



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



In the matter of:)
)
-----) ISCR Case No. 08-00312
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel

For Applicant: *Pro Se*

August 27, 2009

Decision

LEONARD, Michael H., Administrative Judge:

This is a security clearance case in which Applicant contests the Defense Department's intent to deny his eligibility for an industrial security clearance. The action is based on Applicant's connections to China via his involvement with a company doing business in China. These circumstances raised security concerns under the guidelines for foreign preference and outside activities. Applicant mitigated the security concerns by resigning from the company, terminating his interests in the company, and pledging not to travel to China, Hong Kong, and Taiwan. Accordingly, as explained in more detail below, this case is decided for Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) to Applicant on April 7, 2009. The SOR is equivalent to a complaint and it details the factual basis for the action. The SOR alleged security concerns under Guideline B for foreign influence and Guideline L for outside activities. The SOR also recommended submitting the case to an administrative judge for a determination to deny or revoke Applicant's security clearance.

Applicant answered the SOR on April 27, 2009, and he requested a hearing. The case was assigned to me on June 8, 2009. The hearing took place as scheduled on July 16, 2009. The testimony of Applicant was taken, and Government Exhibits 1 through 4 were admitted. The record was kept open until July 31, 2009, to allow Applicant to submit documentary evidence. Those matters were timely received, and they are marked and admitted as Applicant's Exhibits A through E. The hearing transcript (Tr.) was received July 22, 2009.

Procedural Matters

Administrative or official notice was taken of certain facts concerning the People's Republic of China (China) as set forth in Department Counsel's written request.² In summary, the most pertinent of those facts are as follows: (1) China has an authoritarian government that is dominated and controlled by the Chinese Communist Party; (2) China is actively engaged in intelligence gathering (industrial and military) that targets U.S. information and technology; and (3) China has a poor record of human rights.

Findings of Fact

Applicant admitted the SOR allegations, which establish his connections to China via a company doing business in China. For ease of understanding, it will be described as the Chinese company throughout this decision. Applicant testified on his own behalf, and I found his testimony credible in all respects. Based on the record as a whole, the following facts are established by substantial evidence.

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, because the SOR was issued after September 1, 2006, the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005, then made effective within the Defense Department on September 1, 2006, apply to this case. They supersede or replace the guidelines published in Enclosure 2 to the Directive.

² Exhibit 4; Tr. 29–30.

Applicant is a 49-year-old entrepreneur and self-employed business consultant. His educational background includes an MBA, and he is also a certified public accountant. He has his own company and works in the areas of venture formation, private equity, and hedge funds. In his line of work, the formation of a new company typically results in an equity ownership in the new enterprise.³ He also serves as a director of several companies and is paid a fee for his services. He described himself as a “technology guy” with a background in telecommunications, encryption, compression, satellites, and thermal imaging.⁴ He is seeking an industrial security clearance for the first time in connection with his business relationship with a defense-contractor company. He serves as a director on the defense-contractor company’s board of directors, and it is this company that is sponsoring him for the clearance.

The Chinese company is a privately-held company with its headquarters or main office in the U.S. The company is engaged in two lines of business: (1) buying and selling of raw materials for a renewable-energy product; and (2) manufacturing certain parts or components for a renewable-energy product. There is no overlap or commonalities between the business lines of the Chinese company and the defense-contractor company; the only commonality is Applicant’s involvement in each.⁵ Of concern here is a subsidiary of the Chinese company that is currently building the manufacturing facility in China.

Applicant has served as a director and chief financial officer for the Chinese company. He was a minority shareholder who held about 1.5% of the company’s stock. The chief executive officer (CEO), chairman, and founder of the Chinese company holds about 95% of the company’s stock. The CEO is a U.S. citizen who has Chinese ethnicity. The remaining 3.5% of shares of the company are held by a Chinese citizen who is overseeing the manufacturing facility in China. Applicant described his relationship with that gentleman as remote, as Applicant has never met him or spoke to him on the telephone and could not recall his name at the hearing.⁶

Applicant received a large number of shares of stock (vested and unvested) in the Chinese company in exchange for his services. He estimated the potential future value of his equity interest was in the seven-figure range.⁷ Beginning in 2007, Applicant sold shares of stock back to the company at the rate of \$6,000 monthly for about nine months for a total of \$54,000 in capital gains. He ceased selling the shares in about August 2008, when concerns were raised by written interrogatories that the Agency

³ Tr. 72.

⁴ Tr. 43–44.

⁵ Tr. 48.

⁶ Tr. 51–52.

⁷ Tr. 65–66.

propounded to him. He has received no compensation from the company since August 2008, when he “truncated his relationship with the company.”⁸

Applicant’s work for the Chinese company included a business trip to China in 2007. During the trip, he met with local or municipal governmental officials. He described his role as preparing the business plan, providing advice in the areas of capital structure of the company, offering prices, corporate governance documents, and employment agreements, and he helped obtain the necessary building permits.⁹ Applicant fulfilled his responsibilities in this regard, he had no ongoing business role with the manufacturing facility, and he had no ongoing contact with the Chinese governmental officials since concluding the trip.

Applicant has now resigned from the Chinese company, terminated his interests in the company, and pledged not to travel to China, Hong Kong, and Taiwan, and he has advised the defense-contractor company of his actions.¹⁰ First, he notified the CEO of the Chinese company that he was resigning, effective July 16, 2009, as an employee, officer, and director of the company.¹¹ Second, the three-page separation agreement between Applicant and the Chinese company sets forth the terms of the separation. It specifies, among other things, that Applicant will not receive any form of severance or separation payment, and that he irrevocably surrendered all outstanding stock, stock options, and warrants.¹² Third, Applicant agreed in writing not to travel for whatever purpose to China, Hong Kong, and Taiwan, and he agreed to report any contact by a Chinese national.¹³

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, the only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information.

It is well-established law that no one has a right to a security clearance.¹⁴ As noted by the Supreme Court in the case of *Department of Navy v. Egan*, “the clearly

⁸ Tr. 53.

⁹ Tr. 52–53.

¹⁰ Exhibits A – E.

¹¹ Exhibit D.

¹² Exhibit C.

¹³ Exhibit E.

¹⁴ *Department of 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).

consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁵ 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.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹⁶ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁷

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁸ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁰ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²¹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²² The agency appellate authority has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²³

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person’s security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified

¹⁵ 484 U.S. at 531.

¹⁶ Directive, ¶ 3.2.

¹⁷ Directive, ¶ 3.2.

¹⁸ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁹ Directive, Enclosure 3, ¶ E3.1.14.

²⁰ Directive, Enclosure 3, ¶ E3.1.15.

²¹ Directive, Enclosure 3, ¶ E3.1.15.

²² *Egan*, 484 U.S. at 531.

²³ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.²⁴ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

The foreign influence and outside activities concerns are discussed together because the record shows the concerns are factually related or connected to each other. Under Guideline B, the concern is that an applicant's foreign connections may raise security concerns by creating divided loyalties or interests. The overall concern is that:

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.²⁵

Likewise, under Guideline L, the concern is that an applicant's outside employment or activities may raise security concerns by creating a conflict of interest. The overall concern is that:

Involvement in certain types of outside employment or activities is of security concern if it poses a conflict of interest with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information.²⁶

Under the foreign influence and outside activities guidelines,²⁷ the following disqualifying conditions are raised by the record:

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

²⁴ Executive Order 10865, § 7.

²⁵ Revised Guidelines, ¶ 6.

²⁶ Revised Guidelines, ¶ 36.

²⁷ Revised Guidelines, ¶¶ 6–8 and ¶¶ 36–38 (setting forth the security concerns and all the disqualifying and mitigating conditions).

that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;²⁸

A substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation;²⁹ and

Any employment or service, whether compensated or volunteer, with:

- (1) the government of a foreign country;
- (2) any foreign national, organization, or other entity;
- (3) a representative of any foreign interest; and,
- (4) any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology.³⁰

The guidelines also provide that certain facts and circumstances may mitigate the concerns. The following mitigating conditions are raised by the record:

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;³¹ and

The individual terminated the employment or discontinued the activity upon being notified that it was in conflict with his or her security responsibilities.³²

The record contains substantial evidence of Applicant's connections to China through his business activities with the Chinese company. This evidence raises security concerns under both guidelines. The concerns are now resolved, however, by Applicant's affirmative actions. He wholly mitigated the concerns by resigning from the Chinese company and terminating his interests in it. At this point, Applicant has no connections to the Chinese company, and he has no other connections to China that are of concern. His actions were probably to his financial detriment given the potential future value of his equity interest in the Chinese company. But his actions demonstrate

²⁸ Revised Guidelines, ¶ 7(a).

²⁹ Revised Guidelines, ¶ 7(e).

³⁰ Revised Guidelines, ¶ 37(a).

³¹ Revised Guidelines, ¶ 8(b).

³² Revised Guidelines, ¶ 38(b).

his true sense of loyalty or obligation is in favor of U.S. interests. And there is no conflict of interest between Applicant's business activities and his security responsibilities. Applicant has done everything he could do to mitigate the security concerns.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns under Guidelines B and L. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

Formal Findings

The formal findings on the SOR allegations, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:	For Applicant
Subparagraphs 1.a–1.f:	For Applicant
Paragraph 2, Guideline L:	For Applicant
Subparagraph 2.a:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge