



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 15-05357

**Appearances**

For Government: Allison O'Connell, Esquire, Department Counsel  
For Applicant: Aileen Xenakis, Esquire

08/09/2018

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant did not mitigate the security concerns regarding foreign influence and personal conduct. Eligibility for access to classified information is denied.

**History of Case**

On October 14, 2016, the Department of Defense (DoD) Consolidated Adjudication Facility (CAF), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant detailing why DoD adjudicators 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 Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied, or revoked.

The Security Executive Agent, by Directive 4, National Security Adjudicative Guidelines (SAD 4), dated December 10, 2016, superseded and replaced the September 2006 adjudicative guidelines (AGs). They apply to all covered individuals who require

initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. Procedures for administrative due process for contractor personnel continue to be governed by DoD Directive 5220.6, subject to the updated substantive changes in the AGs, effective June 8, 2017. Application of the AGs that were in effect for the issuance of the SOR would not affect my decision in this case.

Applicant responded to the SOR on November 16, 2016, and requested a hearing. The case was assigned to another judge on November 9, 2017, and reassigned to me on November 21, 2017. The case was scheduled for hearing on December 15, 2017. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of nine exhibits (GEs 1-9). Applicant relied on one witness (himself) and 11 exhibits (AEs A-K). All exhibits of the parties were admitted without objection. The transcript (R.T.) was received on December 28, 2017.

Besides its nine exhibits, the Government requested administrative notice of facts covered by 11 source documents, which are identified attached to the Government's administrative notice request.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 (App. Bd. April 12, 2007); ISCR Case No. 02-24875 (App. Bd. October 12, 2006). Administrative notice is appropriate for noticing facts or government reports that are well known. See *Stein*, Administrative Law, Sec. 25.01 (Bender & Co. 2006). The Government's administrative notice request with attached source documents was admitted as HE 1.

For good cause shown, administrative notice was granted with respect to the source documents attached to the Administrative Notice (Administrative Notice I through XI) addressing the geopolitical situation and security concerns extant in the Peoples Republic of China (China). Administrative notice was extended to the source documents themselves, consistent with the provisions of Fed. R. Evid. 201. This notice did not foreclose Applicant from challenging the accuracy and reliability of the information contained in the reports addressing China's current status, or from relying on additional information in the documents not covered in the Government's Administrative Notice.

### **Summary of Pleadings**

Under Guideline B, Applicant allegedly (a) has a spouse who is a citizen of China; (b) failed to report, as required, his association with a Chinese national and his subsequent marriage to the national to his employer; (c) has a spouse who regularly communicates with various companies in China on a regular basis; (d) has a mother-in-law, sister-in-law, and brother-in-law who are citizens and residents of China; (e) has in-laws who loaned him and his spouse approximately \$5,000 to purchase business products in China, and to ship those products from China to the United States; and (f) sought to meet random people during his travels to China, Singapore, Japan, and the Philippines.

Under Guideline E, Applicant allegedly (a) failed to report his travel to China in March 2011, August 2011, November 2011, and May 2012; (b) married his current spouse in March 2012, despite being legally married to another woman (his divorce from his first spouse was not finalized until on or about June 2013); (c) falsified material facts during a personal subject interview in November 2012 with an authorized DoD investigator when he stated he was unaware of the requirement to report foreign travel, despite being aware of his employer's reporting requirements set forth in its security indoctrination briefing, which he signed in November 2011, and as set forth in his employer's 2012 DoD Annual Security Refresher; and (d) falsified material facts during a personal subject interview in September 2013 with an authorized DoD investigator when he stated he thought the reporting requirement for travel was to report it to his supervisor, concealing his awareness of the reporting requirements set forth in its security indoctrination briefing, which he signed in November 2011, and as set forth in his employer's 2012 DoD Annual Security Refresher; which he signed in May 2012; and (e) as alleged in subparagraphs 1.a-1.b and 1.f of Guideline B.

In his response to the SOR, Applicant admitted to having a spouse who is citizen of China, but claimed she is now a naturalized citizen of the United States and no longer a citizen of China. He admitted to not reporting his association with his wife (a Chinese national at the time) to his employer's headquarters in the United States, but claimed his relationship with the Chinese national in a country governed by Sharia law was well known to his supervisor. He claimed, too, that he does not remember any security briefing from his firm's headquarters covering reporting requirements.

Addressing allegations of his wife's daily contacts with various companies in China to purchase products for his on-line business, he denied developing anything that could be construed as an ongoing friendship or business relationship by his wife or himself. He claimed he and his wife are no longer actively working on this business, and Applicant believes they lost more than they earned.

Applicant admitted his mother-in-law, sister-in-law, and brother-in-law are citizens and residents of China, while claiming that he has language barriers with his wife's family members that prevents him from communicating with them and establishing relationships with them.

Applicant also admitted to accepting a \$5,000 loan from his Chinese in-laws, but claimed that the loan was a short-term loan to finance the purchase and shipment of Chinese products for their business in lieu of using credit cards that were not accepted in China. And he admitted to meeting new people in his unaccompanied travels in China.

In his responses to allegations of falsifying facts in his personal subject interview, Applicant admitted the allegations, but denied any clear understanding of the reporting requirements for travel contained in his employer's security indoctrination briefing. He claimed the reporting processes were either not made clear or were absent altogether, and he claimed his supervisor and co-workers in his shop knew where he was going. Implicitly, he denied any deliberate attempts to violate his employer's reporting requirements for foreign travel.

## **Findings of Fact**

Applicant is a 49-year-old information technology (IT) systems engineer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

### **Applicant's background**

Applicant married his first wife (reportedly a Russian citizen by birth and a naturalized U.S. citizen), in April 1999 after meeting her on an online web-site and sponsoring her entry into the United States from Latvia (formerly Russia) in the same month and year. (GEs 1-2) He separated from her in August 2011, and divorced her in June 2013. (GEs 1-2, and 6; Tr. 60)

While still legally married to his first wife, he married his second wife (born and raised in China) in March 2012 in Kuwait. (AE Tr. 59-60) He met his second wife through an Asian website in February 2011. (GEs 1-2, 6, and 8; Tr. 49-52) Aware of U.S. laws banning bigamous marriages and Kuwait laws that preclude a couple from living together without marriage, Applicant and his second wife converted to the Islamic faith to take advantage of his host country's Sharia law, which sanctions male residents taking multiple wives. (GEs 2, 6, and 9; Tr. 50-51) By all accounts reported by Applicant, his March 2012 marriage contract with his current wife was consummated in accordance with Sharia law, witnessed by two friends of his wife from China, and approved as a valid marriage with the consent of the judge. Before approving the marriage contract, the presiding judge accepted the declarations of Applicant and his wife as practitioners of the Islamic faith and determined that there were no legal impediments to the marriage. (GE 9)

Neither party in the hearing offered any evidence to dispute the validity of Applicant's marriage contract under Kuwait law, and their marriage would likely survive any legal scrutiny initiated in Kuwait based on Applicant's bigamous marriage to his first wife if made known to Kuwait authorities. (GEs 6 and 9) Whether their Kuwait marriage could ever gain acceptance in State A or any other state in the United States if challenged for its validity under Kuwait law, or as a marriage that violates state bigamy laws, is unclear.

Following their official marriage in Kuwait, Applicant's current spouse accompanied him to the United States in 2013. She became a naturalized U.S. citizen and received a U.S. passport in April 2015. (GEs 6 and 9 and AEs C-D; Tr. 39-41) Applicant and his current wife have one son from their marriage (age three) who was born in State A in August 2014 and has U.S. citizenship by birth. (AE B; Tr. 42) Both of Applicant's spouses are aware of each other, and Applicant is reportedly on friendly terms with his first wife. (GE 6) He currently resides in Kuwait with his most recent spouse, but listed a potential State A address in his 2014 OPM interview and an actual State A address in his May 2015 application to vote in State A. (AE A; Tr. 33)

Applicant received his high school diploma in 1986 (GE 1; Tr. 31, 42-43) and attended IT classes in 1994-1995, but did not receive a degree or certification. (GEs 1-2) He enlisted in the Air Force (AF) in October 1987 and served three years of active duty on a four-year enlistment before receiving a general discharge for misconduct (sexual transgressions and violating orders) while on active AF duty in 1990. (GEs 1-2 and 5-6; Tr. 31-32, 69-70)

Since July 2013, Applicant has been employed by his current employer (Company A) at a foreign site. (GEs 1-2 and AE A; Tr. 32) Between July 2008 and June 2013, he was employed for another contractor (Company B) as an IT systems engineer. (GEs 1-2 and 6; Tr. 39-40) While employed by Company B, he never committed a security violation and was never disciplined. (GEs 2 and 6)

While Applicant's spouse's father is deceased, her mother and sister (and her husband) are citizens and residents of China. (GEs 1-2 and 6; Tr. 66-68) Applicant's current wife maintains close relationships with her mother and sister. (GEs 1-2 and 6; Tr. 68) His mother-in-law is a homemaker who does not speak English and does not know any specifics about Applicant's work. (GE 6) While his sister-in-law reportedly owns a printing business in China, little is known about her or her husband. Due to language barriers between Applicant and his in-laws, they have had little contact with each other. (GE 6; Tr. 44)

Beginning in May 2011, Applicant began paying for English classes for his current spouse (Tr. 53-54), and continued paying for her English classes through February 2012. Applicant did not report his then relationship with his current wife to anyone in Iraq while employed there. (Tr. 54) After arriving in Kuwait in February 2012 and becoming more familiar with his employer's reporting requirements, he disclosed his relationship with his current wife to his immediate supervisor. (Tr. 55-57) Reportedly, his FSO did not learn of his marriage to his current wife until he reviewed Applicant's August 2012 e-QIP. (AEs 7-8) Since completing his e-QIP in September 2012, Applicant has more carefully familiarized himself with his employer's established procedures for reporting foreign travel. (Tr. 55-57, 71-72) His current plans are to place "his family's roots down" in the United States, and not in Kuwait or China. (Tr. 73)

In January 2013, Applicant started an on-line business with his current wife. (GE 2) To help his wife operate the business, Applicant obtained a government identification number and reseller license in a western state in March 2013. (GE 2) In April 2013, they began shipping their products from China. (GE 2) Applicant's initial investment in the business was around \$15,000.

In August 2013, Applicant's in-laws loaned his spouse and himself approximately \$5,000 to purchase business products in China and ship them to the United States. (GEs 1-2; Tr. 45-46) Because credit cards are not accepted, cash payments for the products were required in China. Applicant repaid his in-laws for the loans after receiving the shipments. (Tr. 45-46) His spouse did not close her China business, though, until 2014 following the birth of their son in August 2014. (Tr. 65-66) Applicant's commercial

activities in China over a period of several years reflect considerable financial ties to his wife's China business interests.

Between March 2011 and May 2012, Applicant made several trips to China with his spouse to purchase Chinese products for his wife's business services. (GEs 2 and 6; Tr. 63-64) In his statements given to investigators from the Office of Personal Management (OPM) in 2014, he confirmed these trips to China, citing five separate trips. (GE 2) In March or April 2011, he traveled to China to meet his current wife. (GEs 2 and 6 and AE H; Tr. 53)

Applicant traveled again to China in August and November of 2011 to meet with his current wife. (GE 2; Tr. 39) He also reported travels to Hong Kong and Thailand in April 2011, where he met random people, utilizing an Asian dating website. (GEs 1-2; Tr. 47) Typically, on his China trips he would see his current wife's family, and occasionally family friends. (Tr. 76) Following his marriage to his current wife, he traveled to China in May 2012 to help her obtain her family visa to return with him to Kuwait. And in March-April 2013, he traveled to China to join his wife and meet her family. While they were in China, they picked up their purchases, boxed them, and shipped them to a U.S. on-line distributor for resale. (GEs 1-2) His most recent trip to China was in August 2017 to visit his wife's family, which he reported to his employer. (Tr. 68-69)

### **China's country status**

While not a country acclaimed to be hostile to U.S. persons and interests, China maintains a relationship that is more competitive than cooperative. China is known to use its intelligence services to collect information about the United States and to obtain advanced technologies. China actively monitors international communications satellites from maintained intercept facilities, in addition to collecting information on U.S. military operations and exercises.

Established in 1949, China with over 1.3 billion people is the world's most populous country. See *The World Factbook: China*, Central Intelligence Agency (July 2018). Today, China continues to undergo rapid economic and social change. Political power, however, remains centralized in the Chinese Communist Party (CCP) with little indication of any change in the foreseeable future. As a corollary of its authoritarian roots, China has never been known for a positive human rights record among Western nations and international human rights groups. Part of this can be explained in terms of China's lack of any cognizable tradition of respect for developing democracies and the rule of law.

U.S.-China disputes over Taiwan, Hong Kong, and Tibet can be expected to continued to undermine improvements in U.S.-China military relations. And, China-sponsored espionage aimed at U.S. military and economic interests promise to continue the need for heavy security monitoring over sensitive U.S. industries.

Still, the United States has sought to build positive, cooperative, and comprehensive relationships with China by expanding areas of cooperation while

addressing areas of disagreement in the areas of tariff policies, as well in the fields of human rights and cybersecurity. See *U.S. Relations with China, Fact Sheet*, U.S. Department of State, Bureau of East Asian and Pacific Affairs at 1-2 (Dec. 2016).

Historically, the United States has emphasized the need to enhance trust in its bilateral relations with China through increased high-level exchanges, formal dialogues, and expanded people-to-people ties. (Id.) The U.S. approach to its economic relations with China has been to integrate China into the global, rules-based economic and trading system and expanding U.S. exporters' and investors' access to the China's market. (Id., at 1-2) How the recent reciprocal rounds of tariffs imposed by the United States (primarily in steel and aluminum) and China (especially in agricultural products) will impact short and long term trade between the two countries is still unclear. Negotiations can hopefully lead to improved trade relations that hold promise for sparing trade wars between China and the United States.

### **China's collection pursuits**

China's actors are the world's most active and persistent perpetrators of economic espionage. Chinese attempts to collect U.S. technological and economic information is expected to continue at a high level and pose a growing and persistent threat to U.S. economic security. See *Military and Security Developments Involving the People's Republic of China*, U.S. Dep't of Defense, Annual Report to Congress, 2009-2011 at 4 (Oct. 2011) (*Military Developments*) and Request for Administrative Notice, *supra* at 3. China's leaders remain focused on developing the capabilities to deter or defeat adversary power projection and counter third-party intervention-including by the United States-during a crisis or conflict. (Id.)

China uses various methods and strategies to acquire foreign military and dual-use technologies, including cyber activity and exploitation of the access of Chinese nationals-such as students or researchers-acting as procurement agents or intermediaries. See *Military Developments 2017, supra*, at 71. China very likely 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 unobtainable through other means. (Id.)

Computer systems around the world, including those owned by the U.S. Government, continued to be targeted by China-based intrusions through 2016. These and past intrusions focused on accessing networks and extracting information. See *Military Developments 2017, supra*, at 59 and Request for Administrative Notice, *supra* at 4. China uses its cyber capabilities to support intelligence collection against U.S. diplomatic, economic, and defense industrial base sectors. The information targeted can be used to benefit China's defense high-technology sectors, support China's military modernization, or provide the CCP insights into U.S. leadership perspectives. (Id.)

China uses state-sponsored industrial and technical espionage to increase the level of technologies and expertise available to support military research, development, and acquisition. See *Military Developments 2017, supra*, at 65 and Request for

Administrative Notice, *supra*. 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." *Military and Security Developments Involving the People's Republic of China*, U.S. Dep't of Defense, Annual Report to Congress at 11-12, 51 (2013) and Request for Administrative Notice, *supra*.

Numerous examples exist of individuals who have been convicted of conspiring to violate federal export control laws by illegally exporting defense equipment to China. Examples include a Chinese national's pleading guilty in March 2016 to participating in a conspiracy over an extended period between 2008-2016 to hacking into the networks of major U.S. defense contractors to steal sensitive military and export-controlled data, and send the the stolen data to China. See Request for Administrative Notice, *supra*, at 5.

In another example, an employee of the U.S. Department of State was charged with failing to report repeated contacts with Chinese foreign intelligence agents who provided her and her family with "thousands of dollars of gifts and benefits over five years." Press Release, *State Department Employee Arrested and Charged with Concealing Extensive Contacts with Foreign Agents*, U.S. Department of Justice, Office of Public Affairs (March 29, 2017). Other examples of individuals who have been convicted of conspiring to violate federal export laws by illegally exporting defense equipment to China are noted and covered in the Request for Administrative Notice, *supra*. Noted examples include recent federal convictions covering the illegal exporting of fighter jet engines and a long-term program involving the development of special nuclear material outside the United States without the required authorization from the U.S. Department of Energy (DoE). See *id*.

Of additional security concern to the United States is the large and growing threat to its national security from Chinese intelligence collection operations. Particularly serious are China's efforts at cyber and human infiltration of U.S. national security organizations. Reports of Chinese espionage are not of recent vintage but extend back over the past 15 years. See Report to Congress of the U.S.-China Economic and Security Review Commission at 289 (Nov. 2016).

Threats from Chinese intelligence operations extend overseas and include China's growing technical intelligence collections capabilities to monitor deployed U.S. military forces. Chinese intelligence services have demonstrated broad capabilities to infiltrate U.S. national security actors with cyber operations. See *id*, at 293 and Request for Administrative Notice, *supra*, at 6.

### **China's human rights record**

China is an authoritarian state in which the CCP is still the paramount authority. CCP members hold all top government and security apparatus positions. See *2016 Human Rights Report: China*, U.S. Department of State, Bureau of Democracy at 1 (March 3, 2017). Human rights concerns observed in 2016 included "illegal detention [in] unofficial holding facilities known as "black jails," torture and coerced confessions of

prisoners, and detention and harassment of journalists, lawyers, writers, bloggers, dissidents, petitioners, and others whose actions the authorities deemed unacceptable. See *2016 Human Rights Report: China*, *supra* and Request for Administrative Notice, *supra*, at 7.

Of note, China passed a new law, effective January 1, 2017, that confirmed that non-government organizations (NGOs) are considered a “national security” threat. To enforce the law, authorities used extralegal measures, such as enforced disappearances and strict house arrest to prevent public expression of critical opinions. Authorities continued to censor and tightly control public discourse exchanged on the internet and through the print and other media. See *id.*, at 2.

Visitors continue to be warned by the U.S. State Department that they can be placed under surveillance without knowledge or consent. See *Country Information - China: Local Laws & Special Circumstances, Surveillance and Monitoring*, US. Dep’t of State at 10 (Sept. 2016) and Request for Administrative Notice, *supra*, at 8. Hotel rooms and personal computing devices for these categories are sometimes searched by security personnel.

### **Foreign travel reporting**

In preparation for his foreign travel trips to China between March 2011 and May 2012, Applicant regularly kept his program supervisor informed of his China travel plans. (GEs 4 and 6) Following his relocation to Kuwait in December 2011, his principal facility security officer (FSO) reminded him of his employer’s requirements that all foreign travel be routed through employer’s regional offices in the United States for official approval. (GE 8)

Asked by his FSO in an August 2012 email whether he had been reporting his foreign travel or recent marriage to security, he indicated he had not and was previously unaware of foreign travel reporting requirements and only reported his May 2012 foreign travels to China to his local program manager. (GEs 2, 6 and 8) Thereafter, Applicant kept his security office properly informed of his foreign travel plans. (GEs 2 and 6)

In interviews with OPM investigators in November 2012 and September 2013, Applicant acknowledged his initial failures to report his foreign travels to his employer’s FSO located at the employer’s offices in the United States as he was instructed to do in his employer’s security indoctrination briefing in November 2011 and in the DoD Annual Security Refresher. Both of these instruments he completed and signed in November 2011 without the benefit of any oral briefings. (GEs 3-4; Tr. 46-47) Applicant assured in his OPM interview and again at his hearing that he did not recall signing the briefing documents or being aware of the specific notice requirements contained in these briefings covering the reporting of foreign travel plans, but consistently briefed his program supervisor on his travel plans. (GEs 2 and 6 and AEs I-J; Tr. 41-43, 46-48, and 51)

Applicant explained at hearing that the briefing materials furnished him never stood out for him and he never fully understood the travel reporting requirements in the briefing materials. (Tr. 46-48) While the briefing materials he reportedly signed are clear in their reporting requirements, his actions in bypassing his FSO and keeping his supervisor informed of his foreign travel plans do not reflect intentional efforts to conceal his plans from his Company B's security office.

Applicant's explanations, considering all of the circumstances surrounding his working conditions in Iraq and Kuwait, reflect inadvertent memory lapses of what he signed and agreed to do when reporting foreign travel plans, but no deliberate bypassing of his employer's briefing requirements for reporting foreign travel plans. Whether his supervisor ever passed along in a timely way Applicant's reported travel plans to the company's FSO is unclear.

### **Endorsements**

Applicant is highly regarded by colleagues and friends who have known and worked with him. (AE K) Each of his references had reviewed the allegations in the SOR and found Applicant to be trustworthy, reliable, and dependable in their personal dealings with him. (AE K) Their expressed interaction with Applicant covered both work and social situations. (AE K) None of his references offered any doubt that Applicant would be susceptible to foreign interests and influence. (AE K) They praised his contributions and trustworthiness. His performance evaluations for calendar year 2012 credited Applicant with meeting program requirements for organization and execution of his IT responsibilities. They reflect excellent credits for his work contributions to his employer. (AEs F-G)

### **Policies**

The AGs for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by administrative judges in the decision making process covering DOHA cases. These Guidelines require the administrative judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied.

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. The following AG ¶ 2(a) factors are pertinent: (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.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Foreign Influence**

*The Concern:* 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 protected classified or sensitive information or is associated with a risk of terrorism. See AG ¶ 6.

### **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . , AG ¶ 15.

### **Burden of Proof**

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a

security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove any controverted fact[s] alleged in the Statement of Reasons, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case. Based on the requirement of E.O.10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan, supra*. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." (*Id.*)

### **Analysis**

Applicant is a U.S. citizen whose current wife immigrated to the United States from China in 2013. Security concerns arise over the status of Applicant's mother-in-law, sister-in-law, and her husband, who are citizens and residents of China, a country historically competitive with the United States in many areas of commerce and trade. While competing with the United States economically, China also seeks to surpass the United States in overall military strength. China also has the reputation for being one of the most aggressive collectors of economic information and technology in the United States and continues to exhibit a poor human rights record that include reported illegal detention in unofficial holding facilities known as "black jails," torture and coerced confessions of prisoners, and detention and harassment of journalists, lawyers, writers, bloggers, dissidents, petitioners, and others whose actions the authorities deemed unacceptable.

Additional security concerns are raised over allegations of Applicant's failure to comply with his employer's foreign travel reporting requirements and allegedly falsifying material facts about his claimed unawareness of his employer's foreign travel reporting requirements during a personal subject interview concerning his stated failures to follow his employer's formal briefing requirements for seeking foreign travel approvals. Security concerns are also raised over Applicant's bigamous marriages.

## Foreign influence concerns

Department Counsel urges security concerns over risks that the citizenship/residence of status of Applicant's mother-in-law, sister-in-law, and her husband residing in China might be subject to undue foreign influence by Chinese government authorities to access classified information in Applicant's possession or control. Because Applicant's in-laws reside in China, they present potential heightened security risks covered by disqualifying condition (DC) ¶ 7(a) of the AGs for foreign influence: "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."

Little is known about the backgrounds of Applicant's mother-in-law, sister-in-law, and her husband. All that is known about these extended family members is that his mother-in-law is a retired factory worker, his sister-in-law's husband works in the private sector, and in the past these family members have provided financial assistance to Applicant and his wife in their business start-up in China. Nothing material is known about whether these family members have any associations or ties to Chinese government officials interested in collecting proprietary or sensitive information in the United States. Past reported collection activities by Chinese government officials historically have been a major source of security concern about their exposure to pressure, coercion, or influence by Chinese officials interested in acquiring sensitive U.S. technology from applicants

Because of the past business relationships Applicant and his current wife have enjoyed with her family members and friends who have supplied material financial assistance to their start-up business in China, DC ¶ 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 classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information," has some application to Applicant's situation. Although Applicant and his wife have since shuttered their business, they have not completely liquidated it. Prospects for reopening the business at some future date cannot be completely ruled out at this time.

The AGs governing collateral clearances do not dictate *per se* results or mandate particular outcomes for applicants with relatives who are citizens/residents of foreign countries in general. What is considered to be an acceptable risk in one foreign country may not be in another. The geopolitical aims and policies of the particular foreign regime involved do matter.

Put another way, the AGs do take into account the country's demonstrated relations with the United States as an important consideration in gauging whether the particular relatives with citizenship and residency elsewhere create a heightened security risk. China continues to target the United States and its companies for economic and proprietary information and has a poor human rights record to contend with.

Based on the past business activities Applicant and his current wife have nurtured in China with the help of his wife's in-laws and friends, and his wife's close relationship with her mother and sister, none of the mitigating conditions potentially available to applicant under Guideline B apply to his situation.

In evaluating Guideline B cases involving China, the Appeal board historically has looked to evidence of heightened risks of coercion and pressure associated with the nature of the foreign government, the Government's intelligence history, the Government's human rights record, the extent to which the foreign government's interests are adverse to the United States, and the applicant's family ties and interests in the foreign country of interest. See ISCR Case No. 16-02435 at 2-3 (App. Bd. May 15, 2018); ISCR Case No. 12-04780 at 3 (App. Bd. Nov. 13, 2013); and ISCR case No. 01-10128 at 3-6 (App. Bd. Jan. 6, 2005) Each of the factors considered in these Appeal Board decisions involving China were assessed in Applicant's case and produce similar concerns.

### **Personal conduct concerns**

Additional security concerns present over Applicant's bigamous marriage in Kuwait to his current wife while still married to his first wife. While his approved marriage contract in Kuwait may meet Kuwait marriage requirements sanctioned by Sharia law, questions remain over whether his Kuwait marriage could ever be accepted in State A or any other state in the United States that criminalizes bigamous marriages. Applicant's attempts to justify his marriage to his current wife with his claims that he and his first wife were separated during his courtship and eventual marriage to his current wife provide no meaningful defense to a knowingly contracted for marriage where the first marriage had not been legally dissolved.

While state criminal laws governing bigamy vary by state, deliberate inducement of another to enter into a bigamous marriage contract while he has a living spouse is potentially criminal under state criminal laws that can vary from state to state but generally treat bigamy as a major felony that is not defensible as an exercise of religious liberty. See *Reynolds v. United States*, 98 U.S. 145 (1878).

While there are cases where the offending party may be immune from bigamy charges (such as where the offending party believes his previous marriage is void, or where the parties have been living apart for a defined number of consecutive years prior to the ensuing marriage during which time the prior spouse was not known to the offending spouse to be alive), Applicant's marriage to his current spouse cannot be reconciled with either of these exceptions.

Marriage between a man and a woman (more recently extended by the Supreme Court to same-sex marriages in *Obergefell v. Hodges*, 135 S. Ct. (2015)) bestows sacred matrimonial obligations on the partners that cannot be breached or compromised by either partner's consummating a bigamous marriage relationship without exposing the offending partner to potential civil and criminal consequences.

Afforded opportunities at hearing, Applicant could provide no saving legal explanation for his entering into a marriage with his current spouse with the knowledge that he was still in a legal marriage relationship with his first wife. His claims that his marriage contract with his current spouse was legally consummated and is enforceable under his host country's Sharia law is highly unlikely to draw comity acceptance against any hypothetical bigamy charges waged against Applicant under cover of state bigamy laws in the United States that criminalize bigamy. Comity principles recognized under our U.S. system of federalism do not require courts to recognize bigamous marriages consummated in foreign countries whose laws sanction bigamous marriages that conflict with marriage laws in force throughout the United States.

To be sure, bigamy prosecutions are rare in the United States, and it is unlikely Applicant would ever have to face criminal prosecution for bigamy were he to eventually relocate to State A or any other state in the United States. However, with bigamy laws still on the books in State A and other states, it remains highly questionable whether any state in the United States would bless his Kuwait marriage under any appeal to comity.

Like the trust bonds that are forged in a marriage relationship, Government approvals of access to classified and sensitive information are based on an applicant's demonstrated trust. See *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980), holding that the United States must be able to repose a high degree of trust and confidence in persons granted access to classified information.

In Applicant's case, his marital breaches warrant the application of two of the disqualifying conditions of the personal conduct guideline. One disqualifying condition is DC ¶ 16(d), "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: . . . (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information." Another is DC ¶ 16(e), "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: . . . (3) while in another country, engaging in any activity that while legal there, is illegal in the United States."

Applicant's bigamous marriage with his current wife that existed for almost three years before he finalized his divorce with his first wife in June 2013 betrayed his solemn commitments to a faithful and trusting partnership with his first wife. While legal in Kuwait under its laws, his marriage to his current wife violates the civil and criminal laws of State A and other states in the United States and creates major doubts about whether he can be trusted to fulfil his fiducial promises to safeguard classified and sensitive information were to be granted access to classified or sensitive information. None of the mitigating

conditions potentially available to Applicant under the personal conduct guideline are applicable.

By contrast, Applicant's failure to report, as required by his employer's centralized reporting requirements, his foreign travels to China between March 2011 and May 2012, and to Hong Kong and Thailand in April 2012, was never accompanied by and intentional attempts to evade his employer's foreign travel reporting requirements. Although, he certainly received his employer's briefing materials governing foreign travel reporting requirements, he never internally processed the information sufficiently to familiarize himself with the central reporting requirements contained in the briefing materials.

Based on what he thought at the time to be the correct procedures in a country (Iraq) far removed from the employer's regional headquarters, he notified his program supervisor of his foreign travel plans. Nothing in the presented evidence reflects any disciplinary measures taken against Applicant for not following the correct reporting procedures, and his own explanations have been accepted as credible ones. Considering all of the circumstances of Applicant's failure to utilize proper reporting procedures for disclosing his foreign travel plans, Applicant's explanations are accepted and substantiated.

Ensuing allegations of his falsifying material facts during his November 2012 personal subject interview are also unsubstantiated. His explanations of being unfamiliar with the specific foreign travel reporting requirements set forth in the briefing materials that he signed for in May 2012 reflect some inattention to details and perhaps poor judgment but not deliberate misstatement of his understandings at the time about his employer's foreign travel reporting requirements.

Pressed by the Government for explanations, Applicant documented his keeping his supervisor informed of his China travel plans and made a plausible showing that he did not deliberately ignore his employer's foreign travel reporting requirements. Applicant's explanations are credible enough to avoid conclusions of (a) intentional disregard of his employer's foreign travel plans and (b) falsification of material facts during his personal interview with an authorized DoD investigator.

### **Whole-person assessment**

Applicant is credited with considerable contributions to the defense of the nation. His military service to the Air Force and his years of service to the nation's defense are duly noted. His contributions are not enough, though to overcome Government concerns about his wife's close relationships with her mother and with her sister and husband who are citizens and residents of China. Security concerns created by Applicant's having in-laws in China and a bigamous marriage conceived from a relationship that blossomed while Applicant was still married to his wife cannot be surmounted by Applicant's defense contributions and commitments to minimize his ties to China.

In Applicant's case, any risks of coercion, pressure, or influence being brought to bear on any of his extended family members by Chinese authorities are considerable. Trust concerns over Applicant's links to China through his current wife are compounded by the bigamous marriage he engaged in for over 15 months before his divorce from his first wife was finalized in 2013. Any Applicant consideration to relocate to any of the 50 states in the United States must take into account risks of potential criminal prosecution for violation of state marriage laws.

Overall, security concerns attributable to Applicant's extended family members in China and his bigamous marriage are insufficiently mitigated and preclude safe predictive judgments about Applicant's ability to withstand risks of undue influence attributable to his familial relationships in China. His continued exposure to potential criminal complications stemming from his past bigamous marriage to his current spouse creates additional concerns about his trustworthiness and reliability. Unfavorable conclusions are warranted with respect to the allegations covered by Guideline B and Guideline E.

### **Formal Findings**

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

#### **GUIDELINE B: (FOREIGN INFLUENCE): AGAINST APPLICANT**

Subparas. 1.a-1.f:	Against Applicant
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#### **GUIDELINE E: (PERSONAL CONDUCT): AGAINST APPLICANT**

Subpara. 2.b and 2.e:	Against Applicant
Subparas. 2.a and 2.c-2.d:	For Applicant

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Roger C. Wesley  
Administrative Judge

