

KEYWORD: Guideline B

DIGEST: The Judge’s decision fails to address important aspects of the case and appears to apply a standard other than the one specified in Egan and the Directive. Favorable decision remanded.

CASE NO: 14-05986.a1

DATE: 10/14/2016

DATE: October 14, 2016

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 14-05986
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 21, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 30, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Roger C. Wesley granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's favorable decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand the case to the Judge.

The Judge's Findings of Fact

Applicant married his wife in Taiwan. They have two children, both of whom were born in the U.S. Applicant's mother-in-law is a citizen and resident of Taiwan, as are his two brothers-in-law. Applicant's mother-in-law is a homemaker with no political or military ties in Taiwan. His two brothers-in-law both served in the Taiwanese military. Applicant has little contact with these in-laws, although his wife maintains bi-monthly contact with them.

Applicant's wife has a bank account in Taiwan so that she can have access to funds when traveling to that country. Applicant's U.S. assets are considerably greater, however. These include checking accounts, retirement accounts, two homes for which the mortgages are about satisfied, etc. Applicant enjoys an excellent reputation for the quality of his job performance. His facility security officer considers him to be of high moral character and to possess good judgment.

Taiwan is a multi-party democracy with a good human rights record. It has experienced increased contacts with the People's Republic of China (PRC) over recent years. Taiwan is one of the most active collectors of U.S. economic and proprietary information, as evidenced by recent espionage convictions of those acting on behalf of Taiwanese companies. In addition, the PRC is also interested in obtaining U.S. protected information by any means including espionage, as evidenced by the indictment of Chinese citizens for that offense. The PRC can be expected to acquire dual-use technologies from the U.S. and Taiwan.

The Judge's Analysis

The Judge concluded that Applicant's Taiwanese in-laws and open bank account in that country entail a heightened risk of foreign exploitation.¹ He observed that

[I]ittle is known about the backgrounds of Applicant's mother-in-law and brothers-in-law. All that is known about Applicant's mother-in-law is that she is a homemaker who occasionally assists with her family's retail car business and does not rely on any financial support from Applicant and his wife. Even less is known about his brothers-in-law who each served in Taiwan's military service. Decision at 13.

He went on to state that none of Applicant's foreign relatives have any identified associations with known Taiwanese intelligence or military organizations. He concluded that any risk arising from these persons is "manageable," insofar as Applicant has infrequent direct contact with them. *Id.* at

¹Directive, Enclosure 2 ¶ 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."

14. Accordingly, the Judge gave favorable application to mitigating condition 8(a).²

In the whole-person analysis, the Judge cited to evidence that Applicant's wife is a naturalized citizen with advanced degrees from U.S. universities, as well as to the evidence of good character and job performance that he submitted. He stated his opinion that the chances of coercion, pressure, or influence being brought through Applicant's foreign relatives is "minimal." *Id.*

Discussion

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 applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. The standard applicable in security clearance decisions "is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the decision to determine whether: 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. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

Department Counsel's argument persuades us that the Judge's findings and conclusions do not support his ultimate favorable decision. For example, he stated that the record contained little information about the backgrounds of Applicant's foreign relatives. The Judge's comment on its face does not support his conclusion that the security concerns arising from Applicant's relatives in a country that practices economic espionage against the U.S. and which has a challenging relationship with the PRC were mitigated.

We note the Judge's finding that Applicant's own direct ties with his wife's Taiwanese relatives are minimal. It is well settled, however, that there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of his or her spouse. *See, e.g.*, ISCR Case No. 11-04980 at 4 (App. Bd. Sep. 21, 2012). Moreover, Applicant's wife's contacts with her relatives are not infrequent, occurring as they do at apparently regular, bi-monthly intervals. These contacts underscore the ties that presumptively exist between Applicant and his in-laws. The Judge failed to address this aspect of the case, which impairs his favorable conclusions.

²Directive, Enclosure 2 ¶ 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."

The Judge's conclusion that Applicant's security concerns were "manageable" appears implicitly to acknowledge that all doubt about Applicant's clearance eligibility has not been resolved. The Judge appears to apply a different, more ambiguous, standard to Applicant's case than the one articulated in *Egan* and required by the Directive. As it stands, a reasonable person could interpret the Judge's decision as having required the Government affirmatively to demonstrate that Applicant's foreign in-laws pose a threat to U.S. interests rather than to require Applicant to demonstrate that his family's circumstances fall within the mitigating conditions. See ISCR Case No. 11-04980, *supra*. Moreover, the Judge's whole-person analysis does not address significant contrary record evidence.³

The Judge's decision fails to address important aspects of the case and appears to apply a standard other than the one specified in *Egan* and the Directive. We conclude that the best resolution is to remand the case to the Judge for a new decision that addresses the errors discussed above.

³We note Applicant's testimony that he had been denied a security clearance in 2013 by another Government agency, due to his family connections in Taiwan, job-related travels in the PRC, and a couple of security infractions. Tr. at 97-98. He also testified that, during a trip to the PRC in the mid-2000s, someone broke into his hotel room and stole a laptop computer. Applicant held a clearance at this time. Tr. at 99. These matters were not alleged in the SOR. However, they are pertinent in evaluating the sufficiency of the Judge's favorable whole-person analysis. See, e.g., ISCR Case No. 12-04554 at 2, Note 1 (App. Bd. Jul. 25, 2014). The incident with the laptop suggests that Applicant may already have come to the attention of persons in the PRC who have an interest in acquiring U.S. information.

Order

The Decision is **REMANDED**.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board