



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 17-02359
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Tovah A. Minster, Esq., Department Counsel  
For Applicant: *Pro se*

01/26/2018

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**Decision**

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MENDEZ, Francisco, Administrative Judge:

Applicant did not present sufficient evidence to mitigate foreign influence security concerns. Clearance is denied.

**Statement of the Case**

On July 31, 2017, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) alleging that his connections to China through his family and an apartment he owns in China raise a foreign influence security concern. Applicant answered the SOR and requested a decision on the administrative (written) record.

On September 20, 2017, Applicant was sent the Government's file of relevant material (FORM). With the FORM, Department Counsel forwarded to Applicant five exhibits, pre-marked Items 1 – 5, which the Government offers for admission into the record. Applicant received the FORM on September 28, 2017. (Appellate Exhibit I) He was given 30 days to raise any objection to the exhibits offered by Department Counsel and submit a response. He did not file any objections or submit a response. Without objection, Items 1 – 5 are admitted into the record.

On January 17, 2018, I was assigned the case. Subsequently, I received written confirmation that Applicant remains sponsored for a security clearance (Appellate Exhibit

II) Accordingly, I have jurisdiction to issue a decision. ISCR Case No. 14-03753 (App. Bd. Sep. 23, 2016).

### **Findings of Fact**

Applicant, 47, was born in China. He is married. His wife was also born in China, and they got married in China. Their child was born in 2001 in the United States.

Applicant received an undergraduate and a master's degree in China. He came to the United States in approximately 1992 to pursue additional education. He earned his doctorate from a highly-respected U.S. school in 1997. He has been employed by a large U.S. company since 2004. He and his family have lived in the same house that he and his wife own since 2005. He became a U.S. citizen in 2006. He submitted a security clearance application in 2016. This is his first application for a security clearance.

Applicant's mother, sister, and mother-in-law are citizens and residents of China. All three are retired and receive pensions and benefits. Before he died, Applicant's father was a senior engineer, responsible for designing control systems for power plants for a Chinese company. Applicant co-owns the apartment in China that his mother and sister live in. He co-owns the apartment with his sister. He frequently speaks with his family in China, and has taken several trips to China to visit his family. He reported this information on his security clearance application and discussed it during the course of the ensuing security clearance investigation.

### **Administrative Notice - People's Republic of China (China or PRC)**

The following pertinent facts about China as set forth in publically-available U.S. Government reports and other reliable U.S. source documents (Item 5):

1. The PRC is an authoritarian state in which the Chinese Communist Party is the paramount authority.
2. China is actively engaged in intelligence gathering efforts against the United States.
3. China has a poor human rights record, where the repression and coercion of individuals and groups is routine.
4. The U.S. State Department warns visitors to China that they may be placed under surveillance. Hotel rooms, offices, cars, taxis, internet usage, and fax machines may be monitored onsite or remotely, and personal possessions in hotel rooms, including computers, may be searched.

### **Law, Policies, and Regulations**

This case is decided under Executive Order (E.O.) 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 National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017. ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information “upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges must remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1.<sup>1</sup>

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). See *also* Security Executive Agent Directive 4 (SEAD 4), ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship

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<sup>1</sup> However, a judge’s mere disbelief of an applicant’s testimony, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on non-alleged conduct. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice that unalleged conduct raises a security concern, it can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

transcends normal 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

## Analysis

### Guideline B, Foreign Influence

Foreign contacts and 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.<sup>2</sup>

A person is not automatically disqualified from holding a security clearance because they have relatives living in a foreign country. Instead, in assessing an individual's potential vulnerability to foreign influence, a judge considers the foreign country involved, the country's human rights record, and other pertinent factors.<sup>3</sup>

In assessing the security concerns at issue, I considered all applicable disqualifying and mitigating conditions, including:

AG ¶ 7(a): contact, regardless of method, with a foreign family member, . . . if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

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;

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 . . . and the interests of the United States; and

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<sup>2</sup> AG ¶ 6. See also ISCR Case No. 09-07565 at 3 (App. Bd. July 12, 2012) ("As the Supreme Court stated in *Egan*, a clearance adjudication may be based not only upon conduct but also upon circumstances unrelated to conduct, *such as the foreign residence of an applicant's close relatives.*") (emphasis added).

<sup>3</sup> See generally AG ¶ 6. See also ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (setting forth factors an administrative judge must consider in foreign influence cases).

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.

An applicant with relatives and other interests in a foreign country faces a high, but not insurmountable hurdle in mitigating security concerns raised by such foreign ties. However, what factor or combination of factors may mitigate security concerns raised by such foreign ties is not easily identifiable or quantifiable. Instead, each case must be judged on its own merits. In conducting this case-by-case analysis, a judge must take into account the foreign country at issue. Additionally, when an applicant's family members reside in a hostile foreign country, such as China, a judge must closely scrutinize all relevant facts and circumstances in light of the heightened security concerns raised by an applicant's ties to such a country.<sup>4</sup>

Here, Applicant's relationship to his mother and sister is far from casual, and he did not rebut the legal presumption that he has close familial ties or bonds to his mother-in-law.<sup>5</sup> In light of the heightened security concerns raised by Applicant's close familial ties and property interests in China, a country that aggressively engages in espionage against the United States and has a less than stellar record when it comes to respecting the rights of its own people, I find that the favorable record evidence (including, but not limited to, applicant's decision to leave his country of birth and create a new life for himself and his family in the U.S., ownership of his home in the U.S. for over 10 years, and long-term employment with a large U.S. company) insufficient to mitigate the security concerns at issue. At the same time, this adverse security assessment is *not* a comment on Applicant's patriotism or loyalty. Instead, it is an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved one, such as a family member. ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009). Foreign influence security concerns remain.<sup>6</sup>

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<sup>4</sup> ISCR Case No. 12-00058 (App. Bd. Apr. 9, 2013); ISCR Case No. 09-07565 (App. Bd. July 12, 2012).

<sup>5</sup> ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015) ("In-laws represent a class of persons who are contemplated by the Directive as presenting a potential security risk. As a matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse.")

<sup>6</sup> In reaching this adverse finding, I considered the whole-person concept. Specifically, I gave due consideration to Applicant's honesty in reporting the information at issue and the candor and level of cooperation he exhibited throughout the security clearance process. See *generally* AG ¶ 2. See *also* SEAD 4, ¶ E.4. However, this and the other favorable record evidence are insufficient to mitigate the heightened security concerns raised by Applicant's circumstances.

### **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 (Foreign Influence):                      AGAINST APPLICANT

Subparagraphs 1.a – 1.d:    Against Applicant

### **Conclusion**

In light of the record evidence, it is not clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is denied.<sup>7</sup>

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Francisco Mendez  
Administrative Judge

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<sup>7</sup> I considered the exceptions listed in SEAD 4, Appendix C. Based on the record evidence, none are warranted in the case.