



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 15-00042
)	
Applicant for Security Clearance)	

Appearances

For Government: Meg Foreman, Esq., Department Counsel
For Applicant: Jacob T. Ranish, Esq.

04/14/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate the security concerns raised by his connections and contacts in China. Clearance is denied.

History of the Case

On August 3, 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 hearing to establish his eligibility for access to classified information (Answer).

On December 3, 2015, a hearing was held. Applicant and his wife testified. Both sides offered exhibits for admission into the record. Government Exhibits (Gx.) 1 – 4

¹ This action was taken under Executive Order (E.O.) 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 implemented by DOD on September 1, 2006.

and Applicant's Exhibits (Ax.) 1 – 9 were admitted without objection.² The hearing transcript (Tr.) was received by the Defense Office of Hearings and Appeals (DOHA) on December 11, 2015.

People's Republic of China (PRC or China) & Uyghur People³

DOHA administrative judges may accept for administrative notice uncontroverted, easily verifiable facts regarding a foreign country or other matters derived from official U.S. Government reports. 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 the judge to assess the reliability, accuracy, and relevancy of any matter requested for administrative notice. See ISCR Case No. 08-09480 (App. Bd. Mar. 17, 2010); ISCR Case No. 05-11292 (App. Bd. Apr. 12, 2007). The parties requested that I take administrative notice of certain matters regarding China and the Uyghur people.⁴ The following pertinent facts are accepted for administrative notice:⁵

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 against the United States. Since at least the mid-2000s, the Chinese government has conducted large-scale cyber espionage against the United States, compromising a range of U.S. networks; including those of the DOD and defense contractors.
3. China has a poor human rights record, where the repression and coercion of individuals and groups is routine. PRC officials continued to employ harassment, intimidation, and prosecution of family members and associates to retaliate against rights advocates and defenders.

² The notice of appearance by Applicant's counsel, scheduling correspondence with the parties, the notice of hearing, the case management order (CMO), and the parties' e-mails identifying their exhibits are attached to the record as Hearing Exhibits (Hx.) I – VI.

³ Other recognized spellings include: Uighur, Uyguir, Uigur, and Weiwuer.

⁴ Post-hearing, Department Counsel's legal brief and supporting documentation were remarked Gx. 5 and Gx. 6, respectively.

⁵ Department Counsel's request for administrative notice, Gx. 3, is a summary of the facts contained in the source documents. Applicant stipulated that the facts regarding China contained in the notice were accurate and did not object to the admission of Gx. 3 as a summary of uncontroverted facts regarding China. See Tr. at 10-11. See *also*, Directive, Enclosure 3, ¶ E3.1.19 (Federal Rules of Evidence (F.R.E.) shall serve as a guide in DOHA proceedings and technical rules of evidence may be relaxed to permit the development of a full and complete record); F.R.E. 201; F.R.E. 1006.

4. The Uyghur are 1 of 55 nationally designated minorities in China. The PRC has engaged in the systematic repression and coercion of ethnic minorities.
5. 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, 57, was born in China. Applicant, his family, his wife and her family are Uyghurs and suffered greatly under the PRC. For instance, during the Cultural Revolution, Applicant and his wife spent time in a PRC “concentration camp.” (Tr. at 39) Despite this, Applicant was one of a few Uyghurs selected by the PRC to attend college. Also, unlike other Uyghurs, the PRC permitted Applicant to learn a foreign language. After graduating from college, Applicant was employed as a college professor in China. He was selected by the PRC for a foreign exchange program. He was required to return to China when the program ended. Instead, he fled to the United States where his future wife was enrolled as a graduate student at a U.S. university. He does not consider himself Chinese. Instead, Applicant considers himself a Uyghur, who was born in what he refers to as East Turkestan; an area that he considers occupied territory by the PRC since about 1949. (Tr. at 16-19.)

Applicant entered the United States in 1988, and became a U.S. citizen in 1999. Upon immigrating to the United States, Applicant began working as a dishwasher in a Vietnamese restaurant. He earned a master’s degree from a U.S. school in 1996. Currently, he is a software engineer, owns several properties in the United States, and has U.S.-based assets totaling over three million dollars. Applicant and his wife have been married for nearly 30 years, and have three children who were born, raised, and educated in the United States. Applicant is involved in his community. He supports youth sport and academic programs. He submitted reference letters from individuals who have known him both socially and professionally, including from the chief executive officer for his current employer. Applicant’s references note that he is dependable, family-oriented, and well respected in the community and at work.

Applicant’s parents and siblings are residents and citizens of China. He speaks infrequently to his parents, maybe three to four times a year. One of his siblings was adopted at a young age, and Applicant has had no contact with them since the adoption. He speaks to his other siblings less often than he does his parents. He sent his parents a relatively nominal amount of money, approximately \$2,000, about five years ago due to some medical issues they were experiencing. He has not provided his parents or other foreign relatives any other financial support. Applicant’s family never approved of his marriage to his wife, which remains a source of familial friction to the present day. Despite being married for nearly 30 years, Applicant cannot recall with exact accuracy the names of his wife’s siblings. (Tr. at 33-37.) Applicant testified that he

is treated as a “Yankee” when he visits his family in China, and has nothing in common with his foreign relatives. (Tr. at 26.)

Applicant has traveled to China on a number of occasions to visit his relatives. His wife and children have accompanied him on some of these trips. He has been subjected to extra scrutiny by the Chinese authorities on some of his travels to China, including having his passport and recording equipment seized and his parent’s home searched while he was visiting them. He was working as a software developer for a private U.S. firm when the overseas incidents involving PRC agents occurred. In 2015, Applicant traveled to China to visit his relatives and was accompanied by one of his children. Applicant states he will no longer travel to China because of the recent cybersecurity breach and theft of data involving the Office of Personnel Management that was reportedly committed by the PRC. (Tr. at 53-57; Gx. 1 at 19; Gx. 2 at 5-10.)

In 2005, Applicant was reprimanded by his former employer for accessing an internet site regarding the Uyghur culture and people during work hours. Applicant helped maintain the Uyghur internet site for several years, but stopped in about 2011. He was also involved with a Uyghur-American association for many years and has participated in peaceful demonstrations in the United States against the PRC, including when the PRC committed a mass atrocity against the Uyghur community in China. He has held a U.S. security clearance or public trust position since about 2009. In 2012, while working as a federal contractor, Applicant was denied access to a U.S. Government facility by another government agency because of his foreign contacts. Applicant left that employment because he was not provided an avenue by which to appeal the adverse administrative action. (Tr. at 16-18, 43-44, 52-53.)

Applicant testified that he would never do anything to jeopardize national security, even if the PRC government threatened to kill his parents and other relatives in China. He further testified that he would immediately report any such attempt to his facility security officer. (Tr. at 40-42.)

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, 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 due process proceedings are conducted “in a fair, timely and orderly manner.” Directive ¶ E3.1.10. Judges make certain 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.⁶

An individual is not automatically disqualified from holding a security clearance because they have connections and contacts 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.⁷ An 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 connections to and contact with his relatives living in China, notably, his parents, coupled with the facts administratively noticed regarding the PRC, raise the foreign influence security concern.⁸ The record evidence also raises 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(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.⁹

⁶ 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).

⁷ ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (setting forth factors an administrative judge must consider in foreign influence cases).

⁸ Applicant's connection to the brother that was adopted at a young age does not raise a security concern. Rather, it is Applicant's remaining familial connections in China, his parents, other siblings, and wife's siblings, that raise the security concern.

⁹ This disqualifying condition applies because of Applicant's wife's ties to her siblings in China. I also considered AG ¶ 7(h), as it is possible that the special attention the Chinese authorities gave to Applicant

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; and

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.

An individual with family members and other connections 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."¹⁰ 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.¹¹

Applicant communicates infrequently with his foreign relatives, including his parents. Over the last 30 years, he has developed significant ties to the United States. Additionally, he holds no affection for a government that systematically persecuted him, his family, and his people. However, he remains close to his relatives in China, as evidenced by his frequent travels to China to visit them. Notwithstanding the additional scrutiny Applicant was subjected to by Chinese authorities, the frequency of his travels to China has increased over the last several years. On some of the trips to China, including at least one where he was subjected to extra scrutiny by PRC government agents, Applicant was accompanied by his wife and children. Applicant's travels to China not only demonstrate his deep and continuing close ties to his foreign relatives, but also the substantial risk that he is willing to take to visit them.

on some of his trips to China were a not so subtle attempt to assess his vulnerability to foreign influence. However, insufficient record evidence exists to support such a conclusion.

¹⁰ ISCR Case No. 07-13739 at 4 (App. Bd. Nov. 12, 2008).

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

A clearance adjudication is an applicant's opportunity to demonstrate that, prior to being awarded a clearance, he actually possesses the judgment, reliability, and trustworthiness essential to a fiduciary relationship with this country. ISCR Case No. 10-09986 at 3 (App. Bd. Dec. 15, 2011).

Here, Applicant's decision to travel to China to visit his relatives *after* he was subjected to extra or special scrutiny by PRC agents raises unmitigated concerns that he may likewise take risk inconsistent with his security obligations.

Furthermore, even if I were to fully credit Applicant's statement that he would repel any attempts to influence him through his foreign relatives,¹² the same conclusion cannot be drawn when it comes to his immediate family members. Applicant put himself in a vulnerable position by traveling to China with his wife and children. Additionally, his wife of nearly 30 years presumably remains close to her brothers. Applicant did not rebut the legal presumption that he "has ties of affection for, or obligation to, the immediate family members of [his] spouse."¹³ Under the circumstances, the heightened security concerns raised by Applicant's familial connections and contacts in the PRC are not mitigated by his stated intent to no longer visit China.

Overall, the favorable record evidence is outweighed by the significant security concerns raised by Applicant's familial ties, both direct and indirect through his wife, to China, especially in light of the matters administratively noticed. Accordingly, I find that AG ¶¶ 8(b) and 8(c) have some applicability but are insufficient to mitigate the foreign influence security concerns.¹⁴

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.¹⁵ A judge's ultimate determination must also take into account the

¹² *But see*, ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007) ("An applicant's stated intention of what he might do in the future in a hypothetical situation is merely a statement of intention that is entitled to limited weight, unless there is record evidence that the applicant has acted in a similar manner in the past in comparable circumstances.").

¹³ ISCR Case No. 11-06619 at 3 (App. Bd. May 2, 2013).

¹⁴ See, e.g., ISCR Case No. 02-31188 (App. Bd. Mar. 8, 2005) (applicant's presence in the People's Republic of China during trips to visit his relatives, when considered in light of the totality of his ties and contacts with relatives in that country, raised unmitigated foreign influence concerns).

¹⁵ The non-exhaustive list of factors are: (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.

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. AG ¶ 2(b). I hereby incorporate my comments under Guideline B and highlight some additional whole-person factors.

Applicant's life story is compelling. Furthermore, he has been honest and cooperative throughout the security clearance process. All of which raise favorable inferences regarding his character and eligibility. However, after weighing the favorable and unfavorable evidence and considering the legal requirement that close cases must be resolved in favor of national security, I find that the favorable record evidence is insufficient to mitigate the foreign influence security concerns. Consequently, the record evidence leaves me with doubts about Applicant's eligibility for continued access to classified information.

At the same time, this adverse finding is *not* a comment on Applicant's patriotism or loyalty but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved one, such as a family member.¹⁶

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):	AGAINST APPLICANT
Subparagraphs 1.a – 1.e:	Against Applicant ¹⁷

Conclusion

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

Francisco Mendez
Administrative Judge

¹⁶ ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).

¹⁷ Except for the sibling that was adopted and Applicant has had no contact with since the adoption.