



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-04389

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: William Peterson, Personal Representative

10/27/2017

Decision

DAM, Shari, Administrative Judge:

Applicant's parents, siblings, and parents-in-law are citizens and residents of the People's Republic of China (China). Resulting security concerns were not mitigated. Based upon a review of the pleadings and exhibits, national security eligibility for access to classified information is denied.

Statement of the Case

On March 16, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, Foreign Influence. 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 for Determining Eligibility for Access to Classified Information*, effective within the DOD after September 1, 2006. On June 8, 2017, new adjudicative guidelines (AG) were implemented and are effective for decisions issued after that date.¹

¹I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

Applicant answered the SOR on April 8, 2016. He admitted all of the SOR allegations concerning family members who are citizens and residents of China, with explanations, and requested that his case be decided by an administrative judge on the written record without a hearing. (Item 2.) On June 23, 2016, Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing five Items, was mailed to Applicant and received by him on July 11, 2016.² The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM. Applicant subsequently received an extension to September 9, 2016, to file his response to the FORM.

On September 8, 2016, the Defense Office of Hearings and Appeals (DOHA) received Applicant's response to the FORM. Applicant's personal representative provided a cover letter and three enclosures containing numerous exhibits. He did not object to Items 1 through 4, which are admitted into evidence. Applicant's FORM response, to which Department Counsel had no objection, is marked Exhibit (AE) A and admitted into evidence. DOHA assigned the case to me on May 22, 2017.

Request for Administrative Notice

Department Counsel submitted Item 5, a written request that I take administrative notice of certain facts about China, along with attachments. Applicant objected to the admissibility of Item 5. He argued that the Government's supporting documents are not relevant to the specific facts in this case because none of the examples in the documents cite instances in which the Chinese government targeted U.S. citizens with relatives in China. Applicant submitted documents in support of his refutation of the U.S. Government's case. Applicant's objections go to the weight of the Government's evidence and not its admissibility; hence his objections are overruled. I take administrative notice of the facts contained in the Government's request that are supported by source documents from official U.S. Government publications, and the facts contained in the documents submitted from Applicant. (AE A.) The facts are summarized in the Findings of Fact, below.

Findings of Fact

Applicant is 52 years old. He was born in China. He earned a bachelor's degree in 1985 and a master's degree in 1993 from Chinese universities. In 1996, at the age of 31, he arrived in the United States on a student visa. He obtained a doctoral degree in 2003 from a U.S. university. He was a self-employed consultant between 2004 and 2007. He became a naturalized U.S. citizen in 2008. (Item 3, Item 4.)

²Item 5 is Department Counsel's request for Administrative Notice pertinent to China, with attachments.

In 2009, Applicant was granted a Secret security clearance through another U.S. agency. From 2009 to 2014, Applicant worked for a contractor for that agency. When he began working for his present employer, a defense contractor, in 2014, his security clearance transferred to his current employer. In August 2014, he submitted a security clearance application to upgrade his Secret security clearance to a Top Secret clearance. (Item 3; AE A: Enc. 3.)

Applicant's wife was born in China. They married in China in 1996 and she accompanied him to the United States. She became a naturalized citizen of the United States in 2008. They have two children who were born in the United States. (Item 3.) His wife and daughter traveled to China in 2012 to visit their relatives. (AE 2: Enc. 3.)

Applicant's parents are citizens and residents of China. They are retired farmers. Applicant saw them in 2005 when they visited him in the United States. He speaks to them quarterly or annually. Applicant has two brothers. They are citizens and residents of China. He has not seen his brothers since leaving China in 1996. He contacts them quarterly or annually by email or telephone. One brother works as a secretary. Applicant does not know his current employer. That brother previously worked for the Chinese military in some capacity. Applicant's other brother is a teacher at a high school. (Item 2, Item 3, Item 4; AE A: Enc. 3.)

Applicant's parents-in-law are citizens and residents of China. Both of them are retired. Applicant does not have information about their prior employment. The last time he saw them was at his wedding in 1996 in China. He has contact with them once a year. (Item 2, Item 3, Item 4; AE A: Enc. 3.) The extent of Applicant's wife's contact with her family in China is not established by the record evidence, beyond the trip she and their daughter took in 2005.

Applicant sends his parents and parents-in-law a few hundred U.S. dollars every year to help pay for living expenses. He would like to have his family members move to the United States, but does not think they will because of their elderly age. (Item 2.)

Applicant has not returned to China since entering the United States in 1996. He said his loyalty is to the United States. (Item 4.)

Applicant submitted numerous awards and certificates he has received from his former employer at another U.S. agency, from his work with military personnel, and from his current employer. Former and current managers and colleagues submitted letters attesting to Applicant's loyalty to the United States and work ethic. Applicant's 2015 performance evaluation documented that he received a 3.0 on a 5.0 rating scale; his 2016 evaluation documented that he received a 4.0 on a 5.0 rating scale. (AE A.)

Applicant owns a home in the United States with an estimated value of \$418,000. He has about \$65,000 in investment accounts in the United States. (AE A.)

Applicant and his wife are active and supportive of their children's involvement in non-school activities. (AE A.) A friend of Applicant stated that Applicant never intends to return to China because of its "intolerable human rights situation and the terrible unfairness." (AE A.) Applicant said his family is not aware of with his work for the U.S. Government or the fact that he holds a security clearance. (Item 4; AE A.)

China³

I took administrative notice of the facts set forth in Department Counsel's request concerning China, and those set forth in AE A, which are incorporated herein by reference as noted above. Of particular significance are the poor human rights situation; China's authoritative government; China's position as the most active, aggressive, and persistent country conducting economic and military espionage against the United States; its hostility to U.S. interests; and its surveillance of visitors to China. There are several recent cases involving actual or attempted espionage and the illegal export of information to China.

Policies

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or

³ Item 5; AE A.

mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person applying for national security eligibility seeks to enter 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 national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny determination under this order adverse to an applicant 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.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline B: Foreign Influence

AG ¶ 6 expresses the security concerns regarding foreign influence:

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.

AG ¶ 7 sets out conditions that could raise a security concern and may be disqualifying. Three of them are potentially applicable:

(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;⁴

⁴The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence 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 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 is vulnerable to foreign government coercion or inducement. The risk of coercion, persuasion, or duress is greater if the foreign country has an authoritarian government, the country is known to conduct intelligence collection operations against the United States, or has political/military interests in direct opposition to U.S. interests. These facts, which are pertinent to China, place a significant burden of persuasion on Applicant to demonstrate that his contacts, connections, and relationships with his parents, siblings, and parents-in-law, who are resident citizens of China, do not create a heightened risk of foreign influence and do not pose a security risk. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and to his family in China. Applicant's immediate-family relationships are presumed to be close and loving, and Applicant offered no evidence to the contrary about his family. The evidence is sufficient to raise security concerns under AG ¶¶ 7(a), 7(b), and 7(e).

The Government met its burden of production by raising the above disqualifying conditions and shifted the burden to Applicant to prove mitigation. AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns. Those with potential application in mitigating the security concerns in this case are:

(a) the nature of the relationship 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

could potentially result in the compromise of classified information. See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

(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 did not sufficiently demonstrate that it is unlikely that he could be placed in a position of having to choose between the interests of a foreign individual or government and those of the United States as a consequence of his ongoing family ties in China. Applicant has maintained relationships with family members in China since leaving there in 1996. He sends money to them to help with their expenses. They visited him in 2005. Applicant shares living quarters with his wife who has ties with her Chinese parents. She visited them in 2012. Applicant did not establish what other contact or connections she has with her family. Applicant sends money to these in-laws for living expenses. Although Applicant stated his family does not know what he does for a living, those reassurances do not negate the risk for foreign influence and exploitation since the Chinese government's ability to learn that information is more relevant. Accordingly, he failed to establish the mitigating conditions set forth in AG ¶¶ 8(a) and 8(c).

Applicant provided some evidence establishing longstanding relationships to the United States, which established partial mitigation under AG ¶ 8(b). He has lived in the United States since 1996; he has two children who were born here; he obtained an advanced degree from a U.S. university; and he has been successfully employed by government contractors since 2009. He and his wife became U.S. citizens in 2008. He has U.S. investment accounts and owns a home here.

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 the 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 national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

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

There is some evidence tending to mitigate the established foreign influence security concerns under the whole-person concept. Applicant is a mature person, who has lived in the United States since 1996 and been a U.S. citizen since 2008. His wife is also a naturalized citizen, and his children are U.S. citizens by birth. There is no evidence that he has ever taken any action that could cause potential harm to the United States. He has worked for government contractors since 2008. He asserted his loyalty to the United States.

Other circumstances outweigh those favorable factors for Applicant in the whole-person analysis. China's government does not conform to widely accepted norms of human rights. More importantly for security concerns, China is actively involved in espionage against the United States, and may attempt to use naturalized U.S. citizens for this purpose. Applicant was raised and educated in China and resided there until he was 31 years old. His parents, two siblings, and parents-in-law are resident citizens of China. He maintains regular contact with his family through phone calls, and by sending money. His parents visited him in 2005, further demonstrating their commendable familial affections for one another. His wife also maintains contact with her family members in China, and last visited them with their daughter in 2012, evidencing a strong familial bond.

After weighing the disqualifying and mitigating conditions in the context of the whole-person, and considering the facts and circumstances established by the evidence in this record, I conclude Applicant did not sufficiently mitigate the security concerns pertaining to foreign influence. Overall, the record evidence leaves me with questions as to Applicant's eligibility and suitability for a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraphs 1.a through 1.d:	Against 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 a security clearance. National security eligibility for access to classified information is denied.

Shari Dam
Administrative Judge