



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 18-00966
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: Leon J. Schachter, Esq.

11/26/2018

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence) by Applicant's family connections to China. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on November 23, 2014. On April 17, 2018, 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 (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on June 7, 2018, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on August 1, 2018, and

the case was assigned to me on August 15, 2018. On September 19, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for October 17, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified, presented the testimony of two witnesses, and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection.¹ DOHA received the transcript (Tr.) on October 24, 2018.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about the People's Republic of China (China). The request and supporting documents are attached to the record as Hearing Exhibit (HX) III. I took administrative notice as requested. The facts administratively noticed are set out below in my findings of fact.

Applicant requested that I take administrative notice of a research report on intermarriage between male U.S. citizens and female immigrants from China. (HX IV.) I declined to take administrative notice as requested on the ground that there was no showing that the results of the study were commonly accepted and not subject to reasonable dispute. I gave Applicant an opportunity to submit all or part of the study as an Applicant's Exhibit or to enter into a stipulation of fact with Department Counsel. Applicant and Department Counsel entered into a stipulation of fact, which is set out below in my findings of fact. (Tr. 11-13.)

Findings of Fact²

In Applicant's answer to the SOR, he admitted both allegations with explanations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 40-year-old senior cyber-security scientist employed by a defense contractor since March 2010, and he requires a security clearance for this employment. He received a security clearance in June 2009 and is seeking to continue it.

Applicant received a bachelor's degree in May 2001, a master's degree in May 2006, and a doctorate in May 2010. All three degrees are in the field of computer science. Most of Applicant's work as a cyber-security scientist is in developing technology for

¹ The documentary evidence was submitted to me in advance of the hearing pursuant to a case management order. (Hearing Exhibit (HX) I.) Applicant objected to the portion of the order requiring submission of documentary evidence before the hearing convened. (HX II.) I overruled the objection. (Tr. 5-7.) The Directive ¶¶ E3.1.9 and E3.1.10 gives administrative judges authority to require prehearing conferences and "conduct all proceedings in a fair, timely, and orderly manner." The Appeal Board has noted the use of case management orders by administrative judges and has not suggested that they are unauthorized. See ISCR Case No. 16-02536 (App. Bd. Aug. 23, 2018).

² Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

detecting cyber threats. Most of his work is in the laboratory, but he occasionally works in operational environments. (Tr. 75.)

Applicant, his parents, and his grandparents are native-born U.S. citizens. He was educated in the United States. He met his wife on a computer-dating website. They met in person in September 2012 and began dating. His wife is a native and citizen of China. She came to the United States on a student visa in 2009, and she enrolled in a graduate program for art and music. (Tr. 76.) Early in their dating relationship, Applicant learned that his future wife's parents were citizens and residents of China. (Tr. 56-59.) In January 2014, his future wife's student visa expired and she returned to China. Shortly thereafter, she applied for a fiancée visa. She and Applicant had discussed marriage, but he had not formally proposed. Applicant visited her in China in May 2014 and formally proposed. (Tr. 77.)

During Applicant's May 2014 visit to China, he was employed as a university professor as well as a defense contractor, and he participated in a forum of computer science and engineering scholars. He stayed with his now wife's parents while in China. He testified that his attendance at the forum was secondary to his primary purpose of visiting China, which was to visit his now wife and propose marriage. (Tr. 77, 88.)

When Applicant submitted his SCA in November 2014, he disclosed that he was engaged to a citizen of China. He also disclosed that he had met his fiancée's parents. (GX 1 at 35-38.) In April 2015, Applicant self-reported that he and his fiancée were living together. They married in May 2016. (GX 2.) After their marriage, his wife received a conditional green card. After two years of marriage, she was eligible to have the conditions removed and become a permanent resident of the United States. Applicant testified that she has filed her application for removal of conditions, and she received a document extending her status for 18 months while her documents are reviewed. She had not received a decision on her application as of the date of the hearing. (Tr. 59-61.)

Applicant's wife is an artist and is not employed outside the home. (Tr. 77-78.) His mother-in-law retired from her position as a teacher in a Chinese vocational school about six years ago. (Tr. 79.) His mother-in-law came to the United States in March 2015 and visited Applicant and his future wife for about six months. (Tr. 80.) She visited again for about three months in July-September 2018. (Tr. 82.)

Applicant's wife returned to China from October 2017 through mid-January 2018 to obtain medical treatments that are not available in the United States. She stayed with her parents during this trip. Applicant spent about two weeks in China in January 2018. He stayed in a hotel during this visit. (Tr. 89-90.)

Applicant testified none of his immediate family or professional associates expressed concern about his marriage to a foreign national. (Tr. 99-100.) The parties stipulated that a recent study found that about 12 percent of Caucasian males in the United States have married a spouse of a different nationality, to include Asians. (Tr. 13.)

Applicant's wife did not testify. All the information about his wife's immigration status and her family was provided by Applicant, based in large part on information obtained from his wife.

Applicant's father-in-law is a retired senior officer in a Chinese police department and a member of the Communist Party. He retired about two years ago. (Tr. 86.) Applicant learned about his father-in-law's connection with the police department when he first visited his then fiancée's parents in China to obtain formal approval for their engagement and marriage. (Tr. 64.) His father-in-law visited and stayed with Applicant and his wife for about two months in June-August 2018. (Tr. 90.)

Applicant's in-laws speak Mandarin Chinese when they communicate with each other and his wife. His in-laws' ability to speak English and his ability to speak Mandarin are all at the "survival level." (Tr. 97.)

Applicant testified that his wife has "talked about" becoming a U.S. citizen. She has lived in the United States for several years, mostly as a student, and she has experienced what it is like to be able to exercise free speech, criticize the government, or read about air pollution, food safety, and similar topics. She is now a conditional permanent resident and is not yet eligible to apply for U.S. citizenship. (Tr. 61.)

When Applicant was asked how he would respond if his wife received and passed on questions from her parents about his work, he would tell her that he could not share that information. He elaborated that the question was hard to answer, because he does not believe his wife would ever act as an intermediary for questions about his work. He testified, "It's outside the kind of behavior that I would expect from her, given, you know, how long I've known her and what I know to be her values." (Tr. 69.)

Applicant testified that he believes everything he has achieved would be at risk if he compromised classified or sensitive information. He also believes that he would lose the respect of his family. (Tr. 98.) He is very careful about sharing any work-related information with his wife that is not in the "public domain." (Tr. 67.)

A university professor who has known Applicant for five years submitted an affidavit and testified at the hearing regarding Applicant's character and reputation. She was a civilian employee of the Navy and held a security clearance until 1988, when she left the Navy to pursue a doctorate and a career as a university professor. She reviewed the SOR before submitting her affidavit and testifying. She and Applicant were colleagues for two years, from 2013 to 2015, but they have maintained occasional social and professional contact. She described him as "a wonderful colleague, a brilliant and conscientious researcher, and a gifted instructor." She testified that Applicant has "impeccable integrity" and she has full confidence in his trustworthiness. She is confident that Applicant would not succumb to any effort to obtain sensitive or classified information and would report any attempts if they occurred. (AX G-3; Tr. 29-33.)

One of Applicant's co-workers since January 2016, who has worked for their employer for 25 years, testified and submitted an affidavit. He and Applicant have frequent professional and social contact, and he is familiar with the allegations in the SOR. He believes that Applicant is not naïve about the nature of the security threats coming from China. He regards Applicant's personal integrity and honest as "stellar." He described him as "100 percent trustworthy and true to his word." He believes that Applicant would immediately report any attempts to obtain classified information from him. (AX G-4; Tr. 35-44.)

Applicant's supervisor for the past two years, who has known him since 2010 and is aware of the allegations in the SOR, submitted an affidavit supporting continuation of his security clearance. He regards Applicant as honest, reliable, and security-conscious. He is confident that Applicant would report any attempts to obtain classified information. (AX G-1.)

A former fellow student, co-worker, and colleague, who has known Applicant for ten years, submitted an affidavit attesting to Applicant's reliability, honesty, and trustworthiness. He is confident that Applicant would not succumb to attempts to gain information and would report any such attempts. (AX G-2.)

Applicant was promoted to his current position as lead cyber-security engineer in May 2017. (AX B.) His performance evaluation for the year ending in October 2017 reflected that he had been recently promoted and had been very successful performing at the higher level. His supervisor commented that his employer has a "high bar" for its employees, and that Applicant had met its expectations. (AX A-1.) His evaluation for the preceding year commented that he had "deep insight in a highly technical areas as well as work leadership, intern hiring, and staff membership." (AX A-2.)

Applicant is financially secure. He owns a home worth about \$570,000, has modest house payments of \$425 per month, and owes a balance of about \$144,400 on his mortgage loan. (Tr. 94; AX H-2.) He has investments of \$244,000. (AX H-1.) He testified that he was unfamiliar with his wife's family's financial situation and did not know whether she was likely to inherit any property from her parents. (Tr. 92-93.)

I have taken administrative notice that China has an authoritarian government dominated by the Communist Party. The United States and the China have been rivals since the Cold War. China aggressively targets sensitive and protected U.S. technology and military information, using worldwide intelligence operations. It is one of the world's most aggressive practitioners of economic espionage. It uses multiple government entities to acquire restricted U.S. technologies and it encourages and rewards private individuals who obtain technology on its behalf. It is one of the leading destinations for illegal exports of restricted U.S. technology. Chinese attempts to collect U.S. technological and economic information are expected to continue at a high level and will evolve with continuing technological advances in the global information environment. China frequently gathers intelligence by appealing to an individual's desire to help the country. U.S. citizens of Chinese ancestry with family ties to China are prime intelligence

targets. China uses a variety of methods to acquire foreign military and dual-use technologies, including access to knowledgeable experts under the guise of civilian research, cyber activity, and exploitation of the access of Chinese nationals, such as students or researchers, to act as agents or intermediaries.

I also have taken administrative notice that China has a poor human rights record. It suppresses political dissent, and it practices arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners. Repression and coercion is focused primarily on organizations and individuals involved in rights advocacy and public interest issues. Efforts to silence and intimidate political activists are common. Travelers to China can expect to be placed under surveillance, with their hotel rooms, telephones, and fax machines monitored and personal possessions, including computers, searched without their knowledge or consent.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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.” Exec. Or. 10865 § 7. 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. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr.20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See 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.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline B. Foreign Influence

The security concern under this guideline is set out in AG ¶ 6:

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 maybe 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 potentially disqualifying conditions are 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;

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 ¶ 7(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; and

AG ¶ 7(i): conduct, especially while traveling or residing outside the U.S., that may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

The nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the 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 operations against the United States.

The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). "[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120 (App. Bd. Feb. 20, 2002); see also ISCR Case No. 09-06457 at 4 (App. Bd. May 16, 2011). While Applicant's ability to communicate with his in-laws is limited, he has not rebutted the presumption that he has ties of obligation to them.

AG ¶¶ 7(a), (d), and (e) all require substantial evidence of a "heightened risk." The "heightened risk" required to raise one of 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. China's record of espionage targeting the United States establishes the required "heightened risk" to establish AG ¶¶ 7(a), (d), and (e) as well as the potential conflict of interest in AG ¶ 7(b). Applicant's travel to China, thereby subjecting himself to the risk of Chinese surveillance, searches, monitoring, arrest, and interrogation establishes AG ¶ 7(i).

The following mitigating conditions are potentially applicable:

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; and

AG ¶ 8(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.

AG ¶ 8(a) is not established. The nature of the Chinese government, its efforts to obtain protected information from the United States, and Applicant's ties to his wife and her family preclude a finding that a potential conflict of interest is unlikely. Applicant's expertise in cyber security makes him a likely intelligence target. Although Applicant is confident that his wife would never attempt to gain protected information from him, either on her own initiative or as an intermediary for her parents or other sources in China, the evidence supporting his confidence is sparse. He knows virtually nothing about his father-in-law's continuing ties, if any, with the Chinese government. His wife's ties to the United States are significant, but she still has strong ties to China. Her parents have visited her in the United States for long periods. She returned to China for six months, from October 2017 to January 2018. Applicant testified that she has "talked about" becoming a U.S. citizen, but she did not testify, limiting my opportunity to judge the sincerity or intensity of her interest in U.S. citizenship.

AG ¶ 8(b) is not established. Applicant has strong familial and professional ties to the United States. He is also deeply devoted to his wife, to the extent that he cannot imagine that she would attempt to obtain protected information from him, because it would be contrary to what he knows about her values. While it is likely that he would resist an overt attempt by his wife to gain classified or sensitive information, it is less likely that he would recognize subtle or surreptitious attempts by his wife, his in-laws, or Chinese intelligence agents. He is a technology expert with limited operational experience, not a counterintelligence expert. His testimony gave no indication that he has considered the possibility that he, his wife, or his in-laws could be detained, interrogated, and threatened while in China.

AG ¶ 8(c) is not established. Applicant has not rebutted the presumption that his contacts with his in-laws are not casual. See ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002).

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances and applying the adjudicative factors in AG ¶ 2(d).³

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 enjoys a reputation as an honest, reliable, and trustworthy person. He was candid and sincere at the hearing. However, his professional life has been in the academic, scientific, and theoretical world. I am not convinced that he fully appreciates the extent of his vulnerability to sophisticated intelligence-gathering efforts.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by his family connections to China.

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 and 1.b: Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge

³ The factors are: (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.