



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 14-06877
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: Christopher J. Camera, Esq.

04/28/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated security concerns raised by the financial support he provided distant relatives and a friend in China between 2007 and 2009. The record does not reflect any continuing close connections and contacts in China. Clearance is granted.

History of the Case

On August 26, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the foreign influence guideline.¹ Applicant answered the SOR and requested a determination based on the administrative (written) record. Department Counsel did not move for a hearing within 20 days of receipt of Applicant's Answer.²

¹ This action was taken under Executive Order (E.O.) 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) implemented by the Department of Defense on September 1, 2006.

² See Directive, Enclosure 3, ¶ E3.1.7.

On October 26, 2015, Department Counsel prepared its written case, a file of relevant material (FORM), and sent it to Applicant. The FORM contains the pleadings, Applicant's security clearance application (SCA), and a summary of Applicant's security clearance background interviews; which were admitted into the record, without objection, as Exhibits 1 – 3. Department Counsel also submitted a request for administrative notice, which was marked Exhibit (Ex.) 4 and is discussed below.

On November 23, 2015, Applicant, through counsel, filed a response to the FORM (Response). The Response has been marked Ex. 5 and, without objection, was admitted into the record.³ On January 20, 2016, I was assigned Applicant's case.

Procedural Ruling

Administrative notice may be taken of uncontroverted, easily verifiable facts regarding a foreign country set forth in a U.S. Government report. Additionally, the official position of relevant federal agencies or the pertinent statements of key U.S. Government officials may be appropriate for administrative notice. Generally, the party requesting administrative notice of a particular matter must provide the source document, either the full document or the relevant portion of the source document, to allow an administrative judge to assess the reliability, accuracy, and relevancy of any matter requested for administrative notice.⁴

Department Counsel requests that I take administrative notice of certain matters regarding the People's Republic of China (PRC or China). Instead of providing the source documents (or, relevant portions thereof), Department Counsel cites to the web addresses where the 18 cited source documents can be located. See Ex. 4 at 9-11. Applicant, through his counsel, filed a general objection to the Government's request for administrative notice. See Response, Ex. 5 at 1.

In ISCR Case No. 14-01655 (App. Bd. Nov. 3, 2015), the Appeal Board held that in taking administrative notice of a pertinent fact(s) regarding a foreign country an administrative judge may not cite to the relied upon source document's web address alone. Instead, to allow the Board to assess the reliability, accuracy, and relevancy of any matters accepted for administrative notice, a judge must include the actual source document(s) in the record. See *also*, ISCR Case No. 14-01655, n. 1 (App. Bd. Nov. 3, 2015) (absence of source documents relied upon by the judge in reaching administratively noticed facts left the record incomplete).

Arguably, when a moving party fails to provide the relevant source documents, a judge should not consider the matters proposed for administrative notice. However,

³ Applicant's acknowledgment that he received the FORM and Department Counsel's submission noting the Government had no objection to Ex. 5 are included in the record as File Exhibits I and II, respectively.

⁴ ISCR Case No. 08-09480 (App. Bd. Mar. 17, 2010); ISCR Case No. 05-11292 (App. Bd. Apr. 12, 2007).

such an approach would be contrary to long-established Appeal Board precedent.⁵ Moreover, excluding an otherwise relevant exhibit would be contrary to the overall goals of the industrial security clearance process to provide for a full, fair, and complete record of an applicant's security worthiness and the Directive, which requires a judge to consider the country at issue in resolving SOR allegations raising a foreign influence security concern.⁶ Accordingly, Applicant's objection to Ex. 4 is overruled.

I have marked and included in the record as Ex. 6 the relevant portions of the source documents relied upon in reaching the following administratively noticed facts regarding China:⁷

1. The PRC is an authoritarian state in which the Chinese Communist Party is the paramount authority.
2. China is actively engaged in intelligence gathering efforts and activities against the United States.
3. China has a poor human rights record, where the repression and coercion of individuals and groups is routine.
4. The U.S. State Department warns visitors to China that they may be placed under surveillance. Hotel rooms, offices, cars, taxis, internet usage, and fax machines may be monitored onsite or remotely, and personal possessions in hotel rooms, including computers, may be searched.

Findings of Fact

Applicant, who is in his mid-fifties, was born in China. He immigrated to the United States in 1979 and became a naturalized U.S. citizen in 1986. He registered with the selective service. He attended and graduated from a U.S. high school. He then earned a mechanical engineering degree from a quasi-U.S. military college. In his Answer, Applicant proudly recalls that as an undergraduate he "went through formation in uniform and saluted to the American flag every day for four years." (Ex. 1 at 4-5.)

⁵ See generally, ISCR Case No. 03-21434 at 5 (App. Bd. Feb. 20, 2007) ("By design, the DOHA process encourages Judges to err on the side of initially admitting evidence into the record, and then to consider a party's objections when deciding what, if any, weight to give to that evidence. . . . Adhering to the approach contemplated by the Directive can keep the focus on the substantive merits of the case and avoid unnecessary remands resulting from a misapplication of the technical rules of evidence.").

⁶ AG ¶ 6. See also, ISCR Case No. 15-05252 (App. Bd. Apr. 13, 2016) (absent objection, a judge's decision to *sua sponte* exclude background interview was error); ISCR Case No. 10-04911 at 4 (App. Bd. Dec. 19, 2011) ("Furthermore, Applicant's arguments rely to an extent on application of an exclusionary rule. Such a rule . . . is not applicable in DOHA proceedings . . .").

⁷ Specifically, the U.S. State Department's Human Rights Report regarding China (page 1); a U.S. Government Report to Congress on Foreign Economic Collection and Industrial Espionage (pages i and 5); and U.S. State Department, Country Information on China (pages 9-10). See Ex. 4, cited source documents I, XVII, and XVIII.

After graduating from college in 1986, Applicant worked for one of the U.S. military departments as a federal civilian employee for over 10 years. He held a security clearance while employed by the federal government. (Ex. 1 at 30; Ex. 2.)

Applicant and his wife, who is also originally from China and a naturalized U.S. citizen, have been married for over 20 years. They have four children, one of whom is currently attending a U.S. military academy. They have lived in the home they own in the United States for over 15 years. Applicant's parents used to care for his children. When Applicant's father got sick and passed away, Applicant left his job and became a stay-at-home parent. He was unemployed from 2001 to 2007, when he reentered the workforce. He has been with his current employer since 2007.

Between 2007 and 2009, Applicant provided about \$54,000 in financial support to two distant relatives and a friend in China. The majority of the financial support went to a distant cousin to help rebuild the family's ancestral home in China. Applicant also provided approximately \$15,000 to an old friend who had recently lost a parent and about \$9,000 to another distant relative whose business had suffered a catastrophic downturn. Applicant does not expect anything in return for the financial support he provided these individuals. He voluntarily disclosed this information on the SCA he submitted in 2011. He also revealed on the SCA that from 2007 to 2011 he took "many short trips" to China. (Ex. 2 at 26.)

In early 2012, Applicant was interviewed on a number of occasions by a contract investigator with the Office of Personnel Management (OPM). The OPM investigator questioned Applicant regarding the financial assistance he provided his foreign relatives and friend. Applicant explained that the money he used to help his foreign relatives and friend came from: another relative who contributed \$10,000, savings, and two lines of credit secured by mortgages on his home in the United States. (Ex. 3 at 4.) Applicant also claimed that he did not visit family or friends on his trips to China, and did not maintain any lasting contacts with anyone he met on the trips. (Ex 3 at 2-3.)

Applicant now states that he did not take out lines of credit on his home to send money to his foreign relatives and friends. Instead, he refinanced his home to take advantage of lower interest rates. (Ex. 5 at 6) He also now acknowledges, through his counsel, that he visited his cousin and the ancestral family home on one of his trips to China in 2007. Applicant also states that on most of the trips to China he did visit with relatives and friends "from his home village." (Ex. 5 at 4)⁸

Applicant had weekly contact from 2006 to 2012 with the cousin he provided the bulk of the financial aid. He has no ownership interest or financial stake in the ancestral home. He has not had any contact with the friend he provided the \$15,000 since at least 2010. The distant relative who he provided \$9,000 passed away "several years ago." (Ex. 5 at 5)

⁸ Applicant's trips to China from 2007 to 2011 and arguably conflicting information regarding the trips and the source of financing were not alleged as a security concern. Accordingly, this information will only be considered in assessing Applicant's mitigation case, credibility, and whole-person factors.

Applicant and his immediate family members, to include his four U.S.-born children, are U.S. citizens. Applicant's mother, mother-in-law, and father-in-law are naturalized U.S. citizens, living in the United States. The record does not reflect that Applicant has:

- (a) any current connections or contacts in China;
- (b) provided any financial assistance to any foreign nationals beyond the three individuals identified in the SOR;
- (c) sent money to China since 2007-2009;
- (d) visited the ancestral family home in China since 2007;
- (e) financial or property interests in China; or
- (f) taken any further trips to China since 2011.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance

of protecting national security, the Supreme Court has held that “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline B, Foreign Influence

The foreign influence security concern is explained at AG ¶ 6:

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.⁹

An individual is not automatically disqualified from holding a security clearance because they have connections and interests in a foreign country. Instead, in assessing an individual’s vulnerability to foreign influence, an administrative judge must take into account the foreign government involved; the intelligence-gathering history of that government; the country’s human rights record; and other pertinent factors.¹⁰ An

⁹ ISCR Case No. 09-07565 at 3 (App. Bd. July 12, 2012) (“As the Supreme Court stated in *Egan*, a clearance adjudication may be based not only upon conduct but also upon circumstances unrelated to conduct, *such as the foreign residence of an applicant’s close relatives.*”) (emphasis added) (internal citation omitted).

¹⁰ ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (setting forth factors an administrative judge must consider in foreign influence cases).

individual with connections and contacts in a foreign country, such as China, faces a very heavy burden of persuasion due to the significant security concerns raised by such circumstances. See ISCR Case No. 06-24575 at 4 (App. Bd. Nov. 9, 2007).

Applicant's past connections and contacts in China are clearly not as strong when compared to individuals with close relatives, such as a parent or sibling, residing in China. However, his past connections and contacts are not insignificant in the security clearance context because they tend to demonstrate that he had bonds of affection or obligation to his relatives and one-time friend in China. Notably, Applicant, out of a sense of familial obligation, provided a substantial sum of money to a distant cousin to help with the restoration of the family's ancestral home in China. Accordingly, the record evidence, to include the administratively noticed facts, raises the foreign influence security concern and the following disqualifying conditions:

AG ¶ 7(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;

AG ¶ 7(b): connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information; and

AG ¶ 7(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.

The foreign influence guideline also sets forth a number of conditions that may mitigate the Guideline B concern. I have considered all the mitigating conditions in assessing the security concerns in the present case, including the following:

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.;

AG ¶ 8(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;

AG ¶ 8(c): contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation; and

AG ¶ 8(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.

An individual with relatives and other connections or interests in a foreign country faces a high, but not insurmountable hurdle in mitigating security concerns raised by such foreign ties. An applicant is not required “to sever all ties with a foreign country before he or she can be granted access to classified information.”¹¹ However, what factor or combination of factors will mitigate security concerns raised by an applicant with family members in a foreign country is not easily identifiable or quantifiable.¹²

Here, AG ¶¶ 8(a), 8(b), 8(c), and 8(f) are established. Although, as noted above, Applicant’s past connections and contacts in China are not insignificant and there is some conflict in the record regarding the nature of his past travels to China, as well as the source of the financing for the monetary aid provided by Applicant, there was no evidence submitted that he has any current connections, contacts, or interests in China.¹³ Instead, the evidence indicates that the financial assistance provided to Chinese nationals that raised a security concern, as alleged in the SOR, ended about seven years ago. The money Applicant provided to his distant relatives and one-time friend between 2007 and 2009 were essentially gifts. He did not acquire an ownership interest in the ancestral home.

Furthermore, Applicant’s ties to the United States are far more significant in comparison to his past connections and contacts in China that were alleged as a security concern in the SOR. Applicant’s immediate family, to include his wife and four children are U.S. citizens, living in the United States. His closest extended family members (i.e., mother, mother-in-law, and father-in-law) are also U.S. citizens, residing in the United States. He was educated in the United States and his entire professional career has been in the United States, to include over 10 years as a federal civilian employee. He also has a track record of handling and safeguarding U.S. classified information. Notwithstanding the heightened security concerns in this case, Applicant

¹¹ ISCR Case No. 07-13739 at 4 (App. Bd. Nov. 12, 2008).

¹² ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

¹³ Based on the written record and without the benefit of a hearing, there is no direct or circumstantial evidence from which I could even reasonably infer that Applicant currently has any connections, contacts, or interests in China. Cf. ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004) (“An unfavorable credibility determination provides a Judge with a basis for deciding to disbelieve an applicant’s testimony. However, mere disbelief of that testimony, standing alone, is not a sufficient basis for a Judge to conclude that the applicant did something . . . for which there is *no independent evidence*.”) (emphasis added).

can reasonably be expected to resolve any conflict of interest arising from his past connections, contacts, and interests in China in favor of the United States.

Whole-Person Concept

An administrative judge's predictive judgment in the security clearance context must be guided by a commonsense assessment of the evidence and consideration of the adjudicative guidelines, as well as the whole-person factors set forth in the Directive. A judge's ultimate determination must also take into account the overarching standard in all security clearance cases, namely, that any doubt raised by an applicant's circumstances must be resolved in favor of national security. I hereby incorporate my comments under Guideline B and highlight some additional whole-person factors.

Several years ago Applicant's distant relatives and an old friend in China who were experiencing financial problems reached out to him – the relatively “wealthy” American – for financial aid. Applicant was just reentering the workforce after spending the past six years as a stay-at-home parent caring for and raising his children. Notwithstanding his recent unemployment, Applicant provided the three individuals identified in the SOR a substantial sum of money. In light of the PRC's aggressive intelligence-gathering efforts against the United States and deplorable human rights record, Applicant's sense of obligation to and bonds of affection for these foreign individuals and to his family's ancestral home could have been used as a means to influence him.

However, seven years have passed since Applicant provided the financial aid to the three Chinese nationals identified in the SOR. In the intervening seven years, one of the individuals passed away and another ceased all communications. As for the cousin to whom Applicant provided the bulk of the financial aid, the record is silent as to any communication between the two since 2012. The record also does not reflect any further travel by Applicant to China after 2011 and, based on the record evidence, the last time he visited the ancestral home in China was in 2007. In short, the strength of the relationship Applicant had with these three individuals has been seriously weakened or completely severed by death or the passage of time. In contrast, Applicant's connections and interest in the United States have remained strong and only grown in the intervening seven years. Accordingly, in light of the record evidence, the foreign influence security concerns raised by the allegations in the SOR have been mitigated.¹⁴

¹⁴ A security clearance decision should be based on the most recent and accurate information available regarding an applicant's eligibility. In this case, the background investigation was completed in early 2012, or over three years before the DOD CAF adjudicated the case and issued an SOR. Under the Directive, an administrative judge does not have the authority to order a new investigation or the *sua sponte* discretion to convene a hearing to inquire about an individual's current circumstances. Instead, judges must remain fair and impartial and decide an individual's eligibility based on the record evidence, not on speculation or conjecture. See, e.g., ISCR Case No. 14-01490 at 4 (App. Bd. Apr. 15, 2016) (judge erred in finding favorable matters without evidentiary foundation in the record.)

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 (Foreign Influence)	FOR APPLICANT
Subparagraphs 1.a – 1.c:	For Applicant

Conclusion

In light of the record evidence, foreign influence security concerns raised by Applicant's past connections and contacts in China are mitigated. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge