and security apparatus positions; repression and coercion markedly increased during the year; extralegal measures to prevent public expression of critical opinions; repression of speech, religion, association, assembly, and movement for certain minorities; extrajudicial killings; enforced disappearance and incommunicado detention; torture and coerced confessions of prisoners; detention and harassment of individuals who sought to peacefully exercise their rights under the law; a lack of due process in judicial proceedings; searches of premises without warrants; monitoring of communications, including telephone conversations, facsimile transmissions, email, text messaging, and internet communications; and, opening of domestic and international mail.

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

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This

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

Section 7 of Exec. Or. 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The security concern for foreign influence is set out in AG ¶ 6:

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.

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

(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;

(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

(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.

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.

As of 2015, Applicant has not provided financial support to his father or sister-in-law in China. He indicated that after he filed his SF 86 in December 2014, his family in China no longer needed his financial support. None of the disqualifying conditions under Guideline B are applicable to SOR ¶ 1.b, and I find SOR ¶ 1.b in Applicant's favor.

Applicant's mother, father, sister, brother-in-law, and sister-in-law are citizens and residents of China. China is one of 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. The U.S.-China Economic and Security Review Commission reported that since at least the mid-2000s, the Chinese government has conducted large-scale cyber espionage against the United States. The U.S. Department of State warns visitors to China that they may be placed under surveillance. Applicant's ties to China through his parents, sister, brother-in-law, and sister-in-law create a potential conflict of interest and a heightened risk of exploitation, inducement, manipulation, pressure, and coercion. AG ¶¶ 7(a), 7(b), and 7(e) have been raised by the evidence.

In both his August 2016 response to the SOR and his November 2016 response to the FORM, concerning SOR ¶ 1.a, Applicant clarified that he does not have a half-brother or a half-sister in China. Rather, when he listed these two individuals as such on his December 2014 SF 86, he, in fact, meant to list them as his brother-in-law and sister-in-law. I find for Applicant as to the half-brother and half-sister in SOR ¶ 1.a.

Conditions that could mitigate foreign influence security concerns are provided under AG ¶ 8. The following are potentially applicable:

(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;

(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

(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.

Concerning Applicant's family in China, AG ¶ 8(a) is not established for the reasons set out in the above discussion of AG ¶¶ 7(a), 7(b), and 7(e). Applicant maintains close contact with his family in China. He sees them when he travels to China once every two to three years. Until 2015, he financially supported his father and sister-in-law. AG ¶ 8(c) is not established.

Applicant has lived and worked for the same employer in the United States since 2000. He was naturalized as a U.S. citizen in January 2010 and obtained a U.S. passport in February 2010. His wife and adult child are dual, Chinese-born, Canadian and U.S. citizens residing in the United States. He and his wife have owned their home in the United States since November 2014. These are factors that weigh in Applicant's favor. However, Applicant's ties to his family in China are as strong. Applicant failed to meet his burden to demonstrate that he would resolve any conflict of interest in favor of the U.S. interest. AG ¶ 8(b) is not established.

Guideline C, Foreign Preference

The security concern for foreign preference is set out in AG ¶ 9:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may provide information or make decisions that are harmful to the interests of the United States. Foreign involvement raises concerns about an individual's judgment, reliability, and trustworthiness when it is in conflict with U.S. national interests or when the individual acts to conceal it. By itself, the fact that a U.S. citizen is also a citizen of another country is not disqualifying without an objective showing of such conflict or attempt at concealment. The same is true for a U.S. citizen's exercise of any right or privilege of foreign citizenship and any action to acquire or obtain recognition of a foreign citizenship.

The guideline notes the following conditions that could raise security concerns under AG ¶ 10:

- (a) applying for and/or acquiring citizenship in any other country;
- (b) failure to report, or fully disclose when required, to an appropriate security official, the possession of a passport or identity card issued by any country other than the United States;
- (c) failure to use a U.S. passport when entering or exiting the U.S.;
- (d) participation in foreign activities, including but not limited to:
 - (1) assuming or attempting to assume any type of employment, position, or political office in a foreign government or military organization; and
 - (2) otherwise acting to serve the interests of a foreign person, group, organization, or government in any way that conflicts with U.S. national security interests;
- (e) using foreign citizenship to protect financial or business interests in another country in violation of U.S. law; and
- (f) an act of expatriation from the United States such as declaration of intent to renounce U.S. citizenship, whether through words or actions.

None of the disqualifying conditions above apply. I find SOR ¶¶ 2.a and 2.b in Applicant's favor.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I have incorporated my comments under Guideline B and Guideline C in my whole-person analysis. After weighing the disqualifying and mitigating conditions under Guideline B and Guideline C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his family in China. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline C:	For Applicant
Subparagraphs 2.a – 2.b:	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.

Candace Le'i Garcia
Administrative Judge