



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



In the matter of:)
)
) ISCR Case No. 15-06817
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

10/23/2017

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline B, foreign influence. Eligibility for access to classified information is denied.

Statement of the Case

On September 10, 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 (AG) effective within the DOD on September 1, 2006. On June 8, 2017, new AG were implemented and are effective for decisions issued after that date.¹

¹ I 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 September 21, 2016, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's file of relevant material (FORM). Applicant received it on October 21, 2016. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 1 through 8. Applicant provided a response to the FORM and documents. They are marked as Applicant Exhibits (AE) A and B. In his response, Applicant made corrections to Item 7, which are accepted. There were no objections to the Government's Items or Applicant's exhibits, and they are admitted into evidence.² The case was assigned to me on October 1, 2017.

Request for Administrative Notice

Department Counsel submitted Item 8, a written request that I take administrative notice of certain facts about the People's Republic of China (China). Applicant did not object, and I have taken administrative notice of the facts contained in the request that are supported by source documents from official U.S. Government publications. The facts are summarized in the Findings of Fact, below.

Findings of Fact

Applicant admitted all of the SOR allegations. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 45 years old. He earned a bachelor's degree in 1995. He has worked for a federal contractor since 2002, and his present employer since 2009. He married in 2008 and has no children.³

Applicant's wife was born in China. She moved to the United States in 1990 and became a naturalized citizen of the United States in 1999. Her mother, two brothers, sister, two nephews, and a niece are citizens and residents of China.⁴

Applicant met his wife through a mutual friend. She was a business analyst at the time they met, but was not when they began their relationship. It is unknown what her current occupation is and where she is employed. She earned a master's degree at an American university.⁵

² Applicant noted in his FORM response that Item 7 had numbers handwritten at the bottom of the exhibit indicating "1 of 11" sequentially until 9. He stated he did not receive pages 10 and 11. The purpose of these numbers and who wrote them is unknown. The record I received also did not have pages 10 and 11. Therefore, Applicant and I have the same evidence, which I will consider along with the changes he provided.

³ Item 5.

⁴ Item 4.

⁵ AE A.

Applicant provided the following statement to the allegations regarding his relationship with his wife's family in China.

We are not able to communicate directly with one another. When I am not traveling with my wife to visit her family, I have no contact with my [mother-in-law, brothers-in-law, sister-in-law]. My [mother-in-law, brothers-in-law, sister-in-law] [are] not aware of any details of my job or any position of trust or clearance associated with it.⁶

Applicant stated that his in-laws do not speak English and he does not speak Mandarin/Chinese, and they are not able to communicate directly with one another. His mother-in-law is a retired factory worker. One brother worked in fleet management for a local taxation bureau. The other brother is self-employed, but the nature of his business is unknown. Her sister is a retired teacher.⁷

Applicant stated that his nephew and niece, who are citizens and residents of China, are related to him through his wife and are not his blood-relatives. His nephew speaks limited English. Applicant reiterated that his only contact with them occurs when he travels to China with his wife. They are not aware of details about his job or any position of trust or clearance associated with it. The nephew works for a technology company. Applicant disclosed the niece's job is "English first Education."⁸

In 2013, Applicant's wife loaned her nephew \$20,000 to use as a down payment for a house. The loan was provided from an account that was held solely in his wife's name that held her funds. He was not a co-owner of the account. They intended to keep this transaction separate from Applicant, although it was done with his consent. He stated it was not a financial burden to make the loan. They do not, nor do they intend to, have a financial interest in the property. They intend to be repaid, but no additional information was provided regarding if the loan has been paid.⁹

Applicant stated in his answer:

My wife and I agreed from the beginning not to discuss my work and agreed it would be best not to disclose any information about my job or any position of trust or clearance associated with it to her family. I have never traveled to China without my wife. I do not participate in social media to ensure no private details of my life are available online. I am confident her family is

⁶ Item 4.

⁷ Items 4, 5.

⁸ Item 5.

⁹ Items 4, 6, 7.

totally unaware of what I do as a profession including any position of trust or clearance associate with it.¹⁰

Applicant travels with his wife to China about once a year. They visited her family in China in 2007, 2008, 2010, 2011, 2012, 2013, 2014 and 2015. Applicant stated they stay in a hotel when they visit.

Applicant and his wife are friends with H and W who are citizens and residents of China. H is employed by the Chinese government. Applicant's wife and W met in college and have remained friends. W later married H. W was a business woman in the shipping industry. Her husband was assigned to work in the United States for approximately six years. W did not work while living in the United States. They had a son who was born in the United States.¹¹

Applicant met H and W in 2008, when he traveled to China. When H and W moved to United States, Applicant stated he had "inconsistent contact with them, but my wife frequently (unable to be more specific) went to lunch or went shopping with [W]."¹² Applicant had contact with them at a holiday party, to deliver a gift to their son once, and the two couples had a few dinners together. After H and W returned to China a few years ago, Applicant has had contact with them three times, once during each of his visits there. He also had dinner once with H while in China.¹³

Applicant's wife owned a townhouse in the United States. While in the United States, H and W needed a place to rent. Applicant's wife and H made arrangements for them to rent it. Applicant's wife managed the property herself. The lease was signed by H and a representative from the Chinese government. Applicant stated that after the lease was signed, neither he nor his wife had contact with the Chinese government. The rent was paid by the Chinese government through a check that Applicant's wife received in the mail. Applicant's wife deposited the rental checks into her individual account at the time. In 2012, the account was changed to a joint account. Applicant stated she received what was considered the fair market value for the rental property at the time. H rented the house from approximately six months. Due to commuting distance, H and W decided to move. Applicant stated that H and W are not aware of his government contractor job, and they never discussed their jobs with each other.¹⁴

Applicant stated he and his wife have no financial or business interests in China. All of their financial interests are in the United States. No information was provided regarding how often Applicant's wife communicates via telephone, email, texts, or any

¹⁰ Item 4.

¹¹ Item 6.

¹² Item 6.

¹³ Item 6.

¹⁴ Item 6.

other medium with her family in China. It is unknown if Applicant's wife has traveled to China without him.

China¹⁵

China is one of the most aggressive collectors of U.S. economic information and technology. Its 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.

The United States DOD assessed the military and security developments in China. It noted that China is active and persistent in economic espionage. It will continue to attempt to collect U.S. technological and economic information at a high level and represents a growing and persistent threat to the U.S. economic security. The advancement of cyber threat will continue to evolve with the increased technological advances in the global information environment.

China uses state-sponsored industrial and technical espionage to increase the level of technologies and expertise available to support military research, development, and acquisition. The organizational network of China's military-industrial complex is such that its army is able to access sensitive and dual-use technology or expertise under the guise of civilian research and development.

China uses its cyber capabilities to support intelligence collection against the U.S. diplomatic, economic, and defense industrial base sectors that support U.S. national defense programs. These actions could be used to exploit the United States' defense networks, logistics, and related military capabilities that could be exploited during a crisis. Numerous computer systems around the world, including those owned by the U.S. Government, continued to be targeted for intrusion, some of which appear to be attributable directly to China's government and military. Since the mid-2000s, the Chinese government has conducted large-scale cyber espionage against the United States and has compromised the DOD, defense contractors, and private enterprises.

China likely uses its intelligence services and employs illicit approaches to violate U.S. laws and export controls to obtain national security and export-restricted technologies and other equipment unobtainable through other means.

China is an authoritarian state and its communist party holds most of the top government and security positions. Repression and coercion have increased, particularly against organizations and individuals involved in civil and political rights advocacy, public interest, and ethnic minority issues. Human rights concerns include repression of speech, religion, association, and assembly. In addition, concerns remain about extrajudicial killings, incommunicado detention, torture and coerced confessions, along with many other issues.

¹⁵ Item 8.

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

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied 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(c), 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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* EO 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 concern regarding foreign influence:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they resulted 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 it associated with a risk of terrorism.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying. I have considered all of them and the following 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;

(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; 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.

AG ¶¶ 7(a) and 7(e) require evidence of a “heightened risk.” The “heightened risk” required to raise this disqualifying condition 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 or owning property in a foreign country. The totality of Applicant's family ties to a foreign country as well as each individual family tie must be considered.

The mere possession of a close personal relationship with a person, who is a citizen and resident of a foreign country, is not, as a matter of law, disqualifying under Guideline B. However, depending on the facts and circumstances, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.”¹⁶

China conducts state-sponsored industrial and technology espionage against the United States. It likely uses its intelligence services and employs illicit approaches to violate U.S. laws and export controls to obtain national security and export-restricted technologies and other equipment unobtainable through other means. Through large-scale cyber espionage against the United States, it has compromised the DOD, defense contractors, and private enterprises. Its illegal actions represent a growing and persistent threat to the U.S. economic security. It is an authoritarian government with human rights concerns that include repression of speech, religion, association, and assembly. In addition, concerns remain about extrajudicial killings, incommunicado detention, torture and coerced confessions, along with many other issues.

Applicant’s mother-in-law, brothers-in-law, sister-in-law, nephew, and niece are citizens and residents of China. His wife has a close personal relationship with friends H and W. Applicant also has a relationship with those friends. H works for the Chinese government. Applicant’s wife provided a \$20,000 loan to her nephew. Applicant and his wife visit her family in China about once a year. The frequency of contact his wife has with her family in China through other means, such as telephonically or through email, is unknown.

Although Applicant emphasized he does not speak Chinese and cannot communicate with his relatives, it does not negate the familial relationship with his wife and her family. These ties create a potential foreign influence concern. His connection to his wife’s family and their friends H and W could create a potential conflict of interest. AG ¶¶ 7(a), 7(b), and 7(e) have been raised by the evidence.

I have analyzed the facts and considered all of the mitigating conditions under AG ¶ 8 and conclude the following are potentially applicable:

- (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

¹⁶ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

position of having to choose between the interests of a foreign individual, group, organization and interests of the U.S.;

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

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

Applicant and his wife maintain an ongoing relationship with her family in China. Although Applicant stated he ensures he never speaks about his work, and her family does not know what he does for a living, those assurances do not negate the risk for foreign influence and exploitation. Applicant obviously shares living quarters with his wife who has close ties with her Chinese family. They visit her family about once a year in China. It is unknown what other contact she has with her family. Their familial closeness is also evidenced by his wife's willingness to loan her nephew money with the expectation it will be repaid, but to date has not been. I cannot find that Applicant's relationship with his wife's family is casual or infrequent because they maintain regular contact. This relationship may place him in a position of having to choose between his wife's family and the interests of the United States. I cannot find that his sense of obligation to his wife and her family is minimal. Considering the Chinese government's aggressive espionage tactics and authoritarianism, I cannot find that it is unlikely that Applicant would be placed in a position of having to choose between his wife's relatives and the interests of the United States. I find AG ¶¶ 8(a), 8(b), and 8(c) do not apply.

Applicant's and his wife's contact with H and W is more than casual and infrequent. His wife has been friends with W since college. They frequently met for shopping or lunch for several years. Applicant had some social contact with them in China when they first met, which continued while H and W lived in the United States, and after they returned to China. Applicant met them for dinner in China in 2014 and 2015. Considering the government position H holds, I cannot determine that it is unlikely that Applicant and his wife's continued contact with these Chinese friends could create a risk for foreign influence or exploitation. AG ¶ 8(c) does not apply.

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 eligibility for a security clearance 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 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.

Applicant is 45 years old and has worked for federal contractors since 2002. His wife's immediate family are citizens and residents of China. Applicant and his wife visit her family about once a year. They also have friends who are citizens and residents of China. H holds a position with the Chinese government. The issue is the heightened risk of potential foreign influence that could be exploited or create a conflict of interest due to contacts in a foreign country. This is especially a concern when the country is known to conduct espionage against the United States, and its human rights record are a concern. This is the case with China. Insufficient evidence was provided to mitigate the security concerns raised.

I have considered all of the facts, and the record evidence leaves me with sufficient questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline B, foreign influence.

Formal Findings

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

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge