



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



In the matter of:)
)
-----) ISCR Case No. 16-01216
)
Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: Sterling L. DeRamus, Esq.

08/12/2020

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for access to classified information due to his marriage to a Chinese citizen who now has permanent resident status in the United States. Applicant met his burden to present sufficient evidence to explain, extenuate, or mitigate the security concern for foreign influence based on family ties via his spouse to China. Accordingly, this case is decided for Applicant.

Statement of the Case

Applicant completed and submitted a Standard Form (SF) 86, Questionnaire for National Security Positions, the official form used for personnel security investigations, on June 11, 2015. (Exhibit 1) This document is commonly known as a security clearance application. He provided a statement during the course of a background investigation in February 2016. (Exhibit 4) Thereafter, on October 15, 2016, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified

information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guideline known as Guideline B for foreign influence due to his relationship with his fiancée who was then a citizen of and resident in China.

Applicant, with assistance of counsel, answered the SOR on November 17, 2016. He denied the SOR factual allegation, explaining he had married his fiancée in July 2016 and she was legally residing with him in the United States. The answer was extensive, consisting of a six-page legal memorandum and six enclosures, some of which will be referred to as evidentiary exhibits herein. He also requested an in-person hearing before an administrative judge.

Department Counsel indicated they were ready to proceed on January 25, 2019. Between January 30, 2019, and August 1, 2019, the case was assigned to three administrative judges before it was assigned to me on August 9, 2019.

The hearing took place as scheduled on September 26, 2019. Both Department Counsel and Applicant offered documentary exhibits, which were admitted as Government Exhibits 1-4 and Applicant's Exhibits A-B. Applicant as well as his spouse were both called as witnesses and were subject to cross-examination by Department Counsel.

I took administrative or official notice, which is similar to judicial notice, of certain facts concerning the country of China per Department Counsel's written request. (Exhibit 3) The essential facts about China are discussed below. The hearing transcript (Tr.) was received on October 11, 2019.

Procedural Matters

At the close of the evidence, I granted Department Counsel's motion to amend the SOR to conform to the evidence admitted, without objections, to the following factual allegations under Guideline B: (a) Your spouse is a citizen of China and a resident of the United States; (b) Your mother-in-law and father-in-law are citizens of and residents in China; and (c) Your brother-in-law is a citizen and resident of China. (Tr. 11-13, 101; Appellate Exhibit I)

Findings of Fact

Applicant is a 66-year-old employee who is seeking to retain a security clearance for his job as a staff engineer with a company that does business in the defense industry. He has worked for this company since 2008. He describes his job as a lead systems engineer working in multiple fields with an emphasis in satellite communications. (Tr. 28, 71) Before his current job, he was self-employed as a consulting engineer during 1996-2008. Applicant is a longtime clearance holder. He has worked for various companies, including his own firm, in the defense industry during the last 40 years. His most recent security clearance was granted in 2011. (Exhibit 1 at 27)

Applicant has a bachelor's degree in electrical engineering, awarded in 1976, and he has a master's degree in the same field, awarded in 1978. He also earned a master's degree in operations research in 1984. He married for the first time in July 2016 to his current spouse, a citizen of China. (Enclosure 3 to Answer) He has no children.

The genesis of this case goes back to 2013-2014 when Applicant decided he wanted to pursue marriage with an Asian woman and used the services of an online match-making service for that purpose. He informed his employer of his intention during a debriefing regarding foreign travel to China in 2014 when he traveled to meet a Chinese woman. (Exhibit 2) That same Chinese woman visited him in the United States. Shortly thereafter in January 2015, the FBI interviewed Applicant concerning his contact with the Chinese citizen. Upon completion of the interview, the FBI informed the company facility security officer (FSO) that the interview went well, nothing unusual was occurring, and they were satisfied that nothing was going on that the company needed to be concerned about. Subsequently, Applicant and the Chinese woman decided to not pursue the relationship further.

Applicant met the woman who is now his spouse in 2015 using the same online medium he used previously. The initial contact was by e-mail that gradually increased from a few times weekly to daily as well as two video calls per week. He traveled to China to meet her in 2015 or early 2016. She also traveled to the United States before accepting his proposal of marriage. She returned to the United States in June 2016 and they married the following month. She has since resided here with Applicant.

Applicant's spouse was born in China in 1971. She earned a bachelor's degree in textile engineering from a Chinese university in 1994. She then worked as a purchasing agent for the next 20 years or so for several trading companies in the import-and-export business. (Tr. 90-91) Some of the trading companies were Chinese-owned businesses while two were foreign-owned businesses (Czech Republic). She has no previous marriages and she has no children.

Applicant's spouse entered the United States in 2016 on a conditional basis as a fiancée of a U.S. citizen, also known as the fiancée visa. In September 2016, based on her marriage to Applicant, her immigration status was adjusted to conditional resident status, and she was issued the so-called Green Card. (Enclosure 2 to Answer) In July 2018, her conditional resident status was extended for 18 months, as her initial Green Card was due to expire in September 2018. (Exhibit B) She was granted permanent resident status in August 2019 based on a bona fide marriage to Applicant, and she was issued a Green Card valid for ten years. (Exhibit A)

Applicant's spouse spent the first year or so getting settled in her new home. She has not been employed in the United States, but since 2018 she has been a full-time student pursuing an MBA degree on full scholarship at a state university. (Tr. 35) She is studying business data analytics, and she anticipates she will complete the MBA program in the summer of 2020. She is highly focused on achieving good grades, and

she intends to turn her attention to studying for the U.S. citizenship test upon completion of the MBA program.

Applicant's spouse maintains contact with her immediate family in China, consisting of her mother, father, and brother. She speaks with them via a Chinese multi-purpose messaging, social media, and mobile payment app, which is on her smart phone. Due to the language barrier, Applicant does not participate in the calls other than a greeting or wave. Applicant and his spouse traveled to China in February 2018 for the New Year's holiday and Applicant met his in-laws during the trip. Otherwise, he has had no in-person contact with his Chinese in-laws.

Applicant's spouse's father and mother, age 83 and 76, have both been retired for more than 20 years. Neither were employed directly by the Chinese government nor the Chinese military. His spouse speaks with her parents at least weekly. Her brother works as a purchasing agent for a manufacturing business (large machinery). He is not employed directly by the Chinese government or military. Given the time difference and her brother's job, she has little communication with her brother. (Tr. 87) She has the same amount of contact with her sister-in-law who works as a bookkeeper for a local college in China.

Applicant does not have business, financial, or property interests in China. The same is true for his spouse except for a bank account in China, which she has maintained for occasional online shopping at a Chinese online retail business. She has not used the bank account for months and estimated a balance of less than US \$1,000. She has not made a deposit to the account since she departed China, and she is simply spending down the remainder.

As a longtime clearance holder, Applicant does not discuss his work with his spouse, other than the general unclassified work that he performs for the company. (Tr. 62) He expressed a good understanding of and sensitivity to the security issues involved with his spouse's family members in China. (Tr. 66-68) His spouse now knows he has a security clearance due to her participation in the hearing, but he did not inform her earlier, although she may have learned about the matter during his telephone discussions with his attorney. (Tr. 62) His spouse stated that she told her parents that Applicant is an engineer, but that was the extent of the conversation. (Tr. 83)

Concerning the country of China, Department Counsel's request for administrative notice contains an extensive discussion of the security concerns associated with China. (Exhibit 3) The essential facts about China are the following: (1) China is an authoritarian state in which the Chinese Communist Party is the paramount authority; (2) China (along with Russia) is the most aggressive collector of intelligence (both industrial and military) related to U.S. information and technology; and (3) China has a poor record of human rights regarding respect for the integrity of the person, respect for civil liberties, respect for political rights, corruption and lack of transparency in government, worker rights, as well as discrimination, societal abuses, and human trafficking.

Law and Policies

This case is adjudicated 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.

It is well-established law that no one has a right to a security clearance.¹ As noted by the Supreme Court in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”² Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.³ The Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.⁴

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁵ Under the Directive, the parties have the following burdens: (1) Department Counsel has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted; (2) an applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven; and (3) an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁶

Discussion

The gravamen of the SOR under Guideline B for foreign influence is whether Applicant’s ties to China should disqualify him from access to classified information. Under Guideline B for foreign influence, the suitability of an applicant may be questioned or put into doubt due to foreign contacts and interests. The overall concern is set forth in AG ¶ 6 as follows:

¹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

² 484 U.S. at 531.

³ 484 U.S. at 531.

⁴ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

⁵ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁶ Directive, Enclosure 3, ¶ E3.1.14 and E3.1.15.

Foreign contacts and interests, including but not limited to business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

The guideline notes several conditions that could raise a security concern under AG ¶ 7. The following are potentially applicable in this case:

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; and

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 classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology.

The starting point for the analysis is the country of China. Suffice it to say, the U.S. Government views the behavior of the Chinese government as presenting a serious national security concern. The heightened-risk element is easily satisfied. Given Applicant's family ties to China, via his spouse, the Government has established its case under Guideline B. The above disqualifying conditions are raised by the evidence.

The guideline provides that certain facts and circumstances may mitigate foreign influence concerns. Given the evidence here, I considered the following mitigating conditions:

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; and

AG ¶ 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.

China's relationship with the United States and the heightened risk it presents place a heavy burden on Applicant to mitigate the security concern. With that said, Applicant has multiple indicators of a mature, stable, responsible, and trustworthy person. He was serious, candid, and credible at the hearing. He appears to have cooperated fully and provided truthful information during the security clearance process and during an interview with the FBI. He made a good impression upon me during the hearing.

I have considered the totality of Applicant's ties to China via his spouse and I am not unduly concerned. Applicant has a demonstrated record as a reliable clearance holder and employee in the defense industry for the last 40 years or so. He expressed a good understanding of and sensitivity to the security issues involved with his spouse's family members in China. (Tr. 66-68) Although the family ties to China still count and cannot be dismissed out of hand, the strength of those ties are diminished given the facts and circumstances here. On balance, his ties to the United States are far stronger than the largely nominal family ties to China.

Given the totality of facts and circumstances, I conclude that it is unlikely Applicant will be placed in a position of having to choose between the interests of the United States and the interests of the Chinese government or her family members who have Chinese citizenship. I further conclude there is no conflict of interest, because Applicant has developed such deep and long-standing relationships and loyalties in the United States that he can be expected to resolve any potential conflict of interest in the favor of the United States. AG ¶ 8(a) is partially applicable. AG ¶ 8(b) is applicable.

Following *Egan* and the clearly consistent standard, I have no doubts or concerns about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive information. In reaching this conclusion, I weighted the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. Accordingly, I conclude that he met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline B:	For Applicant
Subparagraphs 1.a – 1.c:	For Applicant

Conclusion

It is clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Eligibility granted.

Michael H. Leonard
Administrative Judge