



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



In the matter of:)
)
) ISCR Case No. 15-07242
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Department Counsel
For Applicant: Alan K. Hahn, Attorney At Law

November 8, 2016

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

The Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on July 8, 2014. (Government Exhibit 1.) On May 12, 2016, the Department of Defense (DoD), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, (as amended), issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOD could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant answered the SOR in writing on June 2, 2016, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals. The case was assigned to the undersigned Administrative Judge on July 25, 2016. A notice of hearing was issued on August 12, 2016, scheduling the hearing for September 15, 2016. The Government offered two exhibits, referred to as Government Exhibits 1 and 2, which were received without objection. Applicant offered four exhibits, referred to as Applicant's Exhibits A through D, which were admitted without objection. He called one witness and also testified on his own behalf. The transcript of the hearing (Tr.) was

received on September 26, 2016. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

REQUEST FOR ADMINISTRATIVE NOTICE

Department Counsel requested that I take administrative notice of certain facts concerning the current political conditions in the People's Republic of China. (See Tr. p. 15.) There was no objection from Applicant. (See Tr. pp. 15-16.) The request and the attached documents were admitted into evidence and included in the record. (Government Exhibit 3.) The facts administratively noticed are set out in the Findings of Fact, below.

FINDINGS OF FACT

The Applicant is 34 years old, and married. He has a Master's degree in Computer Science. He is employed with a defense contractor as a Software Engineer and is seeking to obtain a security clearance in connection with this employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has foreign contacts, which could create the potential for foreign influence that could result in the compromise of classified information.

Applicant was born in the Philippine Islands in 1989. He came to the United States at the age of eight, and was naturalized at the age of twelve in 1994, along with his mother. Applicant's sister was born in the United States. His father is also a naturalized United States citizen. Applicant obtained his bachelor's and master's degrees in the United States in 2006. He began working for his current employer in 2014. He met his wife, a citizen of China, through an on-line dating website in 2013. Since they met they have had daily contact either in person or by phone. In 2014, Applicant traveled to China to meet his girlfriend and her family. Applicant married his girlfriend in February 2016.

Applicant testified that he understands the reporting requirements associated with having access to classified information. In order to travel to China, he informed his CEO and company security officer of his plans. He was also required to remove his company e-mail from his cell phone. He filled it with music in order to fill the hard drive and then put the old software back, and put the clean software on the cell phone so that he could use it in China. That way, if for some reason his phone was taken from him, it

would be harder for the Chinese to get any kind of company related information off of it.

Applicant's wife was born in China in 1986. She grew up in China, and obtained her bachelor's degree there. She came to the United States in 2008, at the age of 22, on an H1B visa to pursue her master's degree. She lived in the United States for five years before she married the Applicant in February 2016. They currently reside together in the United States. She recently applied for her green card, to obtain permanent residence in the United States, but she has no plans to become a United States citizen. She is employed with an American corporation responsible for managing on-site forensic audits for the company's licensees. She frequently travels to China to perform this function. She deals with Chinese government entities as well as non-governmental entities. (Tr. p. 39.) It is easier for her to travel back and forth to China as a Chinese citizen and avoid getting visas. Applicant has discussed the fact that if his wife is ever approached by Chinese nationals requesting information, she must report it to the Applicant, who would in turn report it to his company. (Tr. p. 44.)

Applicant and his wife plan to live in the United States, and have children in the future. He states that their children will be only United States citizens. (Tr. p. 50.) Applicant and his wife purchased a house in the United States the day of the hearing.

Applicant's wife's parents are citizens and residents of China. They are both age 55, and own property in China. Applicant's wife is their only child and stands to inherit their property in China some day. Applicant's father-in-law is a general contractor for a Western company in China for the past 20 years. At one point, he was a member of the Community party, but no longer considers himself part of it because he has not paid dues in 20 years. (Tr. p. 46.) He is also a member of the Chamber of Commerce for his region. Applicant's mother-in-law has always been a homemaker. Applicant's wife communicates with her parents in China a few times a week at various times. She provides no financial support to her parents in China.

I have taken official notice of the following facts concerning the country of China. China is a large and economically powerful country, with a population of over a billion people and an economy growing at about 10% per year. China is an authoritarian government, dominated by the Chinese Communist Party. In its 2007 annual report to Congress, the United States-China Economic and Security Review Commission noted the following about China's intelligence gathering:

In some cases, access to restricted technology is obtained by China through industrial espionage; China operates an aggressive clandestine effort to acquire additional technologies.

In recent years, this has become such a problem in the United States that U.S. Immigration and Customs Enforcement officials have rated China's espionage and industrial theft activities as the leading threat to the security of U. S. technology.

Moreover, the FBI stepped up counter-intelligence efforts against Chinese Intelligence operations in the United States in July 2007, because of what FBI Director Robert Muller called a “substantial concern” about those operations. As Chinese espionage against the U.S. military and American business continues to outpace the overwhelmed U.S. counter-intelligence community, critical American secrets and proprietary technologies are being transferred to the People’s Liberation Army and Chinese state-owned companies.

The report also concludes that, “Chinese espionage activities in the United States are so extensive that they comprise the single greatest risk to the security of United States technologies”.

The National Counterintelligence Executive has made similar findings, including the fact that China continues to target United States military technologies. Specifically, in its 2007 annual report to Congress, the National Counterintelligence Executive included the following passage in its findings:

Businessmen, scientists, engineers, and academics as well as state-run security services from a large number of countries continue to target US information and technology, according to information compiled during the FY 2007 reporting period. The bulk of the collection activity, however, comes from citizens of a core group of fewer than 10 countries, which include China.

According to the Department of Defense’ “Annual Report to Congress: Military Power of the People’s Republic of China 2009.” (1) China uses “state-sponsored industrial espionage to increase the level of technologies available to support military research, development, and acquisition”; (2) “China continues a systematic effort to obtain dual-use and military technologies from abroad through legal and illegal commercial transactions”; (3) China seeks to “obtain sensitive U.S. technologies (e.g. missile, imaging, semiconductor and submarine) illegally by targeting well-placed scientists and businessmen”; and (4) China poses a “threat to national security due to China’s sustained efforts to obtain U.S. technology illegally.”

Furthermore, according to the State Department, China has a poor record with respect to human rights, which includes: arbitrary or unlawful killings by security forces, physical abuse and torture of prisoners, arbitrary arrest and detention, denial of fair public trials, searches of premises without warrants, monitoring of communications (including telephone conversations, facsimile transmissions, e-mail, text messaging, and internet communications) and opening domestic and international mail, failure to respect freedom of speech and press, failure to respect academic and artistic freedom, severe restrictions on peaceful assembly and associations, restrictions on freedom of association, restriction on the freedom of religion, and citizens lack the right to change their government peaceably, or change the laws and officials that government them.

POLICIES

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Foreign Influence

6. *The Concern.* 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.

Conditions that could raise a security concern:

7.(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;

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

7.(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

Condition that could mitigate security concerns:

8.(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.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct and surrounding circumstances;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavioral changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct, which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence, which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore

appropriately concerned when available information indicates that an Applicant for clearance may be subject to foreign influence that demonstrates unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's situation and the holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

The evidence shows that Applicant's wife is a Chinese citizen, who resides with the Applicant in the United States, but who travels to China on a frequent basis for her employment. At times, she works directly with the Chinese government. She holds a Chinese passport, and has no reporting requirements since she does not have a security clearance nor does she protect the national security. She has no plans to become a United States citizen. She maintains regular contact with her parents in China, and her father was at one time a member of the Communist Party. This situation poses a potential security risk to the United States.

Under Guideline B, Disqualifying Conditions 7. (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*; 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 sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information*; and 7. (d) *sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion* apply. Mitigating Condition 8. (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* also applies, but is not controlling. Given the unique facts of this case, Applicant's wife could be a potential target for foreign influence. Accordingly, Guideline B (Foreign Influence) is found against the Applicant.

I have also considered the "whole-person concept" in evaluating the Applicant's eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth above, when viewed under all of the guidelines as a whole, supports a whole-person assessment of poor judgement, untrustworthiness, unreliability, a lack of candor, an unwillingness to comply with rules and regulations, and/or other characteristics indicating that the person may not properly safeguard classified information.

I have considered all of the evidence presented. It does not mitigate Applicant's foreign influence and the effects it can have on his ability to safeguard classified information. On balance, it is concluded that the Applicant has not overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

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| Paragraph 1 | Against the Applicant. |
| Subpara. 1.a. | Against the Applicant. |
| Subpara. 1.b. | Against the Applicant. |

DECISION

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

Darlene Lokey Anderson
Administrative Judge