

DATE: April 27, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-32166

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

Edward W. Loughran, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant, a 25-year-old native-born U.S. citizen, is currently employed as an electrical engineer for a major defense contractor since August 2002, and he is seeking a security clearance for that employment. In June 2001, Applicant married a citizen of Malaysia who was a student at a U.S. university; she is now a U.S. permanent resident alien. Based on his marriage, Applicant has in-laws who are citizen residents of Malaysia. Although his connections to Malaysia raise a security concern for foreign influence under Guideline B, Applicant has successfully mitigated the security concern. Clearance is granted.

### **STATEMENT OF THE CASE**

On July 24, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline B for foreign influence. Applicant answered the SOR on September 5, 2003, and he requested a clearance decision based on a hearing record.

Department Counsel indicated they were ready to proceed on October 29, 2003, and the case was initially assigned to another administrative judge the same day. On November 13, 2003, the case was reassigned to me due to case load considerations. Thereafter, a notice of hearing was issued to the parties scheduling the hearing for December 15, 2003. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript January 6, 2004.

### **RULINGS ON PROCEDURE**

At the close of the evidence, I moved to amend the SOR to conform to the record evidence as follows:

- Subparagraphs 1.a and 1.d were amended by deleting the figure \$20,000.00, substituting therefor the figure \$50,000.00.
- Subparagraph 1.b was amended by deleting the words stepsister, substituting therefor the words half sister.

Neither Applicant nor Department Counsel objected, and the SOR was amended accordingly.

### FINDINGS OF FACT

In his written answer, Applicant denied the SOR allegations with explanations that appeared to admit to the underlying factual allegations. After a thorough review of the record evidence, I make the following essential findings of fact:

Applicant is a 25-year-old married man and a native-born U.S. citizen. He holds bachelor's and master's degrees in electrical engineering. He finished his studies in June 2002, and he started his current employment in August 2002.

While an undergraduate student, Applicant became friends with another male student who was a citizen of Malaysia. After completing his undergraduate education, Applicant and his Malaysia friend traveled to Malaysia. For Applicant, the trip was a vacation while his friend visited his family. Applicant experienced no problems during this trip. Upon their return to the U.S., Applicant relocated to another state to attend graduate school, and his friend remained at the undergraduate school until he returned to Malaysia in December 2000. Since then, Applicant maintained contact with the friend by e-mail until December 2001 when he saw his friend while in Malaysia for his ceremonial wedding. The friend did not attend the wedding ceremony and Applicant saw his friend briefly before Applicant returned to the U.S.

Applicant met his spouse in January 2001 during graduate school where she was obtaining a master's degree in chemical engineering. Six months later, on June 25, 2001, they married in the U.S. As discussed above, in December 2001 they traveled to Malaysia for a ceremonial wedding with his spouse's family and friends. Neither Applicant nor his spouse experienced any problems or difficulties during this trip.

Based on his marriage, Applicant has Malaysian in-laws ( mother-in-law, father-in-law, stepfather-in-law, and half sister-in-law). In addition, Applicant's spouse has several half brothers and sisters by her father's second marriage. Applicant's spouse has essentially no relationship with these siblings. She also does not have a close relationship with her father because her parents split when she was young and she was essentially raised by her mother and stepfather. Applicant's spouse maintains contact with her family in Malaysia by making twice-monthly telephone calls to her mother. As Applicant does not speak Malay (other than a few words), Applicant does not participate in the calls. Other than his trips in December 2001 and June 2003, Applicant has had no contact or real communication with his Malaysian in-laws.

The stepfather-in-law is retired from the Malaysian army after serving as a sergeant. As a result, he receives a monthly pension. He retired from the military before he married Applicant's mother-in-law. Otherwise, none of the Malaysian family members are connected to or employed by the Malaysian government.

Now a permanent resident alien, Applicant's spouse entered the U.S. on a student visa. To pay for her studies, Applicant obtained a loan from the Malaysian government administered by a governmental agency called MARA (Exhibit A). She is not required to return to Malaysia to work as a term or condition of the loan. For her undergraduate studies, she earned a GPA of 3.59 resulting in 100% of the loan being converted into a scholarship, eliminating any debt. She obtained another loan for \$50,000 from MARA for her master's degree program. With her GPA of 3.01, she does not believe the entire loan will be converted into a scholarship, and she estimates having to repay approximately 10% to 25% of the loan. She anticipates receiving a final accounting in June 2004. Whatever the amount, she plans on repaying the loan from salary she expects to earn upon her employment as a chemical engineer. If unable to make payments, she believes either Applicant or Applicant's parents will assist her.

Applicant's father testified during the hearing, and he credibly asserted that he and his wife are both willing and able to assist their son and daughter-in-law in repaying the student loan to MARA. Owning their \$290,000 home outright, the father's annual salary of more than \$100,000, and possessing other substantial financial assets, Applicant's parents are willing and able to lend or gift the money if necessary.

Applicant also believes he has the ability repay the loan if necessary. In support of his belief, Applicant points to his annual salary of more \$70,000, and about \$50,000 in financial assets (Exhibit C).

The U.S. Department of State has a continuing concern about the possibility of terrorism against American citizens and American interests in Malaysia (Exhibit 2). The focus of the concern is for U.S. citizens traveling to the islands and in the coastal areas of eastern Sabah, a Malaysia State near the southern Philippines. Applicant's wife credibly testified her family lives in western Malaysia, near the city of Georgetown, approximately 1,000 miles away (and across the South China Sea) from Sabah (Exhibit B). She, like Applicant, has never traveled to Sabah, and they have no plans to go. During their most recent trip to Malaysia in June 2003, Applicant and his spouse experienced no problems or difficulties. Applicant also makes it a point to review the State Department's travel advisory before traveling to Malaysia.

After receiving the SOR, Applicant and his spouse discussed what they would do if a member of her family was taken hostage or otherwise used as leverage in an effort to obtain something from Applicant or his spouse. They agreed the best course of action would be to turn the matter over to law enforcement.

## POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the record evidence as a whole, the following security guidelines are most pertinent here: Guideline B for foreign influence.<sup>(2)</sup>

## BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(3)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(4)</sup> The government has the burden of proving controverted facts.<sup>(5)</sup> The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.<sup>(6)</sup> The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.<sup>(7)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(8)</sup> Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.<sup>(9)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(10)</sup>

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(11)</sup> 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.

## CONCLUSIONS

Under Guideline B for foreign influence, a security concern may exist when an individual's immediate family,

including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries, or financial interests in other countries, are also relevant if they make an individual potentially vulnerable to coercion, exploitation, or pressure. Common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service. Concerning family ties, the language of Guideline B does not require a conclusion that an unacceptable security concern exists based solely on an applicant's family ties in a foreign country. [\(12\)](#) An administrative judge must consider the record evidence as a whole in deciding if the facts and circumstances of an applicant's family ties pose an unacceptable security concern under Guideline B. [\(13\)](#)

Here, based on the record evidence as a whole, the government has established its case under Guideline B. Applicant's spouse is a citizen of Malaysia. In addition, his spouse's family members (mother, father, stepfather, and half sister) are resident citizens of Malaysia, and I presume, based on the relationship, Applicant has some feelings of affection or obligation toward his spouse's family members. Accordingly, DC 1 [\(14\)](#) applies against Applicant except for Applicant's Malaysia friend as the record shows Applicant has had no contact with him since December 2001.

Foreign travel may be a security concern, but here DC 6 [\(15\)](#) does not apply based on Applicant's travel to Malaysia. The concern expressed by the government is the potential for terrorist activity in Malaysia. But as shown by Applicant, neither he nor his spouse has ever traveled to that area of Malaysia, and likewise, Applicant's in-laws live approximately 1,000 miles away from the area of concern. Although it is impossible to completely rule out the risk of terrorism, the geography involved here shows the risk is relatively low if not remote.

Contrary to Department Counsel's argument, DC 8 [\(16\)](#) does not apply based on the spouse's student loan. The record shows the spouse is completely responsible for this loan, and MARA has no claim against Applicant. His marriage did not change the terms of the loan thereby converting the matter into a financial obligation of Applicant. Given these circumstances, the spouse's student loan to MARA does not make Applicant vulnerable to foreign influence. I have reviewed the remaining DC under the guideline and conclude none apply.

I have reviewed the MC under the guideline and conclude that MC 1 [\(17\)](#) applies for Applicant for several reasons. First, neither Applicant's spouse nor in-laws are agents of the Malaysian government or any other foreign power. Second, given the in-laws' lack of connection to the Malaysian government along with their geographic location in Malaysia, I am persuaded the in-laws' presence in Malaysia does not put Applicant in a position that could force him to choose between loyalty to his in-laws and the U.S. Third, based on the nature of his relationship (related by marriage), combined with the infrequent and limited communication and contact with his in-laws, I assess the relative strength of Applicant's ties to his foreign in-laws as rather weak. Fourth, Applicant has expressed both an understanding of the security concern and a willingness to report the matter to law enforcement. For all these reasons, it is my commonsense determination that the risk or concern for foreign influence based on Applicant's family ties to Malaysia is not unacceptable.

Assuming for the sake of argument that DC 8 applies against Applicant, the concern is mitigated by application of MC 5. [\(18\)](#) Worst case scenario, Applicant's spouse will owe \$50,000 on the loan. Best case scenario, she will owe \$5,000 (10%) to \$12,500 (25%) on the loan. Under either scenario, Applicant's has the current financial means and ability to repay the loan either by himself or with assistance from his parents. Accordingly, I conclude the student loan obligation is not of such magnitude to affect Applicant's security responsibilities. I have reviewed the remaining MC under the guideline and conclude none apply.

In reaching my decision, I have considered the evidence as a whole, the whole-person concept, and the appropriate factors and guidelines in the Directive. And I have weighed the record evidence as a whole, and conclude the favorable evidence outweighs the unfavorable evidence. Under the totality of the facts and circumstances, I conclude Applicant has met his burden of persuasion. Accordingly, Guideline B is decided for

Applicant.

## FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline B: For the Applicant

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: For the Applicant

## DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Directive, Enclosure 2, Attachment 2, at pp. 21-22.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
11. *Egan*, 484 U.S. at 528, 531.
12. ISCR Case No. 98-0419 (April 30, 1999) at p. 5.
13. *Id.*
14. "An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country."
15. "Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign

government."

16. "A substantial financial interest in a country, or in any foreign-owned or -operated business that could make the individual vulnerable to foreign influence."

17. "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States."

18. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."