



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



In the matter of:)
)
) ISCR Case No. 14-05745
)
Applicant for Security Clearance)

Appearances

For Government: Robert Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

09/17/2015

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the foreign influence security concerns arising from his foreign contacts in the People’s Republic of China (PRC or China), a country that is ruled by an authoritarian communist government that aggressively conducts espionage against the United States. Eligibility for access to classified information is denied.

Statement of the Case

On April 19, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence. DOD CAF took that action 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) implemented by DOD on September 1, 2006.

On April 30, 2015, Applicant answered the SOR and requested a decision based on the administrative record without a hearing. On June 30, 2015, Department Counsel prepared a File of Relevant Material (FORM) that contained documents identified as

Items 1 through 3. Applicant was sent a copy of the FORM and given 30 days from its receipt to submit objections and supply additional information. On July 24, 2015, he submitted a response to the FORM. The case was assigned to me on August 14, 2015.

Findings of Facts

The SOR alleged that Applicant's mother, brother, three sisters, and mother-in-law are citizens and residents of the PRC (SOR ¶¶ 1.a through 1.c); In his Answer to the SOR, Applicant admitted each allegation. His admissions are incorporated herein as findings of fact.¹

Applicant is a 50-year-old senior research fellow who works for a defense contractor. He has worked for that contractor since March 2014. He also has been working as an associate professor at a university since September 2012. He was born in the PRC. He earned a bachelor's degree, master's degree, and doctorate degree from PRC universities as well and a doctorate degree from a U.S. university. He entered the United States in January 1995 and became a U.S. citizen in March 2007. He married in September 1991. His wife was born in the PRC and is now a naturalized U.S. citizen. He has four children, ages 6, 14, 17, and 21. His oldest child was born in the PRC and the three younger children were born in the United States. All of his children are U.S. citizens. This is the first time that he has applied for a security clearance.²

In his Response to the FORM, Applicant indicated that his three sisters and brother are farmers, and his mother and mother-in-law are elderly ("over seventy-six-year-old seniors"). He stated all of them live in remote areas and none work for the government or in technology-related fields. He believes there is no reason why they would be subjected to coercion or exploitation because of his teaching and research.³

In his Response to the FORM, Applicant provided an abstract concerning a research program in which he participated. During that program, he was involved in the development of advanced materials to meet U.S. Navy requirements.⁴

In his security clearance application (SCA), Applicant reported that he traveled to China to visit family members for 11 to 20 days in August 2007. He also reported that he had been in quarterly telephone contact with his brother and two sisters and annual telephone contact with his remaining sister. He listed "homemaker" or "housewife" for the occupations of his sisters. He reported having telephone contact with his mother-in-law the month before he submitted his SCA. In Sections 19, 20A, and 20B of his SCA, he reported no foreign interests, contacts, or activities.⁵

¹ Item 1.

² Item 2.

³ Applicant's Response to the FORM.

⁴ Applicant's Response to the FORM.

⁵ Item 2.

The PRC has an authoritarian government, dominated by the Chinese Communist Party whose members hold almost all top government, police, and military positions. The PRC has a poor human rights record that includes repression of freedom of speech, religion, and association; extrajudicial killings; prolonged illegal detentions at unofficial holding facilities, and a lack of due process in judicial proceedings. The PRC may at times place foreign visitors under surveillance and has been known to monitor hotel rooms, offices, taxis, and communication devices, such as telephones, telefaxes, and internet servers.⁶

In 2009, the U.S.-China Economic and Security Review Commission reported to Congress that, “China is the most aggressive country conducting espionage against the United States, focusing on obtaining information and technologies beneficial to China’s military modernization and economic development.” The Chinese government encourages and rewards private individuals who obtain technology on its behalf. In 2011, the National Counterintelligence Executive found that “China’s intelligence services, as well as private companies and other entities, 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 or e-mail.” Agents of the Chinese government have offered financial inducements to U.S. government officials to encourage them to compromise classified information. Strong evidence also has emerged that the Chinese government is directing and executing a large-scale cyber espionage campaign against the United States.⁷

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 that are to be 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, administrative judges apply the guidelines 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

⁶ Item 3.

⁷ Item 3.

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, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable 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 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.

Section 7 of EO 10865 provides that adverse 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* Executive Order 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 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 describes conditions that could raise a security concern and may be disqualifying. Three are potentially applicable here:

(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; and

(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.

Under Guideline B, a security concern exists when an individual has foreign family members or other foreign contacts that may be manipulated to help a foreign government in a way that is not in U.S. interests. In such situations, common sense suggests that the stronger the ties of affection or obligation are to a foreign contact, the more vulnerable a person is to being influenced if the foreign contact is brought under control or used by a foreign intelligence or security service.

Here, Applicant has close and ongoing family ties in the PRC with his mother, brother, three sisters, and mother-in-law. The Appeal Board has noted that “[t]here is a rational connection between an applicant’s family ties in a country whose interests are adverse to the United States and the risk that the applicant might fail to protect and safeguard classified information.”⁸

AG ¶¶ 7(a) and 7(d) requires substantial evidence of a “heightened risk.” The “heightened risk” required to raise this disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk of greater than the normal risk inherent in having family members living under a foreign government. Specifically, the nature of a foreign government, its relationship with the U.S., and its human rights record are relevant factors in assessing the likelihood that an applicant’s foreign contacts are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a foreign contact is associated with or dependent upon the foreign government, or the country is known to conduct intelligence operations against the U.S. Because the PRC has an authoritarian government that aggressively conducts espionage against the United States, Applicant’s foreign contacts create a potential conflict of interest and a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. AG ¶¶ 7(a), 7(b), and 7(d) apply.

AG ¶ 8 provides conditions that could mitigate foreign influence security concerns. Three are potentially applicable in this case.

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those

⁸ ISCR Case No. 03-21434 (App. Bd. Feb 20, 2007).

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.

This case presents unanswered questions. For example, it is unknown whether Applicant's mother and mother-in-law receive government pensions and are dependent on the government. It is unknown whether his brother is married and, if so, what is his spouse's occupation. The same question applies to the spouses of his sisters who are listed as either "homemaker" or "housewife" on his SCA.

Applicant lived in the PRC until he was about 29 years old. He has resided in the United States for the last 20 years. He became a U.S. citizen eight years ago. His wife and children are U.S. citizens. Nonetheless, his contacts with close family members in China are not minimal, infrequent, or casual. The PRC's large-scale and sophisticated intelligence collection efforts against the United States represent a substantial threat to our national security. Given the PRC's intelligence operations against the United States, Applicant's family members who reside in China are in a position where there is a potential for them to be exploited in a way that could force Applicant to choose between loyalty to those individuals and the interests of the United States. While these are circumstances beyond Applicant's control, they raise security concerns under Guideline B that have not been mitigated. AG ¶¶ 8(a), 8(b), and 8(c) are not applicable.

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 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 considered the potentially disqualifying and mitigating conditions in light of all relevant 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(a) were addressed under that guideline, but some warrant additional comment. I considered Applicant's work history and professional skills. He is a well-educated, productive U.S. citizen. Although I have decided this case against Applicant, this decision should not be construed as a reflection of his loyalty or patriotism to the U.S., as those matters are not at issue. Instead, the "clearly consistent with national interest" standard is a demanding benchmark that requires resolution of any doubt against Applicant. His close family ties in the PRC, an authoritarian state controlled by the Chinese Communist Party that is aggressively involved in espionage against the United States, create such doubt. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Considering all the evidence, I conclude Applicant failed to mitigate the security concerns arising under Guideline B, foreign influence.

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:	Against Applicant

Conclusion

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

James F. Duffy
Administrative Judge