



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 17-01937
)	
Applicant for Security Clearance)	

Appearances

For Government: Adrienna M. Driskill, Esq., Department Counsel
For Applicant: *Pro se*

03/08/2018

Decision

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on February 1, 2016. On June 22, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline B. The DOD CAF acted 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on July 14, 2017, and requested a decision on the record without a hearing. On October 24, 2017, Department Counsel submitted the Government's written case and, on October 26, 2017, sent a complete copy of the file of relevant material (FORM) to Applicant, including documents identified as Items 1 through 5. He was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on November 7, 2017, and did not respond. Item 1 contains a copy the pleadings in the case. Items 2 and 3 are admitted into evidence. Items 4 and 5 are the Government's

Administrative Notice requests, which I have addressed below. The case was assigned to me on February 14, 2018.

Findings of Fact¹

Applicant is 51 years old. He has been married to his wife for 21 years. They have four children, ages 19, 17, 13, and 9. In 1987, he received a bachelor's degree in geophysics from a science and technology university in China. In 1991, he received a doctorate from a U.S. university. Applicant has been employed by U.S. technology company since 1999. This is his first application for a DOD security clearance.²

Applicant is a Chinese citizen by birth. He entered the United States in 1987, and became a U.S. Citizen in 1999. His wife, born in Taiwan, is also a naturalized U.S. citizen. All four of their children are U.S. citizens by birth.³

Applicant's mother and father are Chinese citizens and residents (SOR ¶¶ 1.a and 1.b). He had one sibling, who is deceased. His mother, age 78, and father, age 82, have both been retired from a Chinese offshore oil corporation for over 20 years. Applicant was not sure whether that corporation was government-owned. Since their retirement, neither his mother nor father have been involved in any business or government activities. The record is silent as to how they are financially supported. He communicates with each of his parents once a week, primarily via internet calls, and in person at times not specified in the record. Applicant visited China in 2013 for his brother's funeral, during which he spent time with his parents. The record is otherwise silent as to where or when those in-person visits took place.⁴

Applicant's mother-in-law is a Taiwanese citizen and resident (SOR ¶ 1.c). His father-in-law is deceased. His mother-in-law, age 85, has never worked outside the home. The record is silent as to how she is financially supported. His father-in-law's employment history was not described in the record. Applicant communicates with his mother-in-law annually either in-person or via telephone. In his SOR answer, he described that contact as "infrequent." The record does not specify where or when those in-person visits took place.⁵

¹ I extracted these facts from Applicant's SOR answer (Item 1), her SCA (Item 2), and the summary of his June 2016 security clearance interview (Item 3). I considered that Item 3 was not authenticated as required by Directive ¶ E3.1.20. However, Applicant was informed by Department Counsel that he was entitled to make corrections, additions, deletions, and updates to Item 3. Applicant was also informed that he was entitled to object to consideration of Item 3 on the ground that it was not authenticated. Because Applicant did not respond to the FORM, I conclude that he has waived any objection to Item 3. ISCR Case No. 14-06781 (App. Bd. Dec. 16, 2016).

² Item 2 at 5, 10-12, 15-16, 20-22, 35-38.

³ Item 2 at 5-7, 15-16, 20-22; Item 3 at 7.

⁴ SOR Answer; Item 2 at 17-20; Item 3 at 7 and 8.

⁵ SOR Answer; Item 2 at 23-25.

Besides contacts with his parents and mother-in-law, Applicant maintains contact with two former classmates of the Chinese university that he attended, which was not alleged in the SOR. They are both Chinese foreign nationals. Applicant did not specify where either friend resides, except to say that Friend B does not reside in the United States. Applicant last had in-person contact with Friend A a couple of years ago when Friend A visited Applicant's home state. Although Friend A stayed at a hotel, he did visit Applicant's home. Applicant last had in-person contact with Friend B when they met for lunch during Friend B's visit to Applicant's home state. Friend B was in town to attend a conference on policy and economics, and to visit other friends, who are U.S. citizens and residents. Applicant primarily maintains contact with Friend A and Friend B via social media. He stated that he does not have regular contact with Friend A, but did not describe the frequency of his contact with Friend B. Applicant was not aware of either Friend A or Friend B having any Chinese government affiliation. The record was otherwise silent as to their occupations.⁶

Applicant owns the home in which he has resided since 1999. Neither Applicant nor his wife maintain any foreign financial interests.⁷

Administrative Notice (China)

I have taken administrative notice of the U.S. Government's pronouncements concerning China, as outlined in Item 4 and the documents appended thereto, including the following:

- China 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.
- China commits significant human rights abuses against its citizens, including arbitrary or unlawful deprivation of life, executions without due process, illegal detentions at unofficial holding facilities, torture and coerced confessions of prisoners, lack of due process in judicial proceedings, extrajudicial disappearances of citizens, and discrimination against women.
- Computer systems around the world, including those owned by the U.S. Government, continue to be targeted by China-based intrusions. China uses its cyber capabilities to support intelligence collection against U.S. diplomatic, economic, and defense industrial base sectors.
- The United States faces a large and growing threat to its national security from Chinese intelligence collection operations. Among the

⁶ Item 3 at 7-8. Applicant's contact with these two former classmates was not alleged in the SOR. As such, I will consider them only to evaluate mitigation and whole person.

⁷ Item 2 at 9 and 25-26.

most serious threats are China's efforts at cyber and human infiltration of U.S. national security organizations. These operations are not a recent phenomenon, but reports of Chinese espionage against the United States have risen significantly over the past 15 years.

- In 2011, the U.S. Office of the National Counterintelligence Executive reported that China was one of the two most aggressive collectors of U.S. economic information and technology. It also reported that China's intelligence services, as well as private companies and other entities, frequently sought 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.
- In 2012, the U.S. Office of the Secretary of Defense reported that China was the world's most active and persistent perpetrators of economic espionage. It also reported that China was likely to remain an aggressive and capable collector of sensitive U.S. economic information and technologies, particularly in cyberspace, and that its collection attempts 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.
- In 2013, the U.S. Office of the Secretary of Defense reported that China was using its computer network exploitation capability to support intelligence collection against the U.S. diplomatic, economic, and defense industrial base sectors that support U.S. national defense programs.
- In 2014, the U.S.-China Economic and Security Review Commission reported that, since at least the mid-2000s, the Chinese government had conducted large-scale cyber espionage against the United States, and had compromised a range of U.S. networks, including those of DoD, defense contractors, and private enterprises. It also reported that Chinese students attending U.S. universities had the potential to collect information, whether wittingly or unwittingly, on sensitive U.S. technology on behalf of the Chinese government or military.
- In 2015, the U.S. Office of the Secretary of Defense reported that China continued to leverage state-sponsored industrial and technical espionage to increase the level of technologies and expertise available to support military research, development, and acquisition. There continued to be instances of Chinese nationals located in the United States acting as procurement agents and intermediaries to obtain sensitive or export-restricted U.S. equipment and technologies with military applications. China used its intelligence services and employs

other illicit approaches that violated 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.

Administrative Notice (Taiwan)

I have taken administrative notice of the U.S. Government's pronouncements concerning Taiwan, as outlined in Item 5 and the documents appended thereto, including the following:

- The United States recognizes the Government of the People's Republic of China as the sole legal government of China, acknowledging the Chinese position that there is but one China and Taiwan is part of China.
- The United States does not support Taiwan independence nor have formal relations with Taiwan. However, the United States maintains strong cultural, commercial, and other unofficial relations with Taiwan (including assisting with maintain its defense capability in order to further peace and stability in Asia).
- Taiwan is the United States' ninth largest trading partner, and the United States is Taiwan's second largest trading partner. People-to-people ties between the United States and Taiwan continue to grow.
- Between 1992 and 2003, a then Principal Deputy Assistant Secretary of State (who was involved in policy debates that were of concern to Taiwan) amassed 3,600 documents, some of which were highly classified, that he removed over time from the U.S. State Department. He used his position to share sensitive information with a Taiwanese intelligence agent, whom he met with over three days in 2003 at Taiwan's National Security Bureau. In 2005, he pled guilty to removal of classified documents from the State Department, and concealing his relationship with the Taiwanese intelligence agent (with whom he had been having an affair).

Policies

"[N]o one has a 'right' to a security clearance."⁸ 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."⁹ The President has authorized the Secretary of Defense or his designee to

⁸ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁹ *Egan* at 527.S

grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”¹⁰

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”¹¹ Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR.¹² “Substantial evidence” is “more than a scintilla but less than a preponderance.”¹³ The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.¹⁴ Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.¹⁵ An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.¹⁶

¹⁰ EO 10865 § 2.

¹¹ EO 10865 § 7.

¹² See *Egan*, 484 U.S. at 531.

¹³ See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹⁴ ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

¹⁵ Directive ¶ E3.1.15.

¹⁶ ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”¹⁷ “[S]ecurity clearance determinations should err, if they must, on the side of denials.”¹⁸

Analysis

Guideline B (Foreign Influence)

The security concern under Guideline B (Foreign Influence) is set out in AG ¶ 6, as follows:

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.

The following disqualifying conditions under this guideline are potentially relevant:

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

AG ¶ 7(b): connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology.

Applicant's familial ties to his parents and mother-in-law establish AG ¶¶ 7(a) and 7(b). A heightened risk is associated with the Chinese government because it conducts espionage against the United States and commits serious human rights abuses against its citizens. A heightened risk is associated with Taiwan primarily because of its

¹⁷ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

¹⁸ *Egan*, 484 U.S. at 531; *See also* AG ¶ 2(b).

relationship with China, but also because it has been involved with espionage against the United States. Applicant bears the burden of persuasion to mitigate these concerns.¹⁹

The following are potentially relevant mitigating conditions under this guideline:

AG ¶ 8(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;

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.

Applicant's failure to respond to the FORM results in a record with scant evidence of mitigation, especially given the limited information available from Applicant's SOR Answer.

AG ¶ 8(a) is not established. Applicant maintains familial ties with his parents and mother-in-law. It has not been established that any of his family have specific affiliations with their home countries that would raise a concern. However, there is heightened risk associated with the countries themselves that form the basis of a concern regardless of any such affiliations.

AG ¶ 8(b) is not established. Applicant has strong ties to the United States, particularly since he and his wife are raising their four children here. Moreover, he received his postgraduate degree from a U.S. university, has been employed by the same U.S. company for 19 years, and has owned a home in the United States for at least 18 years. However, the record contains insufficient facts to overcome the equally strong ties that he has to his parents and mother-in-law, who are vulnerable to foreign governments known to conduct espionage against the United States and commit serious human rights violations against its citizens. Under these circumstances, I cannot conclude that it is unlikely that Applicant will be placed in a position of having to choose

¹⁹ ISCR Case No. 99-0532 at 7 (App. Bd. Dec. 15, 2000) (When an applicant's ties in a foreign country raise a *prima facie* security concern, the applicant is required to present evidence of rebuttal, extenuation, or mitigation sufficient to carry his burden of persuasion that it is "clearly consistent with the national interest" to grant or continue a security clearance on his behalf).

between the interests of his family and that of the United States, or that he has met his heavy burden to mitigate the Guideline B concerns.²⁰

Because Applicant has not met his burden to overcome the Guideline B concerns as to his family, it is not necessary to make a finding as to whether Applicant's ties to his former classmates could create any additional risk of foreign influence or exploitation, given the limited information about them in the record.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person. An 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.

I have incorporated my comments under Guideline B in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person and the heightened risk associated with China and Taiwan, I conclude that Applicant has not mitigated his familial ties to citizens and residents of China and Taiwan. Accordingly, I conclude that he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence): AGAINST APPLICANT

Subparagraphs 1.a – 1.c: Against Applicant

²⁰ An applicant with foreign familial ties to a country that is hostile to the United States bears a very heavy burden to show that neither he nor his family members in that country are subject to influence by that country. ISCR Case No. 06-17838 (App. Bd. Jan 28, 2008) and ISCR Case No. 12-04780 (App. Bd. Nov. 13, 2013).

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge