



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



In the matter of:

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ISCR Case No. 16-02435

Applicant for Security Clearance

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: *Pro se*

02/08/2018

Decision

Curry, Marc, Administrative Judge:

Applicant's relatives living in the People's Republic of China (PRC) generate a vulnerability to coercion that he was unable to mitigate. Clearance is denied.

Statement of the Case

On October 15, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR), alleging security concerns under Guideline B (foreign influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR further informed Applicant that, based on information available to the Government, DOD adjudicators could not make the affirmative finding that it is clearly consistent with the national interest to grant or continue Applicant's security clearance, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, denied, or revoked.

On November 4, 2016, Applicant responded to the SOR, admitting the allegations and requesting a hearing. On September 5, 2017, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. DOHA scheduled the hearing for September 21, 2017. The hearing was held as scheduled. I received two Government exhibits (GE 1 and 2), the testimony of Applicant and two character witnesses, and four Applicant's exhibits. (AE A through AE D). In addition, at Department Counsel's request, I took administrative notice of the facts set forth in documents (Hearing Exhibits (HE) I through HE XI). I received the transcript of the hearing on September 29, 2017.

While my decision was pending, Security Executive Agent Directive 4 was issued establishing National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The AG supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017. Accordingly, I have adjudicated Applicant's security clearance eligibility under the new AG.¹

Findings of Fact

Applicant is a 58-year-old married man with two teenage children. He was born, raised, and educated through college in the PRC. (Tr. 18) He immigrated to the United States in 1989 to pursue a Ph.D, and he became a naturalized U.S. citizen in 2000. (GE 1 at 7) Applicant originally worked in the field of broadcast journalism, then switched to information technology. (Tr. 38) Applicant has been working with various Government contractors on the same project since 2004, and he has held a security clearance since 2009. (Tr. 37)

Both of Applicant's parents are deceased. He is the youngest of their four children and he is the only male. The oldest two sisters are PRC citizens and residents. The youngest sister is a PRC citizen who lives in Japan and has permanent legal residency there. Applicant's oldest sister is a retired government clerk, and his second oldest sister is a retired factory worker. Applicant communicates with them every other month through a family group chat application on social media. (Tr. 40, 52)

The youngest of Applicant's sisters is an intellectual property attorney. (Tr. 50) Although she lives in Japan, she maintains property in PRC. Unlike the other sisters, Applicant stays in regular contact with this sister. He last saw his sisters when he returned to PRC in 2016 for a memorial service honoring his father, who had passed away several years earlier. (Tr. 49) When he visited, he stayed with his sister, the intellectual property attorney, at her home she owns in PRC. (Tr. 50) The trip lasted one week.

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case.

Applicant has travelled to PRC five times since immigrating to the United States. His first trip was in 2000. He went to visit his ailing father in 2003 and 2009, he went to his mother's funeral in 2015, and he went to attend the memorial service for his father in 2016, as discussed earlier. (Tr. 26)

Applicant's mother-in-law is a citizen and resident of PRC. Applicant cannot communicate with her because she speaks neither English, nor the Chinese dialect that Applicant speaks. Her daughter, Applicant's wife, speaks with her regularly. (Tr. 52)

Applicant served three years in the PRC army after having been drafted in 1977. He was a private. (Tr. 21)

Applicant owns his home free and clear of any mortgages. His net worth is approximately \$1 million. He owns no property in PRC.

While living in the PRC in the late 1980s, Applicant helped organize a pro-democracy group that advocated for civil liberties. (Tr. 32) The PRC government was aware of his activities. They "didn't like him," and he "didn't like [them]." (Tr. 30) Applicant was at Tianamen Square during the massacre in June 1989. He was working for a European country as a journalist. Applicant immigrated to the United States later that summer. Approximately six weeks after he left, PRC government security agents came to his place of employment seeking to detain him. (Tr. 31-32) They had discovered his personal information after raiding the office of the democratic group where he had served, and discovering his name in a confiscated office journal. Fearing persecution, Applicant did not return to PRC for nine years after immigrating to the United States.

Administrative Notice

The PRC is a totalitarian state that intimidates its citizens by resorting to extralegal measures, such as enforced disappearances and house arrest, to quash dissent. (HE IX at 1) The PRC considers itself a strategic competitor of the United States and is one of the most aggressive collectors of U.S. information and technology in the world. (HE I at 1) PRC intelligence services frequently seek to exploit Chinese citizens or persons with family ties to the PRC to steal trade secrets using removable media devices or e-mail. (HE I at 2)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant

applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline B, Foreign Influence

Under this guideline, "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." (AG ¶ 6)

The PRC is a strategic competitor of the United States, with a totalitarian government that routinely monitors its citizens, and is one of the most aggressive collectors of espionage against the United States of any country in the world. Consequently, Applicant's relationship with his two oldest sisters and his mother-in-law triggers the application of the following disqualifying conditions under AG ¶ 7:

- (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; 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.

Although Applicant's contact with his youngest sister is more frequent than his contact with his two oldest sisters, she no longer lives in the PRC. Under these

circumstances, neither AG ¶ 7(a), nor AG ¶ 7(b) apply to their relationship, and it does not generate a security risk.

Applicant's military service for the PRC was 40 years ago. He did not join voluntarily, as he was drafted, and he was not an officer. I conclude that Applicant's past military service in the PRC does not raise any security concerns. I resolve subparagraph 1.b in Applicant's favor.

Applicant's ongoing contact with his two oldest sisters is casual and infrequent; however, the PRC's totalitarian nature and history of aggressive espionage against the United States, together with its awareness of Applicant's former involvement as a freedom movement organizer render the application of AG ¶ 8(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," inapplicable.

As for Applicant's mother-in-law, he is vulnerable to coercion through her and his wife, regardless of the nature and extent of their contact. The security concern posed by this relationship is not mitigated for the same reasons that they are not mitigated for Applicant's two oldest sisters.

Applicant has lived in the United States for more than 25 years, and all of his property interests are in the U.S. These factors, though significant, are unable to overcome the heavy burden generated by the PRC's status as a totalitarian state with a history of oppressing its citizens, and an aggressive collector of U.S. intelligence, together with their familiarity with him as a democracy movement organizer. AG ¶ 8(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," 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.

Applicant is a courageous man who advocated for justice and democracy while living in the PRC, knowing the potential danger. Since leaving the PRC, he has immigrated to the United States, nurtured a new career, purchased a home, and raised a family. All of these accomplishments are indicative of his strong character. However, the totalitarian nature of the PRC, together with its history of espionage against the United States creates a heavy burden that is simply too high to overcome.

Formal Findings

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

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the security interests of the United States to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc Curry
Administrative Judge