

KEYWORD: Guideline B

DIGEST: A party’s disagreement with the Judge’s weighing of the evidence is not sufficient to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASE NO: 12-00058.a1

DATE: 04/09/2013

DATE: April 9, 2013

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In Re:)	
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-----)	ISCR Case No. 12-00058
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 5, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 23, 2013, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Joan Caton Anthony denied Applicant’s request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge's Findings of Fact

The Judge found: Applicant is 59 years old. He was born and raised in the People's Republic of China (China). In the mid-1980s, he immigrated to the United States. He became a naturalized U.S. citizen in the late 1990s. Applicant has been married three times. The first two wives were citizens of China. He and his first wife divorced in China. Applicant's second wife remained in China. They divorced in the late 1990s. Applicant married his third wife in 2001. She was also born in China. The couple has a daughter who was born in the United States and is a U.S. citizen.

Applicant's father is deceased. Applicant's mother is a citizen and resident of China. She is suffering from poor health, including dementia. Twice in the last decade, Applicant traveled to China to visit his mother when her failing health required hospitalization. Before his mother began to suffer from dementia, he spoke with her on the telephone about three times a year. Since his last visit, Applicant has had little contact with his mother. Applicant surmises that his mother receives a private pension from the hospital that employed her.

Applicant's brother is a citizen and resident of China. Applicant believes his brother works as a salesman for companies in China. When Applicant's mother was in better health, Applicant spoke with his brother about three times a year. Sometimes his brother calls Applicant to inform him of their mother's health condition. Applicant's last telephone contact with his brother was in early 2012. Applicant's brother has not served in the Chinese military.

Applicant's sister is a citizen and resident of China. She worked in a technical profession. Applicant believes his sister and her husband may have worked for an entity of the Chinese government. Applicant's sister has immigrated to the United States with her husband and son. Applicant's sister is a citizen of China and now has legal resident status in the United States. She continues to hold a Chinese passport, and she is working as a nanny for a Chinese family. Before she moved to the United States, Applicant spoke on the telephone with his sister about three times a year.

Applicant does not own any property in China. He owns a home in the United States with a value of \$850,000. He feels that his loyalties are to the United States and not China.

Between 1994 and 2000, Applicant traveled to China five times. China has an authoritarian, Communist government and powerful military forces. It has significant resources and a rapidly expanding economy. China aggressively competes with the United States in many areas. China's competitive relationship with the United States exacerbates the risk posed by Applicant's connections to family members living in China. China has a history of human rights problems, including suppression of political dissent, arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners. The Chinese government also monitors communications devices.

China actively collects military, economic, and proprietary industrial information about the United States. China's active intelligence-gathering programs focus on sensitive and protected U.S. technologies. Chinese intelligence services and private companies frequently try to target Chinese citizens or individuals with family ties to China who can use their insider access to corporate networks to steal secrets using removable media devices or e-mail. Attempts to collect U.S. technological and economic information will continue at a high level and will represent a growing and persistent threat to U.S. economic interests.

The Judge's Analysis

The Judge concluded: Applicant's sister and her family do not live with Applicant and his family, and her presence in the United States diminishes but does not extinguish the possibility of foreign exploitation or coercion. However, Applicant's relationship with his mother and his brother in China is sufficient to create a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion. These relationships with residents and citizens of China create a potential conflict of interest between Applicant's obligation to protect sensitive information or technology and his desire to help family members who are in China. The relationship of China with the United States places a significant, but not insurmountable, burden of persuasion on Applicant to demonstrate that his contacts with his family members living in China do not pose a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. While there is no evidence that intelligence operatives from China seek or have sought classified or economic information from or through Applicant and his family members living in China, it is not possible to rule out such a possibility in the future.

Although his connections to his mother and brother in China are infrequent, Applicant is not able to fully meet his burden of showing there is little likelihood that his relationships with relatives who are Chinese citizens could create a risk for foreign influence or exploitation because of China's aggressive pursuit of classified and sensitive U.S. information. Applicant has strong family connections to the United States. Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationships with his family members who live in China. China's conduct makes it more likely that it would attempt to coerce Applicant through his family living in China, if it determined it was advantageous to do so. Applicant has failed to mitigate the security concerns arising under the Foreign Influence adjudicative guideline.

Discussion

Applicant asserts that he does not have close ties with his brother and mother, as evidenced by his contacting them once, twice, or three times a year, or not at all. He states that his brother and mother do not know what he is doing, and he has not been approached by any Chinese or foreign agents. He asserts that he would report any such contacts immediately. He emphasizes that he has a long and solid record as a government contractor.

As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. See, e.g., ISCR Case No. 06-

10320 at 2 (App. Bd. Nov. 7, 2007). A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Applicant's appeal brief essentially argues for an alternate interpretation of the record evidence. A review of the Judge's decision reveals that the Judge listed the potentially applicable mitigating conditions and then discussed several components of those factors in her analysis in some detail. After a review of the evidence and the Judge's decision, the Board concludes that the Judge's findings and conclusions are reasonably supported by the record.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge

Member, Appeal Board