

KEYWORD: Guideline B

DIGEST: In Foreign Influence cases, the nature of the foreign government and its intelligence-gathering history are important considerations. There is a rational connection between an applicant's family ties in a country whose interests are adverse to those of the U.S. and the risk that the applicant may fail to protect classified information. In-laws represent a class of persons who are contemplated by the Directive as presenting a potential security risk. As a matter of common sense and human experience there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. China has a large, professionalized cyber-espionage community but also utilizes private citizens or organizations to target U.S. data. China has a poor human rights record and, among other things, engages in surveillance of telephone conversations, fax transmissions, emails, text messaging, and internet communications. Favorable decision reversed.

CASENO: 17-03450.a1

DATE: 02/28/2019

DATE: February 28, 2019

In Re: _____)
-----) ISCR Case No. 17-03450
Applicant for Security Clearance)
_____)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 12, 2017, 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 November 28, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Philip J. Katauskas granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's favorable decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant was born in China, coming to the U.S. in the late 1990s. Her husband was also born in China. They became U.S. citizens in the late 2000s. Applicant and her husband have one child. Their net worth is about \$2,000,000. Applicant's parents are citizens and residents of China. They worked for a government entity and both receive retirement benefits from the Chinese government. Applicant speaks with her parents telephonically about once a week. Applicant's father-in-law was a high-ranking official in the Chinese government, now retired. She speaks with him about once a month, although these conversations are difficult because her father-in-law is hearing-impaired. Applicant has never spoken with him about his government service. Applicant contributes to charitable organizations. She enjoys an excellent reputation for the quality of her work performance as well as for her trustworthiness and ability to protect classified information.

China is one of the most active and persistent collectors of U.S. protected information. Chinese intelligence services seek to exploit Chinese citizens or those with personal ties within China, in order to obtain secrets. It has targeted computer systems around the world, including those in the U.S. It likely employs means that violate U.S. laws.

The Judge's Analysis

The Judge concluded that Applicant's family ties within China pose a heightened risk of foreign coercion. He concluded that these ties could pose a conflict of interest between Applicant's desire to help her foreign relatives and her obligation to protect classified information. He also concluded that Applicant's relationship with her husband, with whom she shares living quarters, poses a heightened risk of foreign coercion.¹

Having found that Applicant's family ties within China raised security concerns, the Judge then evaluated Applicant's case for mitigation. He noted evidence of the high esteem in which Applicant's colleagues hold her, her substantial assets within the U.S., and her lack of any assets in China. He also cited to evidence that Applicant has rarely visited China since becoming a U.S.

¹Directive, Encl. 2, App. A ¶¶ 7(a-b, e).

citizen, that she has difficulty speaking with her father-in-law due to his hearing impairment, and that she has lost touch with former friends in China. He concluded that it is unlikely that Applicant will be confronted with a conflict of interest or be coerced into disclosing protected information, due to her parents poor health, the attenuated nature of her relationship with her father-in-law, and her long-standing ties within the U.S.

Discussion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶E3.1.15. The standard applicable in security clearance decisions “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). “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

In deciding whether the Judge’s rulings or conclusions are erroneous, we will review the Judge’s decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 14-02563 at 3 (App. Bd. Aug. 28, 2015).

In Foreign Influence cases, the nature of the foreign government and its intelligence-gathering history are important considerations. There is a rational connection between an applicant’s family ties in a country whose interests are adverse to those of the U.S. and the risk that the applicant may fail to protect classified information. *See, e.g.*, ISCR Case No. 12-08412 at 2-3 (App. Bd. Sep. 11, 2015). In-laws represent a class of persons who are contemplated by the Directive as presenting a potential security risk. As a matter of common sense and human experience there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person’s spouse. *See, e.g.*, ISCR Case No. 09-06831 at 3 (App. Bd. Mar. 8, 2011).

In addition to drawing our attention to the findings summarized above, Department Counsel cites to other things in the record that bear upon the soundness of the Judge’s decision. For example, China has a large, professionalized cyber-espionage community but also utilizes private citizens or organizations to target U.S. data. Moreover, China has a poor human rights record and, among other things, engages in surveillance of telephone conversations, fax transmissions, emails, text messaging, and internet communications. Government Exhibit 2, Request for Administrative Notice, at 8. Department Counsel argues that this evidence significantly undercuts the Judge’s analysis.

We find Department Counsel’s argument to be persuasive. The tenor of the Judge’s analysis, viewed as a whole, suggests that Applicant’s foreign relatives are too obscure to be of concern, given his findings and conclusions about the length of time in which they have been retired from government employment. We have noted in the past that the relative obscurity of foreign family members does not provide a meaningful measure of whether Applicant’s circumstances pose a security risk. *See, e.g.*, ISCR Case No. 14-03112 at 4 (App. Bd. Nov. 3, 2015). In any event, not all of Applicant’s relatives are necessarily obscure, given the high rank that her father-in-law held during his career, which in and of itself is a matter of concern. *Id.*² Given record evidence that China monitors telephone and electronic communications, the Judge’s emphasis upon the ages of Applicant’s relatives, their limited technological prowess, and the many years since they retired from government employment does not logically mitigate a real concern that through regular telephonic communications these relatives could be a means through which Applicant comes to the attention of Chinese officials interested in acquiring U.S. information.

In presenting her argument, Department Counsel cites to ISCR Case No. 12-04780 (App. Bd. Nov. 13, 2013), in which an applicant’s Chinese relatives posed security concerns. The applicant’s parents were retired farmers with whom he communicated once a week, and he also communicated with other relatives and acquaintances on a regular basis. These relatives appear to have been even more obscure than those of Applicant in the case before us. Nevertheless, the Judge concluded that China’s aggressive espionage activities against the U.S. and its willingness to exploit family relationships to that end, precluded the favorable application of any of the Guideline B mitigating conditions. We find persuasive Department Counsel’s argument that the circumstances in the case before us are of equivalent significance. We are further persuaded the Judge failed to engage in meaningful analysis of the adversarial nature of the Chinese government³, as the Judge did in the earlier case that Department Counsel cited, which detracts from his favorable analysis. Similarly, in this case, the Judge made no findings of fact, nor did he analyze record evidence regarding the nature of the Chinese government and its conduct with regard to human rights. There is evidence, for example, that the People’s Republic of China (PRC) is an “authoritarian state” that engages “in [r]epression and coercion [of] individuals and organizations...” There is evidence of “illegal detention...torture and coerced confessions.” Government Exhibit 2. A Judge is not required to discuss each and every piece of record evidence in making a decision, which would be a practical impossibility. *See, e.g.*, ISCR Case No. 16-02243 at 3 (App. Bd. Nov. 30, 2018). However, the Judge cannot ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision. *See, e.g.*, ISCR Case No. 15-02903 at 3 (App. Bd. Mar. 9, 2017). The Judge’s failure to discuss China’s adversarial relationship with the U.S., its approach to human rights and its aggressive intelligence gathering in

²“An applicant’s ties, either directly or through a family member, to persons of high rank in a foreign [government] (such as his in-law), are of concern because it is foreseeable that through such an association the applicant could come to the attention of those interested in acquiring U.S. protected information.”

³*See* ISCR Case No. 07-00029 at 3-4 (App. Bd. Dec. 7, 2007), ISCR Case No. 06-24575 at 3-4 (App. Bd. Nov. 9, 2007), and ISCR Case No. 06-17838 at 4-5 (App. Bd. Jan. 28, 2008).

his analysis of Applicant's case for mitigation is a significant defect, undermining his conclusion that Applicant had met her burden of persuasion.

To summarize, Applicant was born in and educated in China, and her parents and father-in-law are citizens and residents of that country. Her parents were employed by the Chinese government and receive retirement benefits from it. Her father-in-law is retired from a position of high governmental rank. Applicant speaks with her parents by telephone weekly and with her husband's father monthly. China is an aggressive collector of U.S. protected information and monitors telephone and other forms of communication. Given this evidence, the Judge's conclusion that these concerns are mitigated by the age and infirmities of Applicant's relatives, and a paucity of analysis of the threat posed by the Chinese government, undermine his favorable decision. The Judge's decision fails to consider important aspects of the case and runs contrary to the weight of the record evidence. Accordingly, the Judge's favorable decision is not sustainable under the *Egan* standard.

Order

The Decision is **REVERSED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board