



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



In the matter of:)
)
-----) ISCR Case No. 09-08417
)
Applicant for Security Clearance)

Appearances

For Government: Francisco J. Mendez Jr., Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

February 8, 2011

Decision

LEONARD, Michael H., Administrative Judge:

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 ties to China, which, when viewed in light of the identity of the foreign country involved, create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. There is insufficient evidence to explain, extenuate, or mitigate the security concerns. Accordingly, as explained 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 July 21, 2010. The SOR is equivalent to a complaint, and it detailed the factual basis for the action under the security guideline known as 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 timely answered the SOR and requested a hearing. The case was assigned to me September 7, 2010. The hearing took place pursuant to written notice on October 20, 2010. The hearing transcript (Tr.) was received October 28, 2010.²

Procedural Matters

I took administrative or official notice of certain facts concerning the People's Republic of China (China) as set forth in Department Counsel's written request.³ 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; (3) China uses ethnic targeting, by appealing to an individual's desire to help China in some way, in their intelligence operations; and (4) China has a poor record of human rights (for example, the brutal suppression of the Tiananmen Square protests of 1989 and the ongoing human-rights abuses in Tibet). These facts are incorporated into the findings of fact below.

Findings of Fact

Applicant is a 28-year-old software engineer. He has worked for his current employer, a federal contractor, since 2008. He earns an annual salary of about \$60,000. A recent performance evaluation was highly favorable, and it described Applicant as "an adept programmer who has made key improvements in our software capability."⁴ This is

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, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines published in Enclosure 2 to the Directive.

² The title page of the hearing transcript contains an incorrect case number. The correct case number is cited above, and it is also reflected at page five of the transcript.

³ Exhibit 2.

⁴ Exhibit K.

the first time he has applied for a security clearance, completing an application in February 2009.⁵

Applicant is married. He and his wife have one child, who is a native-born U.S. citizen. His wife is a native-born citizen of China, but she is also a lawful resident alien of the United States.

Applicant was born in China. He was raised and educated there until the age of 19 or 20. He and his mother arrived in the United States in 2002 to join his father, who had already been here for several years. During 2002–2004, Applicant attended high school in the United States. He then attended a state university from 2004 to 2008, when he was awarded a bachelor's degree in computer engineering.⁶ Applicant had part-time jobs while he was a college student.⁷ He worked as a cafeteria server for two years, and then he worked as a network assistant and lab operator for his last two years of college.

While in college, Applicant applied for and became a naturalized U.S. citizen. He obtained his naturalization certificate in September 2007, and he obtained a U.S. passport the following month.

Addressing the allegations in SOR ¶¶ 1.a through 1.d, the record establishes the following:

1. Applicant's spouse is a citizen of China. They married in 2005 in China, where she remained with her parents until 2008, when she immigrated to the United States. She is a lawful U.S. resident alien, and she intends to apply for U.S. citizenship as soon as she is allowed to apply. They have one child who was born in the United States within the last year.
2. Applicant's father, brother, and sister are citizens of China and residents of the United States. His mother, who was also born in China, is a naturalized U.S. citizen. His security clearance application reflects that his father, brother, and sister are waiting to obtain an alien registration card. His parents work in a restaurant. His immediate family members intend to remain in the United States and have no intention to return to China to reside there permanently.
3. Applicant's father-in-law and mother-in-law are citizens of and residents in China. Applicant last saw them in person in 2007, and he has limited telephonic contact with them. His wife has regular telephone calls with her parents.

⁵ Exhibit 1.

⁶ Exhibit L.

⁷ Exhibit M.

4. Applicant traveled to China approximately five times during 2005–2007. The 2005 trip was to marry his wife. There were two trips in 2006 to visit his wife. And there were two trips in 2007 to visit his wife who was recovering from a medical procedure.⁸ He made all but the last trip using a Chinese passport, as he did not possess a U.S. passport until October 2007. He used his U.S. passport for the last trip. Applicant denies anything but routine interaction (e.g., customs and immigration) with Chinese authorities during these five trips.

Neither Applicant nor his wife has business, financial, or property interests in China. Likewise, they do not have financial or bank accounts in China. All such matters are in the United States.

Applicant has never served in the Chinese military. Likewise, he has not served in the U.S. military, but he did fulfill his lawful obligation by registering with the U.S. Selective Service.

Applicant presented ten letters of recommendation from various individuals.⁹ He was described in highly favorable terms, to include hard working, dependable, honest, trustworthy, dedicated, diligent, etc.

Law and Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.¹⁰ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹¹ 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.

⁸ Exhibit N.

⁹ Exhibits A–J.

¹⁰ *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).

¹¹ 484 U.S. at 531.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹² An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹³

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁴ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁵ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁶ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁷ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁸ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁹

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant facts and circumstances, the pertinent criteria and adjudication factors, and the whole-person concept.

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.²⁰ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

¹² Directive, ¶ 3.2.

¹³ Directive, ¶ 3.2.

¹⁴ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁵ Directive, Enclosure 3, ¶ E3.1.14.

¹⁶ Directive, Enclosure 3, ¶ E3.1.15.

¹⁷ Directive, Enclosure 3, ¶ E3.1.15.

¹⁸ *Egan*, 484 U.S. at 531.

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

²⁰ Executive Order 10865, § 7.

Analysis

Under Guideline B for foreign influence,²¹ 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:

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.²²

Of the several disqualifying conditions under the guideline, there is one that could raise security concerns and may be disqualifying in Applicant's case:

¶ 7(a) 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.

This disqualifying condition applies due to Applicant's ties or connections to China. His ties include his past citizenship and residence in that country as well as his ties to his immediate family members (except for his mother and his child) who are citizens of China. Further, his ties include his parents-in-law, who are citizens of and residents in China. Although it does not appear that Applicant has a strong relationship with them, it is probable that his wife does. This relationship is imputed to Applicant via his marriage. His ties to his wife are understandably strong as demonstrated by his trips to China during 2005–2007. Taken together, these circumstances create the potential for a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. This is especially true given that the foreign country in question is China, which presents genuine security concerns. It is not merely hypothetical to suggest that a communist government like China's may attempt to use Applicant's ties to China for intelligence gathering. Given these circumstances, his ties to China are exploitable relationships in a foreign-influence context.

The guideline also provides the certain facts and circumstances may mitigate foreign influence security concerns as follows:

²¹ AG ¶¶ 6, 7, and 8 (setting forth the security concern and the disqualifying and mitigating conditions).

²² AG ¶ 6.

¶ 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;

¶ 8(b) 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 United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

¶ 8(c) 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;

¶ 8(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

¶ 8(e) 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;

¶ 8(f) 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 and second mitigating conditions are most pertinent here and will be discussed below. The others are inapplicable given the facts of this case.

The first mitigating condition, ¶ 8(a), does not apply because Applicant's ties to China are of sufficient magnitude or strength to negate it. As noted above, there is a genuine concern that certain elements within China could attempt to use his ties for intelligence gathering.

The second mitigating condition, ¶ 8(b), does not apply for two reasons. First, Applicant's sense of loyalty or obligation to the foreign persons in question, his family members, is not minimal. Second, Applicant has significant relationships and loyalties in the United States. This includes completing his formal education and obtaining employment here. But he arrived in the United States less than ten years ago. Likewise, he obtained U.S. citizenship less than five years ago. It is noteworthy that nearly all his immediate family members are citizens of China. And his wife's parents are citizens of and residents in China. Given these circumstances, his significant relationships and

loyalties in the United States are not deep and longstanding, but are relatively new and developing. In time, this situation may change.

This is not a case of “divided loyalties”²³ with an applicant who has one foot in the United States and one foot in his native country. The record shows Applicant has both feet in the United States, and it is unlikely that will change. But Applicant is in the unfortunate situation of having ties to a foreign country that is ruled by a brutal communist government. His 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.²⁴

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.

Formal Findings

The formal findings on the SOR allegations are as follows:

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

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

²³ AG ¶ 6.

²⁴ AG ¶ 2(a)(1)–(9).