



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



In the matter of:)
)
) ISCR Case No. 16-03217
)
Applicant for Security Clearance)

Appearances

For Government: Julie Mendez, Esq., Deputy Chief Department Counsel
For Applicant: Alan V. Edmunds, Esq.

03/07/2018

Decision

MURPHY, Braden M., Administrative Judge:

Foreign influence security concerns remain due to Applicant's family connections to China. Applicant's eligibility for a security clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 20, 2015. On December 6, 2016, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence and Guideline C, foreign preference.¹

On December 10, 2016, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, National Security Adjudicative Guidelines (AG).

¹ The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within the DOD for SORs issued after September 1, 2006.

The new AGs became effective on June 8, 2017, for all adjudicative decisions on or after that date.² Any changes resulting from the implementation of the new AGs did not affect my decision in this case.

Applicant answered the SOR on January 4, 2017, and requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). She submitted four exhibits with her answer.³ The case was assigned to another DOHA Administrative Judge on July 20, 2017. On July 26, 2017 a Notice of Hearing was issued scheduling the hearing for September 13, 2017, with the agreement of the parties. The case was reassigned to me on September 11, 2017 when the assigned administrative judge had a scheduling conflict.

The hearing convened as scheduled. Department Counsel submitted Government Exhibit (GE) 1, which was admitted without objection. Applicant and one other witness testified. Applicant also submitted 29 exhibits, which were marked as Applicant's Exhibits (AE) A through AE CC, and admitted without objection, but for AE W, which was offered for administrative notice purposes and not as a substantive exhibit. DOHA received the hearing transcript (Tr.) on September 21, 2017.

The record initially closed on the hearing date. On February 6, 2018, I reopened the record to allow Applicant the opportunity to submit updated information. On February 20, 2018, Applicant submitted AE DD to AE OO. Those exhibits were admitted without objection. The record closed upon their receipt.

Request for Administrative Notice

Both parties submitted written requests that I take administrative notice of certain facts about the People's Republic of China (PRC). The requests are marked as Government's Administrative Notice (AN) I and AE W. Without objection, 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.

Amendment to the SOR

At the conclusion of the hearing, based on Applicant's testimony and other record evidence, the Government moved to withdraw the Guideline C allegation (SOR ¶ 2.a). The motion was granted without objection. (Tr. 58-59) Any findings of fact related to Guideline C are included below only as relevant to Applicant's biography and background, and to the whole-person concept.

² Applicant's counsel confirmed at hearing that he had received a copy of the new AGs. (Transcript (Tr.) 7-8)

³ All of the documents included with the Answer were also admitted as part of Applicant's case-in-chief. (AE A – AE E)

Findings of Fact

Applicant admitted all the SOR allegations (SOR ¶¶ 1.a, 1.b, 1.c and 2.a) with narrative explanations. Her admissions and other comments are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 32 years old. She was born in China in 1986. She came to the United States in 2005, at age 19, on a student visa. She earned her associate's degree from a community college in 2011. She earned a bachelor's degree in 2014. (Tr. 42-43, GE 1; AE F – AE L)

Applicant's husband was born in South Korea. He came to the United States with his parents at age nine. Both he and his parents are now citizens and residents of the United States. (Tr. 41-43, 52-54; GE 1)

Applicant and her husband married in 2011. (AE Y, AE Z) Through their marriage, Applicant became a permanent U.S. resident. She became a U.S. citizen in October 2014. (Tr. 43-44; GE 1; AE D) They have a daughter, born in November 2015. At the time of the hearing, they were expecting their second child. (Tr. 30; AE F, AE M, AE CC)

Applicant submitted an SCA in February 2015, when she began working for her current employer. (Tr. 30-31; GE 1; AE F, AE G) She has never held a security clearance. (Tr. 12) She disclosed her foreign family members on her SCA. (GE 1)

Applicant's mother and father, both age 65, are citizens and residents of China. (SOR ¶¶ 1.a, 1.b) Her father is an inventor and retired businessman. He founded his own company in 2011, and retired in April 2017. Previously, he managed a company involved in recruiting Chinese citizens to work overseas. Applicant's mother is a housewife. Applicant testified that her parents have no connection to the Chinese government, and do not receive a government pension. (Tr. 36-38, 44-47; AE U, AE V)

Applicant has not returned to China since she left at age 19 to pursue an education in the United States. Her parents have never been to the United States. Applicant last saw her parents in 2012, when they came to South Korea during her honeymoon there. (Tr. 19, 33-36, 42, 47)

Applicant speaks to her parents every few weeks, either by phone or over the internet. (Answer) She testified that they have sold their home in China and are currently renting their home. (Tr. 47-48)

Applicant petitioned U.S. authorities to allow her parents to immigrate to the United States. The petitions were approved in August 2017. (Tr. 47-49, AE T, AE X). After the hearing, Applicant submitted updated documentation on her parent's immigration status. (AE DD – AE OO) Her parents have successfully submitted

Immigrant Visa and Alien Registration Applications (Form DS-260) to the State Department. (AE MM, AE NN) Their petitioner (Applicant) must next compile and submit appropriate financial and other civil documents before visa interviews can be scheduled. (AE MM – AE OO) As of the close of the record, Applicant's parents remain in China.

Applicant's sister is a Chinese citizen who lives in Japan. (SOR ¶ 1.c) She was sent to Japan by her parents to further her education and she chose to remain there, as Applicant did after she came to the United States. Applicant's sister currently works as a business analyst for a Japanese software company. She met her husband in Japan, though Applicant is not certain of his citizenship. They have one child. She visited Applicant over Christmas 2016, to see Applicant's new baby. Applicant and her sister speak every few weeks. (Tr. 36, 38, 39, 42-43, 49-50; AE A; Answer)

Applicant testified that she has no business contacts or connections in China. She owns no real estate or other property there. She has no family connections in China beyond her parents. (Tr. 40)

At the time of the hearing, Applicant continued to possess a valid Chinese passport. It was issued in 2010, before she became a U.S. citizen, and it expires in 2020. (AE E) She has not used her Chinese passport since becoming a U.S. citizen. She relinquished her Chinese passport to her employer's facility security officer, and testified that she intended to destroy it. (Tr. 33-34) That action was rendered moot when the Government withdrew SOR ¶ 2.a, because an applicant's possession of a valid foreign passport is no longer a disqualifying security concern under the June 8, 2017 AGs. (Tr. 55, 58-59) Applicant also holds a U.S. passport, issued in November 2014. (AE AA)

Applicant earns an annual salary of about \$71,000. Her husband works for an auto dealer, and he has an annual salary of \$130,000. They purchased a home in early 2015, for about \$520,000. At the end of 2016, they owed about \$385,000 on their mortgage. Applicant has a 401(k) retirement plan through her employer. (Tr. 31-32; AE B, AE C, AE M, AE Q)

Applicant's references, including both supervisors and co-workers, attested to her work ethic, professionalism, and dedication to teamwork, as well as to her honesty, integrity, generosity, and good judgment. She received an early promotion. (AE N – AE P) Applicant and her husband are active in their church and their community. (Tr. 39-40; AE S)

A college friend of Applicant testified by phone. She has known Applicant since 2011, and they worked together at a previous job, in 2014. They have remained friends. Since the birth of Applicant's first child, they do not socialize as often as they used to. Applicant's witness was born in Hong Kong. She is a U.S. citizen and DOD civilian employee, with a security clearance. Based on their friendship, she considers Applicant to be honest and trustworthy. (Tr. 22-29)

China

China has an authoritarian government, dominated by the Chinese Communist Party. It has a poor human rights record, suppresses political dissent and engages in arbitrary arrests and detentions, forced confessions, torture, and mistreatment of prisoners.

China is the world's most active and persistent perpetrator of economic espionage. It is among the most aggressive countries in seeking sensitive and protected U.S. technology, as well as military and economic intelligence. China targets the United States with active intelligence-gathering programs, both legal and illegal. Its focus is on obtaining U.S. information and technologies beneficial to China's military modernization and economic development. China's 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 trade secrets using removable media devices or e-mail. There are several recent cases involving actual or attempted espionage, as well as the illegal export of sensitive military technology to China.

In China, authorities routinely monitor telephone conversations, facsimile transmissions, e-mail, text messaging, and internet communications. Authorities open and censor mail. Its security services have entered personal residences and offices to gain access to computers, telephones and fax machines. Hotel guest rooms are sometimes bugged and searched for sensitive or proprietary materials.

Policies

When evaluating an applicant's suitability for a security clearance, 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 access to classified information will be resolved in favor of 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. Under Directive ¶ E3.1.15, 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 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 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; 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.

AG ¶ 7(a) requires 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.

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.”⁴

Applicant’s parents are citizens and residents of China. Applicant’s sister is a citizen of China residing in Japan. China has a significant history of conducting espionage against the United States to gain access to both industrial and military information. China’s tactics include seeking to exploit Chinese citizens or persons with family ties to China who can use their insider access to corporate networks to gain useful information. China has a poor human rights record. This creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion. It also creates a potential conflict of interest. AG ¶¶ 7(a) and 7(b) are 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 relationships 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; and

⁴ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

(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

(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 has not seen her parents since her honeymoon in Korea in 2012. However, she is also sponsoring their applications to immigrate to the United States. Applicant's contact with them, and also with her sister, is not infrequent or casual. AG ¶ 8(c) does not apply.

The nature of a nation's government and its relationship with the United States is relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the country is known to conduct intelligence operations against the United States. In this case, the foreign influence concerns are increased because China aggressively and actively engages in espionage against the United States.

Applicant is sponsoring her parents' applications to immigrate to the United States. The petitions were approved in August 2017, shortly before the hearing. At the close of the record, however, Applicant's parents remain in China, awaiting visa interviews with the State Department.

Applicant was a credible witness on her own behalf. She has a strong work record. She has established a life for herself here in the United States with her husband and family. Her loyalty to the United States is not in question. However, her parents' presence in China remains a significant security concern. Through their presence in China, they remain vulnerable to the potential for foreign influence. Applicant is therefore placed in a position where she might have to choose between family and national interests. AG ¶¶ 8(a) and 8(b) do not apply to them. Applicant's sister remains a Chinese citizen, but the risk of foreign influence is significantly lessened because she lives in Japan.

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(a):

(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(a) were addressed under that guideline, but some warrant additional comment.

Applicant has strong ties to the United States and has established her life here. Though Applicant's parents are seeking to immigrate to the United States, as of the close of the record they remain in China. Applicant has regular contact with them. The potential risk of foreign influence, exploitation or duress from Chinese actors is too great to mitigate on this record. The situation might be different if her parents are approved to immigrate to the United States, and they then move here permanently in the future. However, the record evidence leaves me with questions and doubts as to Applicant's eligibility for access to classified information. 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.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline C:	WITHDRAWN
Subparagraph 1.a:	Withdrawn

Conclusion

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

Braden M. Murphy
Administrative Judge