

DATE: July 25, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09907

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Daniel C. Schwartz, Esq.

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SYNOPSIS

Applicant and her husband are naturalized U.S. citizens with family members who are residents and citizens of the People's Republic of China. Applicant was unable to demonstrate that these foreign contacts did not place her in a position of vulnerability to be influenced by coercive or noncoercive means such that she would be forced to choose between loyalty to her family and loyalty to the U.S. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. In accordance with the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) on 6 January 2003 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the foreign preference (Guideline C) and foreign influence (Guideline B) personnel security guidelines of the Directive.

Applicant answered the SOR in writing on 20 February 2003. The case was originally assigned to Administrative Judge Elizabeth Matchinski on 13 May 2003, but was reassigned to me on that date due to a change in the location of the hearing. On 26 June 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of four exhibits. Applicant testified on her own behalf, called two witnesses, and submitted 12 exhibits. DOHA received the transcript (Tr.) of the proceeding on 7 July 2003.⁽³⁾

FINDINGS OF FACT

Applicant is a 56-year-old artificial intelligence engineer. Tr. 70-71, 106. She was born and raised in the People's Republic of China (PRC). Applicant's grandfather was a prosperous farmer and her grandmother was a famous doctor. Their property was confiscated when the Communists took over China in 1949. Tr. 60. In 1957, the year Applicant was born, the PRC government invited non-communist parties to make suggestions for improving the government. Applicant's parents, who were teachers, recommended leaders be selected by the people and teachers' salaries be based on merit. As a result, their salaries were substantially reduced and they were sent to a labor camp for over a year. Applicant, who was less than one-year old, was cared for by a nanny and her eldest sister. Tr. 59. Applicant is emotionally close to her eldest sister who washed, dressed, and cared for her while their parents were at the labor camp. Tr. 98.

The "Cultural Revolution" of the late 1960s and early 1970s deeply affected Applicant's family. Applicant's education was interrupted during the cultural revolution because the PRC government forced her parents to move to the countryside. Tr. 55. None of her brothers or sisters were able to attend college because the family was in disfavor with the government. Tr. 62. In 1977, the educational system was restored and, after being coached by her parents and siblings, Applicant passed the national exam and was admitted to a university. Tr. 56. After graduation, Applicant earned a graduate degree in English for scientific purposes. She then taught English at the university until she immigrated to the U.S. Tr. 57.

In March 1986, Applicant departed China for the U.S. where her husband was doing graduate work. By the end of that year, Applicant was enrolled in graduate classes. Tr. 64-65. In 1989, Applicant and her husband organized a protest of Chinese students at the PRC Consulate in Washington, D.C., to protest the military assault on the pro-democracy demonstrators in and around Tiananmen Square in Beijing. As a result of those demonstrations, President Bush allowed Chinese students studying in the U.S. to stay. Tr. 65. Applicant received her green card in 1993 and became a U.S. citizen in 1999. Tr. 64-65. Her PRC passport expired on 31 December 1999 and was returned to the PRC Consulate on 14 February 2003. Tr. 86; Ex. D.

Applicant's father is dead, but her mother and siblings are citizens and residents of the PRC. Applicant speaks with her mother and eldest sister by phone a couple times a year. Tr. 91-100. Applicant's husband was born in the PRC and is a naturalized U.S. citizen. Tr. 77. His parents and siblings are citizens and residents of the PRC. Tr. 102. His parents were members of the Communist Party. Tr. 113. Shortly after the couple adopted their daughter, Applicant's parents-in-law visited the couple for six months. Tr. 94.

In 2001, Applicant and her husband traveled to the PRC to adopt their daughter. Tr. 87. They own a house in the U.S., they vote, and attend town meetings. Applicant is well-respected by her colleagues and supervisors.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of

Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See ISCR Case No. 95-0611 at 2* (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *ISCR Case No. 01-20700 at 3* (App. Bd. Dec. 19, 2002); *see Directive ¶ E3.1.15*. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." *ISCR Case No. 01-20700 at 3*.

CONCLUSIONS

Guideline C-Foreign Preference

In the SOR ¶ 1.a., DOHA alleged under Guideline C that the People's Republic of China (PRC) still considers Applicant a citizen because she was born in the PRC and the country provided her a master's degree. Individuals who act in ways that indicate a preference for a foreign country over the U.S. may be prone to provide information or make decisions that are harmful to the interests of the U.S. *Directive ¶ E2.A3.1.1*.

The Government did not establish facts by substantial evidence to demonstrate Applicant has a preference for the PRC, or any other country, over the U.S. Contrary to the allegation in the SOR, the PRC does not still consider Applicant a citizen of that country. Article 9 of the Nationality Law of the PRC provides that "[a]ny Chinese national who has settled abroad and who has been naturalized as a foreign national or has acquired foreign nationality of his own free will shall automatically lose Chinese nationality." Ex. A. Applicant did receive undergraduate and graduate degrees from state educational institutions in the PRC. However, under the circumstances, there is no evidence to suggest that has resulted in a preference for the PRC. Finding is for Applicant.

Guideline B-Foreign Influence

In the SOR, DOHA alleged under Guideline B that the PRC still considers her husband a citizen despite his naturalization as a U.S. citizen (SOR ¶ 2.a.), she maintains regular contact with her mother (SOR ¶ 2.b.) her brothers and sisters (SOR ¶ 2.c.), her mother and father-in-law (SOR ¶ 2.d.), and her brother and sisters-in-law (SOR ¶ 2e) who are citizens and residents of the PRC. A security risk may exist when an applicant's immediate family and other persons to whom she may be bound by affection, influence, or obligation are not citizens of the U.S. or may be subject to duress. Such contacts have the potential to make an individual vulnerable to coercion, exploitation, or pressure.

The Government failed to establish by substantial evidence that the PRC considers Applicant's husband a citizen of that country. By PRC law, he lost his PRC citizenship at the time of his naturalization. Ex. A. Finding on ¶ 2.a. is for Applicant.

The Government did establish that Applicant has immediate family members-her mother, brothers, and sisters-who are citizens and residents of the PRC. DC 1. Furthermore, the evidence supports a conclusion that she has close ties of obligation to her in-laws, who are residents and citizens of the PRC. DC 1.

A determination that the immediate family members or associates are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force an applicant to choose between loyalty to the family member or associate and loyalty to the U.S. is a mitigating condition under Guideline B. C 1. Applicant presented evidence that her immediate family members and in-laws would not do anything to harm Applicant or her husband and are not agents of a foreign power. Applicant asserts her contacts with her family members and in-laws in the PRC are casual and infrequent (MC 3), she promptly reported all contacts with these associates to proper authorities (MC 4), and she has no overseas financial interests (MC 5).

The inquiry in a foreign influence case is not limited to consideration of whether the foreign contacts or connections are agents of a foreign power. Rather, the foreign contacts or connections must also be evaluated in terms of whether they place an applicant in a *position of vulnerability* to be influenced by coercive or noncoercive means, even if there is no evidence that a foreign country has sought to exploit that vulnerability. ISCR Case No. 00-0628 at 5 (App. Bd. Feb. 24, 2003). Thus, in addition to considering the nature of Applicant's contacts with the foreign individual, we must also evaluate (1) whether the country in which the foreign contacts live is hostile to and has interests inimical to those of the U.S., and (2) whether the applicant would have access to information of interest to, and targeted for collection by, that nation.

The PRC is hostile to, and has interests inimical, to those of, the U.S. The PRC is a totalitarian state that depends on the suppression of its people. Applicant admits that her grandparents, parents, and siblings were mistreated because of their economic situation or political beliefs—her grandparents had their property seized, her parents were sent to labor camps, and her siblings were deprived of education opportunities. These are examples of how this suppression affected Applicant. The PRC has been involved in espionage against the U.S., both military and economic. While Applicant's contacts in the PRC are not foreign agents, their presence in that country, subject to the pressures of the communist regime, places Applicant in a position of vulnerability that could force her to choose between loyalty to the persons involved and loyalty to the U.S. Therefore, MC 1 does not apply.

Applicant asserts that her contacts with her family and in-laws is casual and infrequent. MC 3. In this context, "casual" means "not close or intimate; passing." *American Heritage Dictionary of the English Language* 299 (3d ed. 1992). "Infrequent" means "not occurring regularly; occasional or rare." *Id.* at 927. The closer the relationship the less contact is necessary to conclude this mitigating condition fails. Similarly, the greater the contact the less close the relationship needs to be to cause the mitigating condition to fail. Although Applicant's contact with her own family has decreased since she completed her security clearance application, the evidence does not establish that these contacts are casual.

"[E]vidence that an applicant has contacts with an immediate family member in a foreign country raises a rebuttable presumption that those contacts are not casual in nature." ISCR Case No. 00-0484, 2002 DOHA LEXIS 85 at *11 (App. Bd. Feb. 1, 2002). In fact, Applicant admits that she has "a sense of affection and fondness towards China through my family." She has strong emotional ties to both her mother and her eldest sister, who played a large part in her upbringing. Her association with her immediate family in the PRC is not casual.

The Government also established that her husband's parents and siblings are citizens and residents of the PRC. There is a rebuttable presumption that Applicant has ties of affection for, or at least obligation to, her husband's immediate family. ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). That is because an applicant's spouse is in a position to influence the applicant. In this case, Applicant's in-laws spent six months living in Applicant's home after she adopted her daughter and brought her to the U.S. from the PRC. Although Applicant no longer has much contact with her husband's family, her husband does. Applicant's association with her in-laws is not casual. MC 3 does not apply.

Considering all the circumstances, Applicant failed to demonstrate that her foreign contacts do not place her in a position of vulnerability to coercion or influence. Findings on ¶¶ 2.b., 2.c., 2.d., and 2.e. are against Applicant

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline C: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Paragraph 2. Guideline B: AGAINST APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. After receiving the transcript, Applicant submitted proposed changes to conform to the evidence at the hearing. Department Counsel has not objected to the proposed changes. The proposed changes are accepted and adopted.