

cousins.¹ In response to the SOR, Applicant denied the allegation regarding financial support to the extent that he disputed the exact amount given and characterization of the funds as “support” instead of gifts. He admitted the remaining allegations with explanation.

Judge’s Findings of Fact and Analysis

Applicant, in his mid-40s, is married and has one child. His wife was born in China in 1986 and the two met through an internet dating site in 2010. The Judge found that Applicant’s wife “held an office job in China about the time they met” but that Applicant “stated that she never worked for the Chinese Communist Party” (CCP). Decision at 4. Applicant travelled to China for a month-long trip, after which the two were engaged. Applicant’s then-fiancée came to the United States in late 2011 under a fiancé(e) visa, and she and Applicant were married in January 2012. After the birth of their child in April 2013, Applicant’s wife experienced depression due to the child being born with a disability, and she returned to China. After three months, she came back to the United States and has not returned to China since that time. Applicant’s wife became a naturalized citizen in March 2022.

Applicant’s mother- and father-in-law live in China and are retired. The Judge found that Applicant’s wife “has minimal contact with her parents, usually involving their grandson,” and that Applicant has “minimal contact with them because he does not speak Chinese, and they don’t speak English.” *Id.*

Applicant’s wife also has two aunts, two cousins, and a friend who are resident citizens of China. The Judge found that she “has infrequent contact with the aunts, but she corresponds with the others on a weekly to quarterly basis.” *Id.* at 5. One of the wife’s cousins and her husband visited the U.S. from China in 2016, and Applicant maintains communication with the husband once or twice each year.

Applicant and his wife own their own home in the United States and their U.S.-based assets are valued at approximately \$400,000. Applicant was supported by friends, neighbors, and other associates who attested to his family being a “strong family unit” and to his wife’s successful integration into American society. *Id.* at 4.

The Judge took administrative notice of facts regarding the People’s Republic of China, which include that China has an authoritarian government dominated by the CCP and is highly aggressive in seeking sensitive and protected U.S. technology and economic intelligence. It targets the United States with active intelligence gathering programs, both legal and illegal, and is therefore “a growing threat to U.S. national security.” *Id.* at 5.

Noting that “China is known to target U.S. citizens to obtain protected information and has a significant interest in acquiring defense-related intelligence and technology,” the Judge found that Applicant’s connections to China were sufficient to raise disqualifying conditions AG ¶¶ 7(a), 7(b), and 7(e).² Decision at 9. As discussed more fully, below, the Judge went on to find the

¹ The Government did not appeal the Judge’s favorable finding on the SOR’s single Guideline H concern.

² AG ¶¶ 7(a): contact, regardless of method, 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; 7(b): connections to a foreign person, group,

concerns fully mitigated, opining that Applicant’s wife has “minimal contact” with her family in China and that “Applicant and his wife have financial and personal connections to the United States that far outweigh her former connections to China.” *Id.* at 10.

Scope of Review

The Board does not review a case *de novo* but rather addresses material issues raised by the parties to determine whether there is factual or legal error. When a judge’s factual findings are challenged, the Board must determine whether the “findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive ¶ E3.1.32.1.

When a judge’s ruling or conclusions are challenged, we must determine whether they are arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. A judge’s decision can be arbitrary or capricious if: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See* ISCR Case No. 95-0600, 1996 WL 480993 at *3 (App. Bd. May 16, 1996) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In deciding whether a judge’s rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861, 2006 WL 2457675 at *2 (App. Bd. Jun. 2, 2006).

When an appeal issue raises a question of law, the Board’s scope of review is plenary. *See* DISCR OSD Case No. 87-2107, 1992 WL 388439 at *3-4 (App. Bd. Sep. 29, 1992) (citations to federal cases omitted). If an appealing party demonstrates factual or legal error, then the Board must consider the following questions: (1) Is the error harmful or harmless?; (2) Has the nonappealing party made a persuasive argument for how the judge’s decision can be affirmed on alternate grounds?; and (3) If the judge’s decision cannot be affirmed, should the case be reversed or remanded? *See* ISCR Case No. 02-08032, 2004 WL 1434394 at *2 (App. Bd. May 14, 2004).

Discussion

On appeal, the Government challenges two of the Judge’s factual findings and argues that his application of the Guideline B mitigating conditions and analysis under the Whole-Person Concept were arbitrary, capricious, and not supported by the record evidence. The Government’s arguments are persuasive, and for the following reasons, we reverse the Judge’s favorable decision.

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; 7(e): shared 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.

Challenges to Findings of Fact

The Government first challenges the Judge’s finding that Applicant “stated that [his wife] never worked for the [CCP].” Appeal Brief at 7. In support of this, the Government points to the following pertinent portions of the record for what Applicant did state about the connection. During his background interview, Applicant disclosed that, “In China, [his wife] worked for the Government of China as a ‘contract issuer.’” Government Exhibit (GE) 3 at 17. In response to the SOR, he explained that, “From 2007 until 2008, her first job in China was as a contractor for a local district office, where she performed administrative tasks related to issuing construction permits.” SOR Response at 5. At hearing, Applicant testified that his wife was a contractor, not a direct employee, of the local government entity that issued construction permits, but that he was unsure “if the Local Government is considered the People’s Republic of China Government [or] if it’s just like the City Government.” Tr. at 33.

Contrary to the Judge’s finding, we see nothing in the record that supports Applicant having stated affirmatively or definitively that his wife never worked for the CCP. The Judge’s finding is not supported by the record; however, whether this error regarding a one-year-long professional status from over fifteen years before the hearing was harmful is less clear and ultimately need not be addressed in light of the Government’s other persuasive arguments.

To that end, the Judge also found that Applicant’s wife corresponds with her cousins on a weekly or quarterly basis, but that she “has minimal contact with her parents” and “infrequent contact with the aunts.” Decision at 4, 5. The Government charges that this finding about the wife’s contacts with her Chinese family members is “a significant understatement of what is reflected in the evidentiary record, particularly with regard to her parents.” Appeal Brief at 7. The Government’s argument has merit and, because the finding was central to the Judge’s mitigation analysis, it is most effectively addressed in that context.

Application of Mitigation Conditions

After finding that Applicant’s ties to China were sufficient to raise a security concern under Guideline B, the Judge went on to conclude that the concern was mitigated by application of AG ¶¶ 8(a), 8(b), and 8(c).³ On appeal, the Government challenges the Judge’s mitigation conclusion as unsustainable in that it “relies on material factual errors” and fails to analyze Applicant’s mitigation evidence considering the high bar established by Appeal Board precedent in cases involving countries hostile to the United States. Appeal Brief at 12. We agree.

³ 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 United States; 8(b): there is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; 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.

AG ¶ 8(c)

Turning first to the factual error and its harmful impact, the Government challenges the Judge's application of AG ¶ 8(c) as having relied on his erroneous finding that Applicant's wife has "minimal contact" with her family in China and as contrary to Appeal Board precedent.

The SOR alleged – as separate concerns – that Applicant's wife's parents (SOR ¶ 1.b) and her two aunts, two cousins, and one friend (SOR ¶ 1.d) are all resident citizens of China. Despite these distinct allegations and the Judge's specific factual findings that the wife "has minimal contact with her parents" and "infrequent contact with the aunts," but "corresponds with the others on a weekly to quarterly basis,"⁴ he identified neither those distinct relatives nor their differing frequencies of contact in his analysis. Instead, the Judge simply and summarily found that the wife "has minimal contact with her family in China." Decision at 10. The Judge's analysis and application of AG ¶ 8(c) are problematic for several reasons.

First, the Judge's application of AG ¶ 8(c) stems from his characterization of the wife's contacts with her family, particularly her parents, as "minimal." We have previously held, however, that "[t]he concern in Foreign Influence cases arises from the *nature* of an applicant's foreign ties, which is not evinced by the current state of communications in a vacuum." ISCR Case No. 22-00364, 2023 WL 11945240 at *3 (App. Bd. Jun. 22, 2023) (emphasis in original). While the frequency of an individual's contact with foreign family is a factor to be considered in evaluating the concern, it alone is not dispositive.

Applicant testified that his wife video chats with her parents and that, while "they used to talk once every week or two," she has "been avoiding them" and reduced that frequency to about monthly in response to Applicant's security clearance adjudication and concern about him losing his job. Tr. at 41. The Judge's "minimal contact" finding appears to be based exclusively on a snapshot of Applicant's wife's contact with her parents taken as of the hearing. It is well-established, however, that an individual's actions prior to the initiation of the national security adjudication process are illuminating of his or her unmotivated conduct and should be given weighty consideration.⁵ The record here reflects that Applicant's wife reduced her frequency of communication with her parents, not because the relationship itself changed, but to improve Applicant's chances of obtaining a security clearance, which undermines any mitigative weight afforded to that reduction. The Judge should have considered the wife's pre-adjudication contact, the reason for the reduction, and the overall nature of her parental relationship. He did not, and his application of AG ¶ 8(c) was error. Even if her current monthly parental contact could reasonably be considered "minimal" frequency in the context of Guideline B, the *nature* of the wife's ties to her parents appears unrelated to and unaffected by that reduction.

Moreover, as the Government correctly notes, application of AG ¶ 8(c) contemplates contact so infrequent *and* casual that it is unlikely to create a risk of foreign influence or

⁴ Decision at 4, 5.

⁵ The Appeal Board has routinely held that the timing of resolving security concerns is relevant in evaluating its mitigative value. *See, e.g.*, ISCR Case No. 19-01911, 2020 WL 7378998 at *5 (App. Bd. Nov. 4, 2020).

exploitation. Both elements are necessary, and they are not simply, or even necessarily correlated.⁶ Even if the Judge could sustainably find that Applicant’s wife’s communications with her parents are “infrequent,” nothing in the record – to include the Judge’s finding that the communications “usually involv[e] their grandson” – rebuts the presumption that the contacts are not casual.⁷

Looking beyond the parental relationship, Applicant testified that his wife and her two cousins “were raised as sisters,” and that she talks with one of them every week and the other every three or four months. Tr. at 42. The Judge’s factual findings accurately captured this frequency of contact. In his subsequent analysis, however, the Judge not only failed to articulate how those contacts amount to both “casual” and “infrequent,” but he failed to address the wife’s relationship with her cousins *at all*. A judge’s written decision must articulate a rational basis for its conclusions for *all* SOR allegations, not just some of them.⁸ Here, the evidence reflects a strong lifelong relationship and ongoing regular and frequent contact. The Judge’s failure to address this SOR concern, especially in light of his own finding regarding the wife’s contact with her cousins, was material error. Having reviewed the record, we find no rational basis for the Judge’s application of AG ¶ 8(c).

AG ¶¶ 8(a) and 8(b)

Implicit in the Judge’s application of the disqualifying conditions was a finding that Applicant’s ties to China create both a heightened risk of foreign exploitation or coercion and a potential conflict of interest. The Judge concluded, however, that Applicant’s wife’s “former connections to China” and “minimal contact” with her Chinese family were “far outweigh[ed]” by the couple’s personal and financial connections to the U.S. Decision at 10. On appeal, the Government argues that the Judge failed to address an applicant’s very heavy burden to mitigate concerns involving countries hostile to the U.S. and that his resulting mitigation analysis is deficient and unsustainable. Here again, we agree.

We have long recognized that there is a rational connection between an applicant’s family ties in a hostile country,⁹ even if that family has no connection with the foreign government, and the risk that the applicant might fail to safeguard classified information. *See* ISCR Case No. 01-26893, 2002 WL 32117729 at *6 (App. Bd. Oct. 16, 2002) (“[H]uman experience shows that people have engaged in espionage or committed deliberate security violations for a broad range of reasons, including succumbing to threats made by a foreign entity against a third party for whom the target has ties of love or affection.”). Accordingly, an applicant with relatives in a country that is hostile to the U.S. has a very heavy burden of persuasion as to mitigation. *Id.* at *7.

⁶ *See* ISCR Case No. 02-09907, 2004 WL 794277 at *7 (App. Bd. Mar. 17, 2004).

⁷ *See* ISCR Case No. 00-0484, 2002 WL 31341761 at *4 (App. Bd. Feb. 1, 2002).

⁸ *See* ISCR Case No. 03-22883, 2006 WL 2457677 at *3 (App. Bd. Jan. 19, 2006) (citing Directive ¶ E3.1.25). *See also* ISCR Case No. 01-03107, 2002 WL 32114507 at *4 (App. Bd. Aug. 27, 2002) (“[A] judge *must* consider and evaluate an applicant’s conduct under any and all Guidelines under which it has been alleged in the SOR.”) (emphasis in original).

⁹ “[A]ny country whose policies consistently threaten U.S. national security may be viewed as hostile for purposes of national security adjudications.” ISCR Case No. 17-04208, 2019 WL 4415696 at *4 (App. Bd. Aug. 7, 2019) (noting that relatives in a country hostile to the U.S. is one reason explicitly cited by the Supreme Court for denying a security clearance) (citing *Dept. of Navy v. Egan*, 484 U.S. 581, 529 (1988)).

We have already addressed why the Judge's use of "minimal" to describe the wife's contacts to China was problematic and, for the same reasons, his characterization of her connections to China as "former" is also erroneous. This leaves the couple's financial and personal connections to the U.S. as the bases for the Judge's application of AG ¶¶ 8(a) and 8(b).

In his identification of the mitigating conditions, the Judge cited Applicant's and his wife's U.S. citizenship, \$400,000 in U.S.-based assets, and their 12-year-old disabled child who was born and lives here as the connections to the United States that "far outweigh" Applicant's ties to China. The Judge failed, however, to supply a reasonable explanation for how those factors are sufficient to overcome the heightened risk created by Applicant's foreign ties, or to meet Applicant's very heavy burden of establishing that he is unlikely to be placed in a position of having to choose between those ties and U.S. interests or that he would be able to resolve any conflict of interest in favor of the United States.

In summary and contrary to the Judge's analysis, the evidence supports that Applicant's wife's bonds of affection for her family in China are deep and ongoing, and there is nothing in the record to rebut the presumption that, through her, Applicant shares a sense of affection or obligation to that family.¹⁰ Despite his acknowledgment of the current relevant geopolitical situation in China, the Judge failed to recognize Applicant's very heavy burden to demonstrate that his in-laws and extended family are not a means of coercion or exploitation. Accordingly, application of AG ¶¶ 8(a) and 8(b) is unsupported by the record and unsustainable.

Conclusion

Applicant's conduct and character are not an issue in this case. Rather, his circumstances create the security concerns because commonsense suggests that even those whose character is unimpeachable could be faced with situations that would seriously tempt them to place the safety of loved ones ahead of other competing interests.

Further, 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). The standard applicable in national security decisions is that eligibility may be granted only when "clearly consistent with the interests of the national security." *Egan*, 484 U.S. at 528. "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." AG ¶ 2(b).

The Government has met its burden on appeal of demonstrating reversible error below. Based on the record before us, the Judge's favorable decision in this matter was arbitrary and capricious in that it failed to examine relevant evidence and consider relevant factors and important aspects of the case, failed to articulate a satisfactory explanation for its conclusions, and offered an explanation for the decision that runs contrary to the record evidence. It is not sustainable under

¹⁰ There is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. *See ISCR Case No. 01-03120*, 2002 WL 31341788 at *3 (App. Bd. Feb. 20, 2002). This is true even though an applicant has minimal or no direct contact with the relatives. *See ISCR Case No. 07-17673*, 2009 WL 1281213 at *2 (App. Bd. Apr. 2, 2009) (Despite not speaking the same language and having limited direct contact with his parents-in-law, Applicant had a "legitimate, serious interest" in their welfare due to "his loving relationship with his wife.").

the *Egan* standard and must be reversed. *See* ISCR Case No. 22-01002 at 4 (App. Bd. Sep. 26, 2024) (Reversal is appropriate when the Board concludes from the record that a contrary formal finding or overall grant or denial of security clearance eligibility is the clear outcome.).

Order

The favorable decision in ISCR Case No. 24-02470 is **REVERSED**.

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: Allison Marie

Allison Marie
Administrative Judge
Member, Appeal Board

Signed: Jennifer I. Goldstein

Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board