



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



In the matter of:)	
)	
)	ISCR Case No. 16-03625
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Mark Zaid, Esq.
04/18/2018

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant was born, raised, and educated in the People's Republic of China (China). In 1985, when Applicant was 28 years old, he entered the United States. He became a naturalized U.S. citizen in 1998. He has frequent contact with his father, and two sisters, who are citizens and residents of China, and visits them almost every year. Foreign influence security concerns are not mitigated. Access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on July 21, 2014. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) was unable to make an affirmative decision to grant Applicant a clearance. On December 28, 2016, the DOD Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline B (foreign influence).¹ Applicant answered the SOR on

¹ DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

January 20, 2017, and requested a hearing before an administrative judge. The case was assigned to me on September 26, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on October 26, 2017, scheduling a hearing for January 23, 2018.

At the hearing, the Government offered one exhibit. (GX 1) Applicant testified, presented the testimony of two witnesses, and submitted exhibits (AE) A through I. All exhibits were admitted into the record as evidence without objections, except for HE 2 (admitted for the limited purpose of taking administrative notice), and GE 3 (attached to the record to show compliance with discovery requirements). I kept the record open for additional submissions and Applicant submitted two exhibits, one which was a continuation of AX C and another, which was marked as AX J. DOHA received the hearing transcript (Tr.) on January 31, 2018.

Procedural Ruling

Department Counsel requested I take administrative notice of facts concerning the government of China. (GX 2) There were no objections, and I took administrative notice as requested. Department Counsel's request for administrative notice is quoted in the section labeled, "China," *infra*.

Findings of Fact

In his response, Applicant admitted the allegations in SOR ¶¶ 1.a to 1.e. Applicant's admissions are incorporated into my findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact:

Applicant is a 61-year-old, who formed his own U.S. company doing machinery design. It was very successful, and in 1996, he formed another business (ASTM) that received government contracts. (Tr. 37) He was born, raised, and educated in China to Chinese parents. He received his bachelor's degree and master's degree in China. (GE 1) He came to the United States in 1985. In 1993, he obtained a doctorate in civil engineering from a university in the United States. He became a naturalized U.S. citizen in 1998. (GX 1)

In 1985, Applicant married a Chinese citizen-resident, but divorced in 2007. (Tr. 38) She helped Applicant build his company and was in charge of customer relations. As a result of that marriage, Applicant has two adult daughters who are U.S. citizens. He remarried in 2016.

He served as CEO of his company, but due to lack of a security clearance, he had to resign from that position in 2015. He received a Temporary Exclusion Resolution (AX A) which prohibited access to all classified information until eligible for a security

clearance. Before 2015, he participated in day-to-day management affairs and worked on classified projects. He now is on the Board of Directors for the company. (AX A)

Applicant acknowledged that he has two bank accounts in China. He estimates the monetary value is about \$26,000. He has the accounts so that his father has access to the money for his needs. Applicant also sends his father, who is ill, money every year that amounts to about \$5,000. Lately, he has not sent his father an annual sum. He has no other financial or property interests in China. On the other hand, he has three real estate properties, retirement accounts, and substantial financial interests in the United States. (AX B)

Applicant's 90-year-old father is a citizen and resident of China. In 1988, his father and mother came to the United States for almost five years. However, when his father became ill, they decided to go home to China permanently to better communicate with doctors. His parents did not speak English. (Tr. 42) Applicant's father is retired from a University in Beijing, where he served on the administrative staff. (Tr. 41) Applicant's father completed mandatory military service in China. He receives a pension from the state. Applicant spoke to his father on the phone before he became so ill. He last saw him in 2016 in China and last spoke to him about one and a half years ago. Applicant texts his sister or the caretaker and asks how his father is doing. His father does not know the nature of Applicant's work in the United States. (Tr. 45) When Applicant communicated with his father, the telephone discussions were about family and health. Applicant traveled to China every year from 2008 until 2016. He acknowledged at the hearing that he has not gone the past few years due to his security clearance investigation. (Tr.44) Applicant averred he will not inherit anything when his father dies.

Applicant's most recent visit to China was about two years ago when he saw his father. (Tr. 44) His visits usually lasted 10 to 20 days according to his 2014 SCA. On some occasions in the past, he would visit twice a year. (GX 1) He would go for the Chinese New Year and to commemorate the anniversary date of his mother's death.

Applicant's sister is a 58-year-old citizen and resident of China. She was an accountant and is now retired. She worked for a private company and has no connection to the Chinese government. She is married to an editor. (Tr. 46) Applicant is not certain about the nature of the magazine. He stated that it is possible that it is government sponsored. (Tr. 46) Applicant communicates with his sister about once or twice a week by text. (Tr. 46) They generally discuss their father's health. He spoke with her on the telephone about three or four months ago. (Tr. 48) She has no knowledge of Applicant's work or that he seeks a security clearance. Applicant sponsored her to come to the United States and she was approved in 2008, but she is waiting to hear from the Chinese government. She and her husband would hope to come to the United States. (Tr.47)

Applicant's other sister is 54 years old and is a resident and citizen of China. She is the vice-president of a private school. He believes it is a private school. (Tr. 48) She is married and her husband is an art teacher. Applicant does not believe that his brother-in-law has any connections to the Chinese government. (Tr. 49) Applicant does

not speak to him, but he talks to his sister once a week or every couple of weeks. He usually texts. The conversations are about the family, especially his father's health. Applicant stated that he has not talked to her in about half a year. He last saw her in 2016 in China. (Tr. 50) His sister has never visited the United States. Applicant has sponsored this sister for a green card. He does not know if this sister knows about his work. (Tr. 51) She has never asked about his work.

Applicant admitted that he had sponsored a citizen of China since 2012 for residence in the United States on a student visa. (Tr. 51) She is now his current wife. They were married in 2016. He met her through an international dating system. At first they emailed and a few months later, he met her in China. Her family lives in China in a rural area. He does not believe they have any connections to the Chinese government. He has not had any contact with them. (Tr. 52) His current wife is a permanent resident. She will be eligible for U.S. citizenship next year. She went back to China once to finish school matters, but has not been back for six years. (Tr. 53) She is a stay-at-home wife. Applicant's wife has an older brother in China, who is a stock broker. She speaks to her family in China once a week. They usually text. When Applicant's wife gets her citizenship, she hopes to sponsor her parents to come to the United States.

Applicant votes in U.S. elections. He loves to work. He jogs and travels, but his "hobby" is work. He does not socialize with the Chinese-American community. Most of his friends are from the company. His friends are U.S. citizens.

Applicant's witnesses at the hearing spoke about his work ethic and loyalty to the United States. Both witnesses have known Applicant for many years and both possess security clearances. Applicant is described as a person who follows all rules. He is trustworthy, honorable and reliable. (Tr. 23) A former commander from the U.S. Navy stated that he has known Applicant professionally and socially. He has no doubt as to Applicant's ability to follow all rules and regulations that are required for a clearance. (Tr. 31) He believes that Applicant would report anything suspicious to the FSO for the company. (Tr. 34)

Applicant submitted seven letters of reference from members of the company. Their statements support approval of a security clearance for Applicant. His FSO wrote a letter stating that he has known Applicant since 2005 and he has no concerns about Applicant. His company manager knows the SOR allegations and recommends Applicant highly. Each letter attests to Applicant's excellent work ethic and his willingness to safeguard classified materials. He has made important contributions to the company. Their statements support approval of his security clearance. (AE D-J)

China

I take administrative notice of the following facts concerning the government of China: The National Counterintelligence Executive has identified China and Russia as the most aggressive collectors of U.S. economic information and technology. 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 secrets using removable media devices or email.

In assessing the military and security developments in China, the U.S. Department of Defense has reported that:

- Chinese actors are the world's most active and persistent perpetrators of economic espionage. Chinese attempts to collect U.S. technological and economic information will continue at a high level and will represent a growing and persistent threat to U.S. economic security. The nature of the cyber threat will evolve with continuing technological advances in the global information environment.
- China 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 not readily obtainable through commercial means or academia.
- China is using its computer network exploitation (CNE) capability to support intelligence collection against the U.S. diplomatic, economic, and defense industrial base sectors that support U.S. national defense programs. The information targeted could potentially be used to benefit China's defense industry, high technology, policymaker interest in U.S. leadership thinking on key China issues, and military planners building a picture of U.S. network defense networks, logistics, and related military capabilities that could be exploited during a crisis.
- 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 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.
- China has in place a long-term, comprehensive military modernization program designed to improve its armed forces' capacity to fight short-duration, high-intensity regional conflicts and, as China's global footprint and international interests grow, its military modernization program has become progressively more focused on investments for a range of missions beyond China's periphery.

In assessing the national security implications of the bilateral trade and economic relationship between the U.S. and China, the U.S.-China Economic and Security Review Commission has reported:

- Since at least the mid-2000s, the Chinese government has conducted large-scale cyber espionage against the United States. China has compromised a range of U.S. networks, including those of DoD, defense contractors, and private enterprises. China's material incentives for continuing this activity are immense and unlikely to be altered by small-scale U.S. actions.
- China's progress modernizing its defense industry is due in large part to China's substantial and sustained investment in defense research and development (R&D). China's large-scale, state-sponsored theft of intellectual property and proprietary information also has allowed China to fill knowledge gaps in its domestic defense and commercial R&D.
- Since the 1990s, China has promoted civil-military integration to facilitate the transfer of commercial technologies for military use. As part of this effort, China has encouraged civilian enterprises to participate in military R&D and production, sponsored research into dual-use science and technology, and developed common military and civilian technical standards.
- With the emergence of a more modern and able domestic defense industrial base, China is gradually shifting its focus from purchasing complete foreign systems to procuring foreign military and dual-use subsystems and components via open sources, trade, and traditional and nontraditional espionage. Among China's most effective methods used to acquire sensitive U.S. technology are cyber espionage, witting and unwitting collection by Chinese students, scholars, and scientists; joint ventures; and foreign cooperation.

With respect to human rights concerns observed in China in 2014, the U.S. Department of State reported:

- The Peoples Republic of China (PRC) is an authoritarian state in which the Chinese Communist Party (CCP) is the paramount authority. CCP members hold almost all top government and security apparatus positions.
- Repression and coercion were routine, particularly against organizations and individuals involved in civil and political rights advocacy and public interest issues, ethnic minorities, and law firms that took on sensitive cases.
- Human rights concerns that were observed during 2014 also included a wide variety of human rights violations from extrajudicial killings to various violations of due process.

The U.S. Department of State warns visitors to China that they may be placed under surveillance. Hotel rooms (including meeting rooms), offices, cars, taxis, telephones, Internet, usage, and fax machines may be monitored onsite or remotely,

and personal possessions in hotel rooms, including computers, may be searched without knowledge or consent.

Policies

Eligibility for access to classified information may be granted “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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

[I]f the individual has divided loyalties or foreign financial interests, [he or she] may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 indicates three conditions that could raise a security concern and may be disqualifying in this case:

(a) contact 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 sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology; and

(e) shared living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure or coercion.

Applicant was born, raised, and educated in China. Applicant's father and two sisters are citizens and residents of China. His mother died in 2007. He is close to his father and visits China almost every year. Applicant has frequent contact with his family. He provides financial support to his father living in China. He has bank accounts in China.

There is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. See *generally* ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Feb. 20, 2002). Applicant has ties of affection for her mother and sister as indicated by her frequent contact with them and her almost annual visits to China to visit her mother.

Applicant's relationships with residents of China create a concern about Applicant's "obligation to protect sensitive information or technology" and his desire to help his relatives, who live in China. For example, if intelligence agents or government officials in China wanted to expose Applicant to coercion, they could exert pressure on his father or sisters residing in China. Applicant would then be subject to coercion through his relatives and classified information could potentially be compromised.

An applicant's possession of close family ties with their family living in a foreign country are not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one relative, living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See *Generally* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

The nature of a nation's government, its relationship with the United States, its history of intelligence gathering, and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion or inducement. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government or the country is known to conduct intelligence collection operations against the United States. The relationship of China with the United States, and China's "history of conducting espionage against the United States puts a heavy burden of proof on Applicant" to demonstrate that his relationships with family members living in China do not pose a security risk. See ISCR Case No. 12-04780 at 3 (App. Bd. Nov. 13, 2013). Applicant should not be placed into a position where he might be forced to choose between loyalty to the United States and a desire to assist relatives living in China.

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." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

There is no evidence that intelligence operatives from any foreign country seek or have sought classified or economic information from or through Applicant or his relatives living in China. Nevertheless, it is not possible to rule out such a possibility in the future. Applicant's relationships with family members living in China create a potential conflict of interest because these relationships are sufficiently close to raise a security concern about his desire to assist relatives in China by providing sensitive or classified information. Department Counsel produced substantial evidence of Applicant's contacts or relationships with family living in China, raising the issue of potential foreign pressure or attempted exploitation. AG ¶¶ 7(a) and 7(b) are established and further inquiry is necessary to determine the potential application of any mitigating conditions.

AG ¶ 8 lists three conditions that could mitigate foreign influence security concerns including:

(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 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 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶¶ 8(a) and 8(c) have limited applicability. Applicant has frequent contact with his father and sisters, who are citizens and residents of China. He has visited his father and sisters almost every year, and he texts or phones his sisters. His current wife communicates with her parents in China every week.

Applicant's loyalty and connections to family living in China are positive character traits. However, for security clearance purposes, those same connections negate the possibility of full mitigation under AG ¶¶ 8(a) and 8(c), and Applicant failed to fully meet his burden of showing there is "little likelihood that [his relationships with family living in China] could create a risk for foreign influence or exploitation."

AG ¶ 8(b) partially applies. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S." Applicant's relationship

with the United States must be weighed against the potential conflict of interest created by his relationships with family living in China.

There is no evidence that the Chinese government or those conducting espionage have approached or threatened Applicant or his family to coerce Applicant for classified or sensitive information. However, there would be little reason for U.S. competitors or enemies to seek classified information from an applicant before that applicant has access to such information or before they learn of such access.

While the U.S. Government does not have any burden to prove the presence of such evidence, if such record evidence were present, Applicant would have a heavier evidentiary burden to mitigate foreign influence security concerns. It is important to be mindful of the United States' sizable financial and diplomatic investment in China. Applicant's family living in China could become potential targets of intelligence agents because of Applicant's support for the United States, and Applicant's potential access to classified information could theoretically add some risk to Applicant's family living in China.

Applicant has significant connections to the United States and more limited connections to China. He has substantial financial assets in the United States. Notwithstanding, his connections to his family living in China are significant. Security concerns are not analyzed in a piecemeal assessment. Instead, the overall situation must be considered. Applicant's close relationship to his father and sisters, who are vulnerable to potential Chinese coercion, outweighs his connections to the United States in the security analysis. Moreover, Applicant is personally vulnerable to coercion when he visits China, as he does almost annually until recently. However, he plans on another trip quite soon. Foreign influence security concerns under Guideline B are not mitigated.

Whole-Person Concept

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

There are some facts supporting a grant of Applicant's access to classified information. He entered the United States in 1985, and began attending a U.S. university. He was awarded a doctorate in the United States. He has minimal financial interests in China. Applicant was naturalized as a U.S. citizen in 2009. His company has successfully worked for a government contractor for many years. He has two adult daughters who are U.S. citizens. His current wife is a permanent resident in the United States. He has excellent references from colleagues. He has substantial financial interests in the United States.

A Guideline B decision concerning a foreign country must take into consideration the geopolitical situation and dangers in that country including from intelligence agents.² The danger of coercion from the Chinese government or intelligence agents is more likely than in many other countries. China competes with the United States militarily, diplomatically, and through trade. China has a history of espionage targeting U.S. military and industrial secrets.

The weight of the evidence supports denial of Applicant's access to classified information. Applicant's father and sister are citizens and residents of China. Applicant has close ties of affection and obligation to his father and sisters. His current wife has frequent contact with her family in China. "It is not to question Applicant's patriotism to acknowledge that the record in [Applicant's] case raises the reasonable concern that [he] could be placed in a position of having to choose between [his] ties to the U.S. and [his] obligations to [his] foreign family members." ISCR Case No. 07-02485 at 5 (App. Bd. May 9, 2008) (reversing grant of security clearance because of Chinese connections). Applicant should not be placed into a position where Chinese government or intelligence officials could coerce his father, sisters, or Applicant, to attempt to obtain classified information. I conclude Applicant has failed to mitigate the foreign influence security concern.

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 interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

NOREEN A. LYNCH
Administrative Judge

² See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).