



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-03251

Appearances

For Government: Nichole A. Smith, Esq., Department Counsel

For Applicant: *Pro se*

10/15/2018

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline B, foreign influence. Eligibility for access to classified information is denied.

Statement of the Case

On October 24, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence. The action was taken 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) effective within the DOD on June 8, 2017.

Applicant answered the SOR on November 28, 2017, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's file of relevant material (FORM) containing five Items, and it was received by Applicant on April 26, 2018.

The FORM notified Applicant that he had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant did not submit a response to the FORM or object to the Government's evidence. Items 1 through 4 are admitted into evidence without objection. The Defense Office of Hearings and Appeals (DOHA) assigned this case to me on July 27, 2018.

Request for Administrative Notice

In the FORM Department Counsel submitted Item 5, which requested that I take administrative notice of certain facts about the People's Republic of China (China). Applicant did not object, and 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.

Findings of Fact

Applicant admitted all of the SOR allegations. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 56 years old. He was born in China. He earned bachelor's and master's degrees from a Chinese university in 1982 and 1985, respectively. He came to the United States on a student visa in 1987. He became a naturalized citizen of the United States in 1999. He has worked for his current employer, a federal contractor, since 2015.²

Applicant's wife was born in China. They were married in the United States in 1990. His wife became a naturalized citizen on an undetermined date. They have no children.³

Applicant's father and mother are citizens and residents of China. Applicant disclosed in his February 2016 security clearance application (SCA) that he has weekly electronic contact with his parents. He listed that his father worked for a sports commission, not affiliated with the government. His mother worked for a wholesale medicine company, not affiliated with the government. It is unknown if they receive any benefits or pension from the Chinese government. In Applicant's answer to the SOR, he stated his parents were elderly and have health and memory issues. He stated both parents have U.S. permanent resident cards, and used to live in the United States. They returned to China in 2006, due to their health and the high cost of medical care in the United States. No other information was provided about Applicant's parents.⁴

Applicant disclosed in his SCA that his brother and sister are citizens and residents of China. His brother works at a research center, not affiliated with the government, and

² Item 3.

³ Item 3.

⁴ Items 2, 3.

his sister works for a public housing center, not affiliated with the government. He also disclosed in his SCA that he has monthly electronic contact with his siblings. In Applicant's answer to the SOR, he stated that he does not have regular contact with his siblings and the only contact he has with them is an annual Chinese New Year's greeting through social media.⁵

Applicant disclosed on his SCA that he traveled to China to visit family and friends for 21-30 days in 2010, 2011, and 2013. In May 2017, Applicant was interviewed by a government investigator. At that time, he updated his travel information and disclosed he had gone to China in 2016 to visit family and friends.⁶

During Applicant's May 2017 background interview, he disclosed that he has a niece, who is a Chinese citizen and has been attending college in the United States for the past four years. His niece is his brother's daughter. Applicant has contact with her approximately every three months by telephone. She has gone on vacations with Applicant. Since 2013, he has provided her with about \$10,000 to go on trips and for spending money. He forgot to list her on his SCA.⁷

During Applicant's interview, the government investigator asked him if he had ever made any large cash transactions. Applicant disclosed that in 2014 when he was returning from a visit to China, he transported \$30,000 in cash from China to the United States, which was from his mother for his niece. The money was to help his niece with college expenses and spending money. Applicant explained to the investigator that it is complicated transferring or wiring money out of China because it has to go through the Chinese government. Applicant told the investigator that he declared the money to U.S. Customs when he entered the country. He deposited the cash in his account and then sent his niece a check. Applicant did not disclose the 2014 trip to China on his SCA.⁸

The investigator inquired if Applicant had any additional large cash transactions and he responded "no." He was then confronted with a cash transaction in July 2011 for \$18,000. Applicant could not recall the nature or origin of that transaction. He was also confronted with cash transactions of \$15,000 in August 2007 and another transaction in September 2010. Applicant agreed with the information presented to him by the investigator. He explained that this money was from Chinese accounts owned by his mother-in-law and father-in-law. The accounts were closed, and his spouse brought the cash back to the United States.⁹

⁵ Items 2, 3.

⁶ Item 4.

⁷ Item 4.

⁸ Applicant's failure to disclose information in his SCA will not be considered for disqualifying purposes, but may be considered when making a credibility determination, in the application of the mitigating conditions, and in the whole-person analysis.

⁹ Item 4.

Applicant was also confronted by the investigator with additional cash deposits that were made in August 2013 for \$20,000 and \$30,000, and in July 2016 for \$30,500. Applicant agreed with the transactions and amounts. He stated this money was used to help pay for his niece's education and living expenses in the United States. He reiterated the transfers were done in cash to subvert the Chinese government from becoming aware and because of the difficulty in transferring money from China. When he or his wife got to the United States with the cash, they declared it with U.S. Customs, deposited it in their account, and wrote a check to the niece.¹⁰

In Applicant's answer to the SOR, he stated that his niece is attending graduate school and intends to remain in the United States after she graduates and become a U.S. citizen. Applicant did not provide any additional information or evidence.¹¹

China¹²

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 frequently seeks 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 and emails. Private companies and other entities in China also exploit Chinese citizens to steal information.

The U.S. Department of Defense reported that Chinese actors are the world's most active and persistent collectors of economic espionage. It is anticipated that this conduct will continue at a high level and will be a persistent and continuing threat to U.S. economic security.

China uses a variety of methods to acquire foreign military and dual-use technologies including cyber activity and exploitation of the access of Chinese nationals, such as students or researchers. It is suspected that China uses other illicit approaches that violate U.S. laws and export controls to obtain key national security and export-restricted technologies and materials unobtainable through other means.

Computer systems around the world, including those owned by the U.S. Government, are target by China. It uses its cyber capabilities to support intelligence collection against U.S. diplomatic, economic, and defense industrial based sectors. Its organizational network is able to access sensitive and dual-use technologies or knowledgeable experts under the guise of civilian research and development.

¹⁰ Item 4.

¹¹ Item 2.

¹² See Administrative Notice Request and supporting documents.

There are numerous examples of individuals who have been convicted of conspiring to violate federal export control laws by illegally exporting defense equipment to China. There are also recent examples of Chinese nationals and others who have been involved in hacking into computer networks of major U.S. defense contractors and failing to report repeated contacts with Chinese foreign intelligence agents.

Among the most serious threats by China is its effort at cyber and human infiltration of U.S. national security organizations. Reports of Chinese espionage against the United States has risen significantly over the past 15 years. China has a large and professional cyber espionage community demonstrating broad capabilities to infiltrate a range of national security and commercial operations. Many unofficial Chinese actors target the United States.

China is an authoritarian state in which the Chinese Communist Party is the paramount authority. Repression and coercion of organizations and individuals involved in civil and political rights advocacy as well as in public interest and ethnic minority issues remained severe with limited forms of redress against official abuse. Public security officials harass, intimidate, and take punitive measures against family members of rights defenders in retaliation for their work. The Communist Party controls the judiciary and in certain cases dictates the court's rulings.

There are serious human rights concerns, which included illegal detention, torture and coerced confessions of prisoners, detention and harassment of journalists, lawyers, writers, bloggers, and others whose actions are deemed unacceptable by the authority. There is a lack of due process in judicial proceedings, closed trials, administrative detention and discrimination against women, minorities, and persons with disabilities. Citizens do not have the right to choose their own government and have limited forms of redress against official abuse.

The U.S. Department of State warns visitors to China that they may be placed under surveillance. Hotel rooms, meeting rooms, offices, cars, taxis, telephones, Internet usage, and fax machines may be monitored onsite or remotely. Personal possessions in hotel rooms, including computers, may be searched without knowledge or consent.

Policies

When evaluating an applicant's suitability for national security eligibility, 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 national security eligibility will be resolved in favor of the 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. Directive ¶ E3.1.15 states 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 resulted 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 it 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.

AG ¶¶ 7(a) and 7(e) require evidence of a "heightened risk." The "heightened risk" required to raise these disqualifying conditions 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.

The mere possession of a close personal relationship with a person who is a citizen and resident of a foreign country is not, as a matter of law, disqualifying under Guideline B. However, depending on the facts and circumstances, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.

China is one of the most aggressive collectors of U.S. economic information and technology. Its intelligence services 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 and emails. China has serious human rights issues.

Applicant's father, mother, brother, and sister are citizens and residents of China. Applicant visited them in at least 2010, 2011, 2013, 2014, and 2016. He maintains electronic contact with them also. In his answer to the SOR, he minimized his contact with his parents and siblings; however, he visits them, and has carried large amounts of cash from China into the United States from his mother for his brother's daughter. His niece is a citizen of China, attending school in the United States. He has provided her about \$10,000 since 2013 for travel and other expenses. It is unknown how often she travels to China. It is unknown if Applicant's siblings have traveled to the United States. Applicant's

familial contacts in China and his contact with this niece create a heightened risk. AG ¶¶ 7(a) and 7(b) apply.

There is substantial evidence of the above disqualifying conditions, and the burden shifted to Applicant to rebut them or otherwise prove mitigation. Three mitigating conditions under AG ¶ 8 are potentially applicable to the disqualifying security concerns based on the facts:

(a) the nature of the relationship 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 and 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 interests in favor of the U.S. interests; 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's contact with his father, mother, brother, sister, and niece is more than casual and infrequent. He disclosed that he visits family and friends during trips to China. He has carried large sums of cash from his mother to the United States for the benefit of his niece. Applicant has weekly electronic contact with his parents. He provided conflicting information on his contact with his siblings, but he obviously has emotional ties as he provides his brother's daughter financial support and has taken her on vacation. Applicant's relationship with his family in China could create a risk for foreign influence or exploitation. Applicant provided insufficient evidence to conclude that there is no conflict of interest because his loyalty to his family is minimal or that he can be expected to resolve any conflict of interest in favor of the United States. It is too great of a burden to expect Applicant to be loyal to the interests of the United States and resolve any conflicts in favor of the United States over those of his parents and siblings, who are citizens and residents of China, and his niece, who is a citizen of China. AG ¶¶ 8(b) and 8(c) do not apply.

The Chinese government and private entities exploit Chinese citizens to steal information. China's authoritarian government, treatment of its citizens by the government, and poor human rights protections raise concerns. Applicant told the government investigator that his mother and other relatives provided cash for him and his wife to transport to the United States so as to circumvent any Chinese government's interference. This action could make Applicant and his family members in China vulnerable if the government should learn of their actions. Applicant continues to maintain significant ties to his family in China. I cannot find under these facts that it is unlikely that

Applicant or his family members would be placed in a position of having to choose between the interests of their Chinese family members or the Chinese government and the interests of the United States. AG ¶ 8(a) does not apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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

Applicant is 56 years old and has been a naturalized U.S. citizen since 1999. Applicant has deep ties to his family in China and his niece currently living in the United States. He did not provide sufficient evidence to mitigate the foreign influence security concerns. The record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance.

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

Carol G. Ricciardello
Administrative Judge