



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



In the matter of:	)	
	)	
	)	ISCR Case No. 14-03200
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Gregg A. Cervi, Esq., Department Counsel  
For Applicant: *Pro se*

04/28/2015

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**Decision**

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COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline B, foreign influence. He mitigated the concerns under Guideline E, personal conduct. Applicant's eligibility for a security clearance is denied.

**Statement of the Case**

On July 18, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence, and Guideline E, personal conduct. DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on September 2, 2014. He requested a hearing before an administrative judge. The case was assigned to me on February 5, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 18, 2015, with a hearing date of March 4, 2015. The hearing was convened as scheduled. The Government offered exhibits (GE) 1 and 2, which were admitted into evidence without objection. The Government produced a letter dated January 26, 2015, informing Applicant of the exhibits it intended to offer at the hearing. This document was marked as hearing exhibit (HE) I. Its exhibit list was marked as a HE II and its request to take administrative notice of certain facts about the Peoples Republic of China (PRC) was marked as HE III. Applicant testified and one offered exhibit (AE) A, which was an incomplete document. The record was held open after the hearing and Applicant produced a completed document which was substituted for AE A. It was admitted without an objection. No other post-hearing documents were produced. DOHA received the hearing transcript (Tr.) on March 11, 2015.

### **Procedural Ruling**

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the PRC. Applicant did not object and the request was approved. The request and the attached documents were not admitted into evidence but were included in the record as HE III. The facts administratively noticed are set out in the Findings of Fact, below.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted all the SOR allegations. However, regarding all the Guideline B allegations (SOR ¶¶ 1.a through 1.d), he explained that he divorced his wife (a citizen of the PRC) and therefore was no longer related to his wife, her father, mother, and brother who are all citizens and residents of the PRC. He also admitted using marijuana while holding a security clearance (SOR ¶ 2.a). Those admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 34 years old. He is a U.S. citizen by birth. He served in the USMC. from 2000 to 2004, at which time he received an honorable discharge as a sergeant, pay grade E-5. He then began working as a federal contractor employee from 2005 through the present. From 2005 through 2012, he worked for a federal contractor in Japan. While working in Japan, he met N.M. who was a citizen of the PRC attending school in Japan. They began dating in 2004. After they dated for some time, Applicant inquired with his security manager about whether there were any security concerns if he would marry N.M. On his own, he also researched the question by reviewing the National Industrial Security Program Operating Manual (NISPOM). After receiving assurances from his security manager that there was not a problem, Applicant married

N.M. in August 2007. In October 2007, they went to the PRC to celebrate their wedding.<sup>1</sup>

Applicant and his wife had a child born in November 2009. In 2012, Applicant's family moved from Japan to their current location in the United States. According to Applicant, sometime after his son was born, the marriage began to break down. They separated in July 2013 and formally divorced in April 2014. Under the terms of the divorce decree, Applicant and N.M. are to share joint custody of their son. N.M. returned to the PRC, taking their son, in May 2014 and remains there as of the date of this hearing. Applicant gave her verbal permission to leave the country with their son, but he believed she would bring him back to the United States after a short visit. By remaining in the PRC with their son, N.M. is in violation of the divorce decree. In an attempt to bring his son back to the United States, Applicant visited the PRC in October 2014 and hired an international law firm to attempt to negotiate the return of his son. This attempt was unsuccessful. Applicant's son is solely a U.S. citizen and not a joint citizen with the PRC. His son's original 60-day entry visa has expired; therefore, his legal status in the PRC is unknown. He has weekly contact with his son and ex-wife over the internet. His ex-wife has permanent residency status in the United States that expires in May 2015. Applicant is hoping she returns before then. If she does return, he plans on returning to court to seek full custody of his son through a modification of the divorce decree.<sup>2</sup>

When Applicant was married to N.M., he had limited contact with his father-in-law, mother-in-law, and brother-in-law. They did not speak English and he did not speak Chinese. They do not have any PRC government affiliation. He visited the PRC in 2008 for his brother-in-laws wedding. Since the divorce from his wife, he does not have contact with his former in-laws. He did see them when he was in the PRC in October 2014 trying to regain custody of his son.<sup>3</sup>

Applicant used marijuana when he was on vacation with a friend on two occasions, once in 2007, and once in 2008. A friend offered him the marijuana and he was curious and tried it on these occasions. He has not used marijuana since that time and does not intend to do so in the future. He acknowledged that he held a security clearance at the time of those uses and that he exercised poor judgment. He admitted the uses on his security clearance application and background interview without trying to hide this information. Many things have changed in his life since he last used marijuana. He is more responsible now and will not jeopardize his future by using marijuana again.<sup>4</sup>

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<sup>1</sup> Tr. at 24-25, 27-28, 36; GE 1-2.

<sup>2</sup> Tr. at 28, 38-42, 46-47, 49-50, 53, 56; GE 1; AE A.

<sup>3</sup> Tr. at 29, 36-37, 60; GE 2.

<sup>4</sup> Tr. at 31-36; GE 2.

## People's Republic of China

The PRC has an authoritarian government, dominated by the Chinese Communist Party. The PRC has a poor record with respect to human rights, suppresses political dissent, and its practices include arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners. Repression and coercion, particularly against organizations and individuals involved in rights advocacy and public interest issues, are routine.

The PRC is one of the most aggressive countries in targeting sensitive and protected U.S. technology, and economic intelligence. It has targeted the U.S. with active intelligence gathering programs, both legal and illegal. In China, authorities have monitored telephone conversations, facsimile transmissions, e-mail, text messaging, and internet communications. Authorities opened and censored mail. The security services routinely monitored and entered residences and offices to gain access to computers, telephones, and fax machines. All major hotels had a sizable internal security presence, and hotel guestrooms were sometimes bugged and searched for sensitive or proprietary materials.<sup>5</sup>

### Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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 access to classified information will be resolved in favor of 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is

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<sup>5</sup> HE III.

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 to obtain 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 about potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 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**

The security concern relating to the guideline for foreign influence is set out in AG ¶ 7:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. Two are potentially applicable 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; 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 sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

Applicant's ex-wife is a citizen of the PRC. She took the couples' son to the PRC one month after they divorced and remains there in violation of a divorce decree. Applicant has initiated efforts to regain custody of his son, but so far has been unsuccessful. He remains in contact with his ex-wife and son through weekly internet communications. When he was married to his ex-wife he had very limited contact with his in-laws. Now that they are divorced he has no contact with them. China is a communist country with a poor human rights record. It is one of the world's most aggressive nations in the collection of U.S. intelligence and sensitive economic information. While Applicant's ex-wife retains custody of the couples' son in the PRC, there exists a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion. The same situation also creates a potential conflict of interest for Applicant. AG ¶¶ 7(a) and 7(b) have been raised by the evidence. Applicant has no further connection to his ex-in-laws thus alleviating any heightened risk or potential conflict of interest. SOR ¶¶ 1.b – 1.d are resolved in Applicant's favor.

Conditions that could mitigate foreign influence security concerns are provided under 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 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; 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 is clearly a loyal U.S. citizen with no allegiance to the PRC. However, he is in a difficult position because his ex-wife has taken their son to the PRC, in violation of their divorce decree, and refuses to return. There is very little in the world that is stronger than a parents desire to care for his child. This works against Applicant in this case because it possibly places him in a position of having to choose between the interests of his ex-wife over those of the United States. Although Applicant has

longstanding ties to the United States and has fully met his reporting requirements concerning his foreign contacts, his wife has almost no ties to this country and refuses to return Applicant's son to the United States. As stated above, the protection of the national security is the paramount consideration and any doubt must be resolved in favor of national security. Doubts remain about Applicant's ex-wife because she could use the custody issue as leverage against Applicant. Because of Applicant's continuing ties to his ex-wife and the nature of the government of China, I am unable to find either of the mitigating conditions to be fully applicable to SOR ¶ 1.a. AG ¶ 8(b) partially applies because of Applicant's long-standing loyalties in the United States. Despite the presence of some mitigation, it is insufficient to overcome the significant security concerns generated by Applicant's ex-wife and possibility that she uses the custody disagreement against Applicant.

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant admitted two uses of marijuana while holding a security clearance in 2007 and 2008. The record contains sufficient evidence to support application of AG ¶¶ 16(c) and (e) in this case.

AG ¶ 17 provides conditions that could mitigate security concerns:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant has not used marijuana since 2008 and committed to not using it in the future. He fully admitted his uses in his security clearance application and his clearance interview. His life has changed since his last use and he is more responsible. Applicant mitigated the uses of marijuana. AG ¶¶ 17(c) – 17(e) 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(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.

Applicant's ex-wife is a citizen of and resides in the PRC and has possession of the couples' son in violation of their divorce decree. Applicant has visited the PRC in an

attempt to gain custody of his son. The PRC has an authoritarian government, a bad human rights record, and has a very aggressive espionage program aimed at the United States. 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. There is no reason to question Applicant's loyalty and devotion to this country. However, he has not overcome the vulnerability to pressure, coercion, exploitation, and duress created by his ex-wife and the custody issue related to his son.

Applicant has done nothing whatsoever to question his loyalty and devotion to this country. However, he has simply been unable to overcome the heavy burden of showing that he and his ex-wife in the PRC are not subject to influence by that country. His vulnerability to foreign pressure, coercion, exploitation, or duress remains a concern.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Foreign Influence security concerns. He did mitigate the personal conduct 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
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b – 1.d:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	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 interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Robert E. Coacher  
Administrative Judge