



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



In the matter of:)
)
-----) ISCR Case No. 09-02355
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jennifer I. Goldstein, Esq., Department Counsel

For Applicant: *Pro Se*

October 23, 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 foreign influence security concerns raised by Applicant's ties or connections to China. The record contains substantial evidence of Applicant's strong family ties to China. His family ties, when viewed in light of the identity of the foreign country involved, create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. The record contains insufficient evidence to explain, extenuate, or mitigate the security concerns. Accordingly, as explained in detail below, this case is decided against 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 June 30, 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. The SOR also recommended submitting the case to an administrative judge for a determination to deny or revoke Applicant's security-clearance eligibility.

Applicant answered the SOR on July 11, 2009, when he submitted a three-page memorandum in which he requested a decision without a hearing. Accordingly, the case will be decided on the written record in lieu of a hearing.

On July 31, 2009, the government submitted its written case consisting of all relevant and material information that could be adduced at a hearing. This so-called file of relevant material (FORM) was mailed to Applicant and received by him on August 14, 2009. He then had 30 days to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation. He did not respond within the 30-day period. The case was assigned to me September 23, 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 the following: (1) China is ruled by an authoritarian government 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 (for example, the brutal suppression of demonstrators at Tiananmen and the ongoing serious human rights abuses in Tibet).

Findings of Fact

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 FORM at 2-11.

Applicant is a 52-year-old senior software engineer who is employed by a federal contractor. He is married and has two children who are both native-born citizens of the U.S. His wife is also a naturalized U.S. citizen, and she is employed as a business analyst for a pharmaceutical company. This is the first time Applicant has applied for a security clearance, completing an application in October 2008.

Applicant was born, raised, and educated in China. Before coming to the U.S. to pursue his formal education, he worked in the field of satellite-image processing (non-military usage) for a non-governmental research institute. He immigrated to the U.S. in 1989, when he enrolled as a graduate student at a U.S. university. He earned a master's degree in 1992. He has worked for his current employer since 1998.

He obtained U.S. citizenship in 2002. He decided to become a U.S. citizen after the 9/11 terrorists attacks, because he then realized that "the United States is the country [he] belong[s] to."³ In the same vein, the United States is where Applicant has lived, worked, and raised his family during the prime of his life, and he intends to continue to contribute to the U.S. for the balance of his life.⁴

Concerning the allegations in SOR ¶¶ 1.a through 1.f, the record establishes the following:⁵

1. Applicant's mother and father are citizens and residents of China. He has regular contact with them via telephone calls. Both parents are retired and about 80 years old. His mother is a retired school teacher. His father is a retired engineer.
2. Applicant's sister is a citizen and resident of China. He has less contact with her, perhaps monthly, via telephone calls. His sister is employed as a structural engineer for a provincial institute. In his Answer to the SOR, Applicant denied that his sister worked for a Chinese governmental agency. He explained that the institute is not connected to the Chinese central or state governments, and it operates like a privately-owned company.
3. Applicant's parents-in-law are citizens and residents of China. His mother-in-law is a retired university teacher. His father-in-law is a retired chief engineer for a governmental agency. He has telephonic contact with them about once every two months.
4. Applicant bought an apartment in China for his parents in 2007, and they live in that apartment. He contributed \$90,000 (from his savings) and his father

³ Answer to SOR.

⁴ Answer to SOR.

⁵ Exhibit 5 and the Answer to the SOR are the sources for most of this information.

contributed about \$10,000 for the purchase. The deed to the apartment is registered under his name. He views the purchase of the apartment as his duty to his parents as the eldest son, in keeping with Chinese tradition. While the apartment cost about \$100,000, the record is silent concerning Applicant's financial assets in the U.S., his net worth in the U.S., and his household's annual income.

5. Applicant has some contact with a former coworker. The contact appears to be limited to special occasions such as the Chinese New Year.
6. Applicant traveled to China in 2007, when he purchased the apartment for his parents. He also traveled there in 2002. He intends to travel to China about once per year. The record is silent as to whether anything untoward happened during the trips.

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.⁶ As noted by the Supreme Court in the case of *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁷ 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.⁸ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.⁹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁰ The government has the burden of presenting

⁶ *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).

⁷ 484 U.S. at 531.

⁸ Directive, ¶ 3.2.

⁹ Directive, ¶ 3.2.

¹⁰ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

evidence to establish facts alleged in the SOR that have been controverted.¹¹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹² In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹³ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁴ The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁵

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 information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.¹⁶ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

Under Guideline B for foreign influence,¹⁷ the suitability of an applicant may be questioned or put into doubt due to an applicant's foreign connections and interests. The overall concern under the guideline 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

¹¹ Directive, Enclosure 3, ¶ E3.1.14.

¹² Directive, Enclosure 3, ¶ E3.1.15.

¹³ Directive, Enclosure 3, ¶ E3.1.15.

¹⁴ *Egan*, 484 U.S. at 531.

¹⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁶ Executive Order 10865, § 7.

¹⁷ Revised Guidelines, ¶¶ 6, 7, and 8 (setting forth the security concern and the disqualifying and mitigating conditions).

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.¹⁸

Of course, the mere possession of close family ties with a person in a foreign country is not—as a matter of law—disqualifying under Guideline B. But if only one relative resides in a foreign country and an applicant has contact with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.¹⁹

Based on the record, there are two disqualifying conditions that could raise security concerns and may be disqualifying in Applicant's case:

Contact with a foreign family member, business, or professional associate, friend, or other person who is a citizen of or a resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;²⁰ and

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.²¹

Here, the two disqualifying conditions apply based on (1) Applicant's family ties to his mother, father, sister, and parents-in-law in China, and (2) his ownership of the Chinese apartment. Clearly, Applicant has strong ties of affection, emotion, or obligation to his parents as demonstrated by his travel to China to visit them. Those ties are further demonstrated by Applicant's actions in purchasing the apartment for his parents. These circumstances create the potential for a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. This is especially so given that the foreign country in question is China, which presents real-world concerns. It is not merely hypothetical to suggest that a brutal communist government like China's would use Applicant's family ties to China as leverage in an attempt to pursue intelligence gathering. Given these circumstances, his family ties are exploitable relationships in a foreign-influence context.

¹⁸ Revised Guidelines, ¶ 6.

¹⁹ See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

²⁰ Revised Guidelines, ¶ 7(a).

²¹ Revised Guidelines, ¶ 7(e).

The guideline also provides the certain facts and circumstances may mitigate foreign influence security concerns. The six mitigating conditions²² under the guideline are:

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.;

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;

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;

The foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

The individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; or

The value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

The first, third, and sixth mitigating conditions are most pertinent to the facts of this case and will be discussed below. The others do not apply in Applicant's favor.

The first mitigating condition²³ does not apply because Applicant's family ties to China are of sufficient magnitude or strength to negate it. As noted above, there is a possibility that certain elements within China could attempt to use his family ties as leverage in intelligence gathering.

²² Revised Guidelines, ¶ 8(a) – (f).

²³ Revised Guidelines, ¶ 8(a).

The third mitigating condition²⁴ applies to Applicant's former coworker in China due to the limited nature of the contacts or ties. Accordingly, SOR ¶ 1.e is decided for Applicant.

The sixth mitigating condition²⁵ might apply to Applicant's ownership of Chinese apartment. But the record does not contain enough information about his overall financial condition to make a determination. Without that information, it is not possible to compare the value of his U.S. financial and property interests with the Chinese apartment, and then assess the likelihood that his ownership of the Chinese apartment might result in a conflict or be used for foreign exploitation.

To sum up, this is not a case of "divided loyalties"²⁶ with an applicant who has one foot in the U.S. and one foot in his native country. The record shows Applicant has both feet firmly rooted in the U.S., and that he has significant contacts and ties to the U.S. Looking forward, it is highly unlikely that Applicant will change course. But Applicant is in the unfortunate situation of having strong family ties to a foreign country that is ruled by a brutal communist government. His strong family ties to China create a heightened risk of exploitation that cannot be ruled out. These circumstances are contrary to the clearly-consistent standard that I am required to apply. Accordingly, Guideline B is decided against Applicant. In reaching this conclusion, I gave due consideration to the nine-factor whole-person concept.²⁷

Throughout his Answer to the SOR, Applicant denied that he would not be loyal to the United States. Accordingly, it bears repeating that an adverse clearance decision is not a determination of an applicant's loyalty.²⁸ Instead, it is a determination in terms of the national interest that an applicant has not met the strict guidelines the President has established for granting eligibility for access to classified information. And here the guideline at issue is foreign influence, not Applicant's loyalty.

To conclude, Applicant did not present sufficient evidence to explain, extenuate, or mitigate the security concerns under Guideline B. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

²⁴ Revised Guidelines, ¶ 8(c).

²⁵ Revised Guidelines, ¶ 8(f).

²⁶ Revised Guidelines, ¶ 6.

²⁷ Revised Guidelines, ¶ 2(a)(1) – (9).

²⁸ Executive Order 10865, § 7.

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:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge