



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



In the matter of:)
)
-----) ISCR Case No. 14-02648
)
Applicant for Security Clearance)

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

02/24/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges and the record establishes that Applicant has significant connections to the People’s Republic of China (China or PRC). His mother lives in China; he frequently communicates with her; he visited her in 2011 and 2013; and he purchased a residence for her. Foreign influence concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On December 11, 2013, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86). (Item 5) On August 25, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the revised adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline B (foreign influence). (Item 1) The SOR detailed reasons why DOD could not make the affirmative finding under the Directive that it is clearly consistent with the national security to grant or continue a

security clearance for Applicant and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On September 5, 2014, Applicant responded to the SOR allegations and waived his right to a hearing. (Item 4) A complete copy of the file of relevant material (FORM), dated October 15, 2014, was provided to him on November 10, 2014.¹ Applicant did not respond to the FORM. The case was assigned to me on January 5, 2015.

Procedural Ruling

Department Counsel requested administrative notice of facts concerning China. (FORM at 2-13) Department Counsel provided twenty supporting documents to show verification, detail and context for these facts in the Administrative Notice request. *Id.* Applicant did not object to me taking administrative notice, and I granted Department Counsel's request.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). Usually administrative notice in ISCR proceedings is accorded to facts that are either well known or from government reports. See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

Findings of Fact²

In Applicant's SOR response, he admitted the SOR allegations. (Item 4) Applicant's admissions are accepted as findings of fact.

Applicant is a 54-year-old staff employee of a defense contractor, who has worked for the same defense contractor since 2010.³ In 1961, Appellant was born in China. In 1981, he entered the United States. In 1996, he was naturalized as a U.S. citizen. He rents his U.S. residence. In 1984, he was awarded a bachelor's degree, and in 1986, he was awarded his master's degree. Both degrees were issued by a U.S. university. He has never served in the U.S. military. In 1988, he married his spouse,

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated November 6, 2014, and Applicant's receipt is dated November 10, 2014. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

²Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

³The source for the facts in this paragraph is Applicant's December 11, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86). (Item 5)

who was born in China. His spouse is a U.S. citizen. In 1989 and 1992, his children were born in the United States. Applicant, his spouse and children reside in the United States.

Applicant's mother, mother-in-law, and father-in-law are citizens and residents of China.⁴ Applicant purchased a residence in China for his mother. The residence is valued at about \$60,000. He has weekly contact with his mother. His father passed away. He had quarterly contact with his mother-in-law and father-in-law. He visited family in China in 2011 and 2013. Applicant's brother was born in China, and he resides in Canada.

There is no evidence that Applicant has committed security violations, alcohol or drug abuse, or criminal conduct. There is no evidence that he has violated any of his employer's rules.

China

The PRC has powerful military forces, including strategic nuclear missiles. China is geographically vast, and has a population of over a billion people. It has significant resources and an economy that in recent years has continued to expand. China aggressively competes with the United States in many areas. China's competitive relationship with the United States exacerbates the risk posed by an applicant's connections to family members living in China.

China has an authoritarian, Communist government. China has a poor human rights record, suppresses political dissent, and practices arbitrary arrest and detention, forced confessions, torture, and other prisoner mistreatment. China also monitors communications devices, such as telephones, telefaxes, and internet servers.

China actively collects military, economic, and proprietary, industrial information about the United States for the following reasons: (1) its position as a global power; (2) its military, political, and economic investments in the Pacific Rim and Asia; and (3) its leading role in the development of advanced technology that China desires for economic growth. China's active intelligence gathering programs focus on sensitive and protected U.S. technologies.

The U.S. Department of Defense, Office of the Secretary of Defense, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2012*, at 10, noted the following about China's economic espionage:

Chinese actors are the world's most active and persistent perpetrators of economic espionage. Chinese attempts to collect U.S. technological and economic information will continue at a high level and will represent a growing and persistent threat to U.S. economic security. The nature of the

⁴The sources for the facts in this paragraph are Applicant's December 11, 2013 SF 86 and SOR response. (Items 4, 5)

cyber threat will evolve with continuing technological advances in the global information environment. (FORM at 3)

In cases resulting in federal prosecutions during fiscal years 2007 and 2008, China was ranked second only to Iran as the leading destination for illegal exports of restricted U.S. technology. (FORM at 5)

Chinese intelligence personnel are more inclined [than Russian intelligence personnel] to make use of sympathetic people willing to act as a “friend of China.” While this most clearly has been seen in PRC-targeted recruitment of Chinese-Americans, PRC agents also have used as sources U.S. citizens of other ethnic backgrounds. . . . “The crux of the PRC approach is not to try to exploit a perceived vulnerability but to appeal to an individual's desire to help China out in some way . . . ethnic targeting to arouse feelings of obligation is the single most distinctive feature of PRC intelligence operations.” (FORM at 5 (citation omitted))

China’s espionage and industrial theft activities are a threat to the security of U.S. technology. Department Counsel’s summary provides additional details of China’s aggressive intelligence efforts directed towards acquiring U.S. secrets and proprietary technologies as well as nine examples of criminal cases from 2008 to 2014 involving people and organizations connected to the PRC. *Id.* at 8-9.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 applicant’s 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

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, these guidelines are applied 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, 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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 indicates four conditions that could raise a security concern and may be disqualifying in this case:

- (a) contact 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 sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information;
- (d) sharing 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
- (e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

Applicant has a close relationship with his mother, and he communicates frequently with her. Applicant, his spouse, his mother, and in-laws were born in China, and his mother and in-laws live in China. Applicant's interest in his mother's residence in China is a substantial property interest. His property interests in China and his mother and in-laws are available for potential coercion or inducements from the Chinese government.

There is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. See *generally* ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Feb. 20, 2002). “[A]s a matter of common sense and human experience, there is [also] 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. 07-17673 at 3 (App. Bd. Apr. 2, 2009) (citing ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002)). This concept is the basis of AG ¶ 7(d). Although there is limited evidence that Applicant has direct ties of affection to his in-laws living in China, he has affection for his spouse, and she has affection for her family living in China. So under the Appeal Board's jurisprudence, there is a presumption of an indirect tie between Applicant and his in-laws living in China.

Applicant has not rebutted these presumptions with respect to his mother. His relationship with his mother is sufficient to create “a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.” His relationships with his spouse and in-laws create a lesser concern about Applicant's “obligation to protect sensitive information or technology.” For example, if the Chinese government wanted to expose Applicant to coercion, it could exert pressure on his relatives in China. Applicant

would then be subject to indirect coercion through these relationships and classified information could potentially be compromised.

The mere possession of close family ties with a family member living in China is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one relative living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See *Generally* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

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 or terrorist coercion or inducement. 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, the country is known to conduct intelligence collection operations against the United States, or terrorist activity causes widespread fear or destruction. The relationship of China with the United States places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his relationships with his mother and in-laws do not pose a security risk. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist his mother or in-laws living in China because they might be threatened, coerced, or receive inducements from entities in China.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

While there is no evidence that intelligence operatives or terrorists in China seek or have sought classified or economic information from or through Applicant, his spouse, his mother, or his in-laws living in China, it is not possible to rule out such a possibility in the future. Applicant's communications with his mother living in China are frequent. Applicant feels an obligation to her and affection for her. Applicant's concern for his mother is a positive character trait that increases Applicant's trustworthiness; however, it also increases the concern about potential foreign influence. Department Counsel produced substantial evidence and raised the issue of potential foreign pressure or attempted exploitation.

Applicant's relationship with his in-laws living in China is too attenuated to fully establish a security concern. His contacts with his in-laws are much more limited than

his contacts with his spouse. Applicant's spouse's relationship with parents living in China is not sufficiently developed to establish the applicability of AG ¶ 7(d), and SOR ¶¶ 1.c and 1.d are mitigated. AG ¶¶ 7(a), 7(b), and 7(e) apply to SOR ¶¶ 1.a and 1.b. Further inquiry is necessary about potential application of any mitigating conditions.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns including:

(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 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 interest in favor of the U.S. interest;

(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;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for

access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶¶ 8(a), 8(b), 8(c), and 8(f) have limited applicability. Applicant traveled to China in 2011 and 2013. He has frequent contact with his mother. Applicant purchased his mother’s residence in China, and it is valued at about \$60,000. The amount of contacts between an applicant and relatives living in a foreign country are not the only test for determining whether someone could be coerced or influenced through their relatives. Because of his connections to his mother, Applicant is not able to fully meet his burden of showing there is “little likelihood that [his relationship with his mother who lives in China] could create a risk for foreign influence or exploitation.” It is evident that Applicant feels an obligation for his mother’s welfare.

Applicant has “deep and longstanding relationships and loyalties in the U.S.” He has strong family connections to the United States. Applicant and his spouse have two children. Applicant, his spouse, and two children live in the United States and are U.S. citizens. Applicant has been employed by a U.S. company since 2010.

Applicant’s relationship with the United States must be weighed against the potential conflict of interest created by his relationship with his mother, who lives in China. It is important to be mindful of the United States’ recent relationship with China, and especially China’s systematic human rights violations and aggressive intelligence efforts targeting U.S. economic enterprises. China’s history of espionage make it more likely that China might attempt to coerce or induce Applicant through his relatives, if Chinese intelligence agents determined it was advantageous to do so.

AG ¶¶ 8(d) and 8(e) do not apply. The U.S. Government has not encouraged Applicant’s involvement with his spouse or mother. Applicant is not required to report his contacts with his mother living in China.

AG ¶ 8(f) has some applicability. Applicant has substantial property interests in the United States, which include his employment in the United States and any property he may have in the United States. However, this mitigating condition is not applied through a mathematical weighing and comparison of the interests in the United States and the interests in a foreign country. The property interest in China is substantial and important to Applicant, or he would have divested himself of this interest. His property interest in China is not resolved as a security concern.

In sum, the primary security concerns are Applicant’s relationship with his mother, and his property interest in China. He has frequent contact with his mother, and he visited China in 2011 and 2013. His mother is readily available for coercion and influence. Although the Chinese Government’s failure to follow the rule of law further increases the risk of coercion, the major cause of concern is China’s history of espionage activity by Chinese intelligence agents targeting U.S. interests.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under this guideline, but some warrant additional comment.

There are some facts supporting mitigation of security concerns. Applicant has strong connections to the United States. Applicant was born in China 54 years ago, and he immigrated to the United States in 1981. In 1984, he was awarded a bachelor's degree, and in 1986, he was awarded his master's degree. Both degrees were issued by a U.S. university. He has never served in the U.S. military. In 1988, he married his spouse, who was born in China. In 1989 and 1992, his children were born in the United States. In 1996, he was naturalized as a U.S. citizen. Applicant, his spouse, and his two children are citizens and residents of the United States. There is no derogatory information concerning Applicant's police or financial records. There is no evidence showing any U.S. arrests, illegal drug possession or use, or alcohol-related incidents.

The circumstances tending to support denial of Applicant's clearance are more significant than the factors weighing towards approval of his clearance at this time. Applicant's mother lives in China, and he has frequent contact with her. Chinese intelligence agents may attempt to coerce or influence Applicant through his mother to obtain classified information. Applicant has substantial property interests in China, and he has not divested himself of this property. These substantial and long-standing connections to China raise an unmitigated security concern.

A Guideline B decision concerning China must take into consideration the geopolitical situation in China, that country's history of espionage against the United States, as well as the dangers existing in China.⁵ The danger of coercion or influence

⁵See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).

from Chinese intelligence agents in China is more likely than in many other countries. I have continuing doubts that Applicant's mother living in China will remain free from influence and coercion should Applicant receive access to classified information.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude Applicant has not fully mitigated the foreign influence security concerns.

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 and 1.b:	Against Applicant
Subparagraphs 1.c and 1.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge