

DATE: June 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-25937

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's close familial ties with citizens and residents of the People's Republic of China, her retention of her Chinese passport after becoming a U.S. citizen, and her failure to report on her security clearance application a trip she took to the Peoples' Republic of China in August and September 1998 raise serious security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On January 21, 2004, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under Guideline C (Foreign Preference), Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of the Directive.⁽³⁾ Applicant answered the SOR in writing February 6, 2004, and requested that her case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on March 23, 2004. The FORM contained documents identified as Items 1 through 6. Additionally, the Government submitted for administrative notice a U.S. Department of State, Bureau of Consular Affairs, Consular Information Sheet entitled "China," containing information current as of March 23, 2004. By letter dated March 30, 2004, a copy of the FORM was forwarded to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant did not submit additional information or objections within that time period. On May 20, 2004, the case was assigned to another DOHA Administrative Judge. For reasons of case load distribution, the case was reassigned to me May 31, 2005, for a decision.

FINDINGS OF FACT

The SOR contains four allegations of disqualifying conduct. Two allegations relate to conduct charged under Guideline C, Foreign Preference, one allegation relates to conduct charged under Guideline B, Foreign Influence, and one allegation relates to conduct charged under Guideline E, Personal Conduct. In her answer to the SOR, Applicant admitted the four allegations charged under the three guidelines of the Directive. Applicant's admissions are

incorporated as findings of fact.

Applicant is employed as a software engineer by a defense contractor. She was born in 1963 in the Peoples' Republic of China (PRC) and became a U.S. citizen in September 2000. She was married in 1987. Her husband, a naturalized U.S. citizen, was also born in the PRC. (Item 4.) Applicant and her husband are the parents of two children. (Item 6.)

Applicant came to the United States in 1990 to join her husband, who had been in the U.S. as a student since 1987. In 1998, Applicant used her Chinese passport to travel to the PRC to visit her parents. In July 1999, she renewed her Chinese passport for a term of five years. In September 2000, Applicant became a naturalized U.S. citizen and acquired a U.S. passport. Applicant states she is willing to relinquish her Chinese passport. In October 2001 she telephoned the embassy of the PRC and asked for assistance in relinquishing her Chinese passport. She said she was told that since she was now a U.S. citizen, her Chinese passport was no longer valid and the government of China did not want it back. (4) Applicant did not know to whom the passport should be given if the Chinese embassy would not accept it. She continued to keep the passport in her possession.

Applicant's parents and two brothers are citizens and residents of the PRC. The parents are retired. Applicant's parents visited her in the U.S. in 1994 for a period of approximately 18 months. They also visited her for an extended period of time in 2001. During their visits, Applicant's parents resided in her household. Applicant's mother was not feeling well and wanted to return to the PRC for medical treatment because she could not afford to be treated in the U.S. without health insurance. One of Applicant's brothers is an electrical engineer in the PRC; the other brother is a sales representative for a medical equipment company in the PRC. Applicant says her brothers and her parents want to emigrate from the PRC to the U.S. Applicant speaks with her parents by telephone approximately once every two months. (Item 6, at 1- 2.)

In June 2001, Applicant took a job as a programmer analyst 1 with a defense contractor. She completed a security clearance application (SF-86) on July 5, 2001.

Question 16 on the SF-86 reads:

Foreign Countries You Have Visited

Have you traveled outside the United States on other than official U.S. Government orders in the last 7 years? (Travel as a dependent or contractor must be listed.)

Applicant responded "Yes" to Question 16 . She indicated she had traveled to Canada for four days in August 2000. (Item 5.) She had traveled to the PRC in the last seven years, but did not list the travel.

Applicant was interviewed by a special agent of the Defense Security Service in October

2001. She acknowledged she took a three-week trip to the PRC in 1998 to visit her parents. She stated her failure to list the trip in her response to Question 16 was due to misunderstanding or misinterpretation of the question. (Item 6, at 2- 3.) She incorrectly believed the time period for reporting travel outside the United States was only the past two years and not the past seven years. (Item 6, at 2.)

Applicant went to work as a software engineer for her present employer in December 2001. She completed a second SF-86 in January 2002. In response to question 16, she answered "yes" and listed her travel for pleasure to Canada in August 2000 and her trip to the PRC in August 1998. (Item 4.)

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

In the SOR, DOHA alleged, under Guideline C that Applicant obtained a passport from the PRC, had it renewed in 1999, became a U.S. citizen and acquired a U.S. passport in 2000, while retaining the PRC passport which did not expire until July 2004 (¶1.a.); and that, while Applicant expressed willingness to relinquish her PRC passport, as of October 22, 2001, it was still in her possession. (¶1.b.)

A security concern arises under Guideline C of the Directive when an individual's actions indicate a preference for a foreign country over the United States, leading to the conclusion that he or she may be prone to provide information or make decisions that are harmful to the interests of the United States. An individual's possession and/or use of a foreign passport is identified as a Disqualifying Condition under ¶ E2.A3.1.2.2.of Guideline C. A security concern in this case is Applicant's continued possession of her PRC passport after receiving U.S. citizenship and acquiring a U.S. passport.

A Memorandum dated August 16, 2000, from the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (Money memorandum), sets down policy guidance to be used in adjudicating cases involving an applicant's possession or use of a foreign passport:

The Guideline specifically provides that "possession and/or use of a foreign passport" may be a disqualifying condition. It contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country. The only applicable mitigating factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline are that the possession and use of a foreign passport in preference to a U.S. passport raises doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. Therefore, consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government.

Applicant admitted continued possession of her PRC passport after receiving U.S. citizenship. Applicant stated she telephoned the PRC embassy and was told it would not accept her unexpired passport. The embassy's refusal to accept her offer to surrender the passport does not mitigate Applicant's continued possession. Applicant offers no evidence she has obtained official approval from the United States Government to possess or use her PRC passport. Accordingly, pursuant to Applicant's admissions and the policy guidance of the Money Memorandum, the SOR allegations in

subparagraphs 1.a. and 1.b. under Guideline C of the Directive are concluded against the Applicant.

The SOR alleges that Applicant's parents and two brothers are citizens and residents of the PRC (¶ 2.a.) A security risk under ¶ E2.A2.1.1 of Guideline B of the Directive may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information.

Applicant's admissions and the record evidence suggest her close familial ties with and obligations to citizens of the PRC create the potential for foreign influence that could result in the compromise of classified information. A Guideline B security concern exists when an individual seeking clearance is bound by ties of affection, influence, or obligation to immediate family, close friends, or professional associates in a foreign country, or to persons in the United States whose first loyalties are to a foreign country. A person who places a high value on family obligations or fidelity to relationships in another country may be vulnerable to duress by the intelligence service of the foreign country or by agents from that country engaged in industrial espionage, terrorism or other criminal activity. The more faithful an individual is to family ties and obligations, the more likely the chance that the ties might be exploited to the detriment of the United States.

Applicant's case also requires the recognition that the PRC has historically acted in a hostile manner to U.S. security interests. American citizens traveling to the PRC are advised that PRC security personnel "may place foreign government officials, journalists, and business people with access to advanced proprietary technology under surveillance." Consular Information Sheet; China, May 29, 2003, at 2.

Applicant's admissions that her parents and two brothers are residents and citizens of the PRC raise security concerns under the Disqualifying Conditions (DC) identified in subparagraphs E2.A2.1.2.1, E2.A2.1.2.2, and E2.A2.1.2.3 of Guideline B. Applicant is close to her parents. They have visited her in the U.S. twice for protracted periods of time and have shared her living quarters. She traveled to the PRC in 1998 to visit her family. Applicant telephones her parents in the PRC and speaks with them every other month. Given the totalitarian government of the PRC, Applicant's brothers are connected with the government as employees of state-run industries.

The record indicates that mitigating condition ¶ E2.A2.1.3.1 applies only in part to the facts of Applicant's case. While the evidence does not establish that Applicant's father, mother, and two brothers are agents of a foreign power, they are citizens of a totalitarian state with interests antithetical to the United States and could be exploited by their government in a way that could force Applicant to choose between loyalty to them and the United States. Applicant's contacts with citizens of the PRC are frequent and familial, and thus mitigating conditions E2.A2.1.3.2 and E2.A2.1.3.3 do not apply to Applicant's relationships with her father, mother, and brothers.

Applicant was unable to put forward evidence that could mitigate the security concerns discussed herein and demonstrate that she would not be vulnerable to foreign influence that would result in the compromise of classified information. Accordingly, the allegations in subparagraph 2.a. under Guideline B of the SOR are concluded against the Applicant.

Guideline E - Personal Conduct

In the SOR, DOHA alleged Applicant falsified her answer to question 16 on the SF-86 she executed on July 5, 2001.(¶ 3.a.(1)). A security concern arises under Disqualifying Condition E2.A5.1.2.2. when an individual deliberately omits, conceals, or falsifies relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant admitted the falsification allegation in the SOR. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

An applicant's responsibility to provide truthful and complete responses to questions on the SF-86 cannot be set aside or ignored. An applicant's non-official travel outside the United States is material to a determination of his or her security

worthiness. With respect to the Guideline E conduct alleged in SOR subparagraph 3.a.(1), Applicant falsified her SF-86 by omitting and concealing relevant and material information about her non-official travel to visit her family in the PRC.

Applicant's assertion that she misunderstood the question and thought she was obliged to report only foreign travel in the previous two years has dubious merit. Question 16 clearly stated the reportable time period was the previous seven years. Applicant's only non-business foreign trips in the seven years before 2001 were a four-day excursion to Canada in 2000 and a three-week trip to the PRC to visit her parents in 1998. Applicant's failure to answer Question 16 on her SF-86 truthfully and completely brings her conduct under disqualifying condition E2.A5.1.2.2. The information she withheld was pertinent to a determination of her judgment, trustworthiness, and reliability. Thus, mitigating condition E2.A5.1.3.1. does not apply. She did not make a prompt good-faith effort to correct the falsification before being confronted with the facts, and, accordingly, mitigating condition E2.A5.1.3.3 does not apply. The record is insufficient to show whether Applicant's falsification was an isolated incident. It was recent, and she subsequently supplied correct information voluntarily. I conclude that mitigating condition E2.A5.1.3.2 applies in part, although it is insufficient to mitigate the personal conduct concerns. Finally, Applicant's falsification was not based on advice from legal counsel, and thus mitigating condition E2.A5.1.3.6. is inapplicable.

With respect to the Guideline E conduct alleged in SOR, the Government has established its case. Accordingly, the allegation in subparagraph 3.a.(1) is concluded against the Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline C: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Guideline B AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a.(1): 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.

Joan Caton Anthony

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. Applicant's first name was incorrectly listed on the SOR. *See* Item 6 for the correct spelling of Applicant's first name.
4. The Peoples' Republic of China does not recognize dual nationality. Consular Information Sheet, "China," at 1-2.