



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 18-00601

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

10/01/2018

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 March 13, 2018, 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 March 18, 2018, and requested a hearing before an administrative judge. The case was assigned to me on May 2, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 16, 2018. I convened the hearing as scheduled on July 24, 2018. The Government offered exhibits

(GE) 1 and 2. There were no objections to the exhibits offered, and they were admitted into evidence. Applicant testified and did not offer any exhibits.¹ DOHA received the hearing transcript on April 25, 2018.

Request for Administrative Notice

Department Counsel submitted HE III, a written request 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.² The facts are summarized in the Findings of Fact, below.

Findings of Fact

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

Applicant is 31 years old. He was born in China. He moved to the United States in 2006, with his mother, stepfather, and sister. He became a naturalized citizen of the United States in 2011. He earned an associate's degree in 2010, and a bachelor's degree in 2012. He has worked for a federal contractor since March 2013.³

Applicant completed an electronic Questionnaire for Investigations Processing (e-QIP) in February 2017. In it, he disclosed he began cohabitating in October 2016 with a Chinese citizen, who was in the United States on a nonimmigrant student status visa. He testified he married this woman in December 2017. She remains a citizen of China, but through Applicant, as his wife, she is now a permanent resident of the United States.⁴

Applicant was unsure when his wife initially came to the United States, but believed it was about 2014, as a student studying oriental medicine. Mutual friends introduced them to each other in August or September 2016, and they began cohabitating in October 2016. They traveled together to China in December 2016 to visit their families. They married in December 2017. His wife completed her schooling in 2017 and could legally remain in the country for up to year. After they married, in June 2018, she obtained her permanent resident's card. She maintains a Chinese passport. Applicant has a United States passport. Since becoming a naturalized citizen, Applicant has traveled to China to see his father in 2009, 2013, 2015, and 2016. He also traveled earlier in 2016 to see a

¹ Hearing Exhibit (HE) I is the exhibit list. HE II is the discovery letter.

² Source documents are attached to HE III.

³ Tr. 18-23, 53; GE 1, 2.

⁴ Tr. 20-25; GE 1.

girlfriend that he is no longer involved with. He usually stayed in China for several weeks and visited family while there.⁵

Applicant disclosed in his e-QIP and during his July 2017 background investigation that his father is a citizen and resident of China. He communicates with him through Skype. His father is a retired truck driver and a self-employed investor of hotels and other businesses. Applicant testified his father holds permanent resident status in the United States. Applicant sponsored him in 2013, and his father lived with him and his sister to qualify for this status. Applicant testified that his father returns to China to live, but cannot remain outside the United States for more than six months. His father continues to maintain residency in China and his citizenship. He prefers the familiarity of China. He stays with Applicant or his sister when he is in the United States. Applicant last visited with his father in August 2017, but talks with him by phone or through phone applications about every two months.⁶

Applicant's mother is a citizen of China and permanent resident of the United States. She obtained her permanent resident's status through her then husband, Applicant's stepfather. His stepfather is Chinese and was born in the Philippines. He met Applicant's mother when he was living in China. He is a naturalized citizen of the United States. His mother and stepfather divorced in approximately 2008. His mother is self-employed. She does not speak English, so does not believe she can pass the citizenship test. She recently returned to China for a visit. Before then she visited China about two to three years ago. She maintains contact with her relatives in China, especially her mother, Applicant's grandmother.⁷

Applicant's grandmother is a citizen and resident of China. She is a retired nurse. Applicant last visited her in China in December 2016. He recently contacted her by telephone and calls her regularly to check on her well-being. Applicant does not provide her financial support.⁸

Applicant's mother-in-law and father-in-law are citizens and residents of China. Applicant speaks with them on the telephone infrequently. His wife maintains contact with them through social media and group chats about every two days. Applicant's wife is in daily contact with her mother through media applications and telephonically about once a month. Applicant was uncertain as to the type of contact his wife had with her father. They do not provide her parents financial support. Applicant met his in-laws when he was in China in December 2016. Applicant told the government investigator that his in-laws run a closed caption television company.⁹

⁵ Tr. 20-28; GE 1, 2.

⁶ Tr. 34-36, 39-42; GE 1, 2.

⁷ Tr. 36-39, 42-44; GE 1, 2.

⁸ Tr. 44-45; GE 1, 2.

⁹ Tr. 45-50; GE 2.

Applicant has 11 aunts and uncles who are citizens and residents of China. He testified that he may have met some of them the last time he was in China. He does not have in person contact with them, but does have contact usually through different message groups on social media. He does not contact any of them individually. He does not know their occupations.¹⁰

Applicant has six adult cousins who are citizens and residents of China. Applicant had contact with one of them when Applicant was getting married. He does not maintain regular contact with them. He visited two cousins when he was visiting China in 2016. He believes one cousin works in advertisement and another works in a plastic factory, but he does not know the occupations of the others. He stated "I never heard of anyone from my family [who] work[s] for [the] Chinese government."¹¹

Applicant and his wife rent a room in their house to a boarder. In June 2017, they rented the room to an international student from China. She lived there until August 2017. When asked how he found a Chinese citizen to rent the room, Applicant testified that his wife put an advertisement on her school website and posted an advertisement on Craig's list, and other rental website. The advertisement was listed in both Chinese and English language, as they were looking for a Chinese boarder. Applicant explained they preferred a Chinese person because they would be familiar with their cooking. They recently advertised for a new boarder. They accepted the application for a new boarder. She was to move in later in the week. Applicant stated he did not know the nationality of the prospective boarder. He did not know if the new boarder was a Chinese national, and does not know her nationality, but thought she may be Asian. Applicant stated that his wife did a background check on the person.¹²

Applicant and his wife do not have any assets or real estate in China. He purchased a home in the U.S. in 2015 that is valued at about \$215,000. He has bank accounts in the United States with about \$10,000 in them and about \$2,000 in investments. He has been contributing to a 401k pension plan since 2013. He is registered to vote in the United States, but has not exercised his right. He testified he is not involved in any community activities, other than donating blood. His wife volunteers at a hospital.¹³

¹⁰ Tr. 50-51; GE 1, 2.

¹¹ Tr. 51-52; GE 1, 2.

¹² Tr. 28-33; GE 2.

¹³ Tr. 27, 53-57.

China¹⁴

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.

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

¹⁴ HE I.

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 in China, 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 national security eligibility, the administrative judge must consider the 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;

(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; 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.

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 is a citizen of China and a permanent resident of the United States. His father spends time residing in China, and when in the United States he stays with Applicant or his sister. Applicant’s wife’s parents are citizens and residents of China. Applicant’s grandmother, 11 aunts and uncles, and six cousins are citizens and residents of China. Applicant maintains regular contact with his grandmother and some contact with his other relatives through social media and electronic applications. AG ¶¶ 7(a), 7(b), and 7(e) apply.

After the Government produced substantial evidence of those disqualifying conditions, 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 wife's contact with her parents is ongoing and not casual or infrequent. Applicant maintains contact with his father and grandmother. His father spends time residing in China. Applicant also visits China regularly. He and his wife last visited in December 2016. Applicant's relationship with his father, grandmother, and his wife's relationship with her family in China could create a risk for foreign influence or exploitation. I find AG ¶ 8(c) does not apply. Applicant has less contact with his aunts, uncles, and cousins, and the contact they maintain is through social media and electronic applications. I find his contact with his aunts, uncles, and cousins does not create a risk of foreign influence and exploitation. AG ¶ 8(c) applies to them.

Applicant has a close relationship with his father and grandmother in China. His wife has a close relationship with her family in China. She came to the United States on a student visa in 2014, met Applicant in August or September 2016, began cohabitating with him in October 2016, and they married in December 2017. She obtained her permanent residents status through Applicant. She placed advertisements on social media sites for tenants in the Chinese and English language, presumably to find a Chinese boarder. It is unknown if Applicant reported that he had a Chinese boarder living with him at the time.

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. I cannot find under these facts that it is unlikely that Applicant, his father, grandmother, and Applicant wife, or her family in China 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.

Applicant immigrated to the United States with his mother and sister and became a naturalized citizen in 2011. He frequently returns to China for family visits. His father spends time in both China and the United States. Applicant's wife has minimal ties to the United States, except through Applicant. Her family are citizens and residents of China. She met Applicant while in the U.S. on a student visa. Applicant has some financial interests in the United States. I cannot find that Applicant's sense of loyalty to his wife and her relationship to her family in China is minimal. I cannot find that his other familial ties to China are minimal. I have concerns about his pursuit of Chinese boarders, which could create a vulnerability. 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 father, grandmother, and his wife's relationship with her parents in China. AG ¶ 8(b) 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 31 years old. He became a naturalized citizen of the United States in 2011. He met his Chinese born wife in August or September 2016 while she was in the United States on a student visa. Shortly thereafter they began to live together and married in December 2017. His wife obtained her permanent resident status through Applicant. Her family lives in China. Applicant's father lives in China and the United States. His grandmother lives in China. Applicant's family ties to the United States are not outweighed by his familial obligations and loyalty to those closest to him. It is too great a burden to expect him to resolve a conflict of interest in favor of the United States instead of his family. China's active and aggressive collection and espionage program that targets its people enhances the security concern. The heightened risks raised by familial ties with his father, grandmother, and his wife's family in China continue to raise security concerns under Guideline B, foreign influence, and are unmitigated. The record evidence leaves me with 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.c:
Subparagraphs 1.d-1.e:

Against Applicant
For 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