

DATE: May 30, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26031

DECISION OF ADMINISTRATIVE JUDGE

WILLIAM R. KEARNEY

APPEARANCES

FOR GOVERNMENT

HENRY LAZZARO, Department Counsel

JONATHAN BEYER, Department Counsel

FOR APPLICANT

THOMAS L. MCGOVERN, III

SYNOPSIS

The Applicant became a U.S. citizen on September 17, 1999, at which time she possessed a Chinese passport. Just prior to the hearing, she returned her foreign passport. Applicant's mother, father and sister are citizens of China. Her father is a permanent resident in the United States; her sister is a permanent resident of Germany; Applicant's mother is presently residing in China. Arrangements have been made to have her mother obtain a visa and immigrate to the United States and live with the Applicant. Under specific facts in evidenced herein, the Government's security concerns have been mitigated by Applicant's strong preference for, and demonstrated loyalty and allegiance to, the United States. Clearance granted.

STATEMENT OF THE CASE

On January 15, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program*" (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding ⁽¹⁾

under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, notarized on February 11, 2002, the Applicant responded to the allegations set forth in the SOR, wherein she admitted all the allegations alleged, and requested a hearing.

The undersigned Administrative Judge received the case assignment on April 1, 2002, and a notice of hearing was issued on April 5, 2002, noting the hearing date as April 25, 2002. The Applicant's attorney filed a notice that his law firm was representing the Applicant, and requested a continuance of the hearing date. The hearing was reset for May 3, 2002, and all the parties concerned were notified. At the hearing the Department Counsel presented four (4) exhibits. The Applicant's case consisted of the presentation of eight (8) exhibits and the testimony of the Applicant and her husband. The record in this case was closed at the end of the hearing on May 3, 2002, and the undersigned received the Transcript ("Tr") on May 13, 2002.

FINDINGS OF FACT

The SOR consisted of allegations predicated on the following guidelines: paragraph 1, Guideline C (Foreign Preference), and Guideline B (Foreign Influence). After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant has admitted all of the factual allegations set forth in the SOR pertaining to Guideline C, Foreign Preference, and to Guideline B, Foreign Influence. Her admissions are incorporated herein as findings of fact.

The Applicant is a 33-year-old female part owner of a computer company that has done business with the U.S. Government since March 2000. She is also known as Rose Wang which is her professional identity. She is the CEO and President of her computer company. The Applicant seeks to obtain a Top Secret personnel security clearance.

She is a naturalized citizen of the United States since September 17, 1999. She was born in Shanghai, Peoples Republic of China. Applicant was a resident of the U.S. for approximately ten years prior to becoming a U.S. citizen. At the time she became a U.S. citizen she renounced her Chinese citizenship. Applicant holds a Master of Science degree from the University of Houston, Texas since May 13, 1995.

The Applicant's parents are citizens of China, her father is a long term resident of the U.S. and her mother is at the present time residing in China, and is well on her way for receiving an immigration visa, to permanently reside in the U.S. Applicant's sister is a citizen of China, but has been a long time resident of Germany, with no intention of returning to China.

Applicant grew up in a very educated academic family, as both of her parents were professors at a university. Her mother speaks five foreign languages and her father speaks three foreign languages. The Applicant speaks several languages, having learned English at a very early age. She came to the United States in 1990, to attend graduate school. At the time of the hearing Applicant was a resident in the U.S. for the past twelve years. She tried to come to the U.S. four years prior, to attend college, however, she was not granted a visa by the Chinese government. She met her husband on October 14, 1990, when she was a masters student. They were married two years later on February 1, 1992. At the present time, they have been married ten years. Her husband was born in the U.S. and is a U.S. citizen. He presently holds a PhD degree in computer science, and he owns the other half of the computer company with his wife.

Prior to the time the Applicant came to the United States, she was apolitical and did not participate in Chinese government activities, and she was never in the Chinese military or trained for military service, nor did she ever work for the Chinese government in any capacity. She has never been a member of the Communist or any other totalitarian party. She never voted in China and she never taken any oath of allegiance to China. Applicant has no property, business connections, or financial interests in China. She has no loyalty or other affinity to the Chinese government.

Prior to becoming an American citizen, Applicant held a Chinese passport that was reissued to her on July 7, 1998, with an expiration date of July 27, 2003. At the time she attended the U.S. naturalization ceremony, on September 17, 1999, she brought her Chinese passport with her, fully expecting that somebody would take it from her, as she is now an American citizen, but nobody took it from her. When she returned to her home she just placed it in a dresser drawer and forgot about it. She did not know where to surrender it or how to surrender it. Applicant remained unaware of the true significance of possessing a foreign passport, or its potential impact on her obtaining a security clearance. Her attorney advised her, prior to the hearing, as to the procedure to surrender her Chinese passport. She went to the Chinese embassy visa office in Washington, D. C., on April 13, 2002, and told them that she wanted to surrender her Chinese passport, she filled out an application, paid \$20.00, renounced her Chinese citizenship and surrendered the Chinese

passport. Applicant was given back the passport with the corner cut and each page was stamped "cancelled." On April 15, 2002, the Embassy of the People's Republic of China gave the Applicant a letter (See Exhibit A), stating that she "has automatically lost her Chinese citizenship, effective from the date of obtaining her American citizenship."

Applicant is not a dual citizen with any other country in the universe. Applicant has testified that she loves the U.S. and the freedom of doing whatever you want to do or be, and she intends to permanently stay in the U.S. She married a U.S. citizen and they own a computer business together and a house in Maryland. Neither the Applicant nor her husband have a police record. Upon becoming a U.S. citizen the Applicant obtained a U.S. passport on October 7, 1999, (see Exhibit B), and she used her valid U.S. passport to travel out of the country on several occasions, including one trip to China to visit her mother. Since becoming an American citizen, Applicant has exercised the rights and privileges, and performed the responsibilities of a citizen of the United States.

Although her mother is a Chinese citizen and presently resides in China, the Applicant is her sponsor to immigrate to the United States, and there is evidence that Applicant's mother is well on the way for receiving an immigration visa, to permanently reside in the United States, and that they are in the final stage of paper work in getting her mother into this country (see Exhibits E and F).

Applicant's father is a citizen of China and has been a long time resident in the United States. Since 1985, he has lived in various western countries. Applicant's parents have been frequent travelers getting research appointments in various research labs in various countries, such as Germany, France, England, and the United States. Her father has spent extended time in Germany. In 1995, the Applicant's father came to the United States with a research appointment at the University of Houston, Texas. At the present time, he is a permanent resident of the U.S. and he is working for an oil consulting company.

Applicant's sister is a citizen of China, but has been a long time resident in Germany. She came to Germany with her father who was on a two year appointment in a research lab while she was in high school and she stayed in Germany. Her sister is presently married, with one child, and has resided in Germany for a long period of time and does not intend to return to China. Exhibit H is a certificate from a German lawyer which states the Applicant's sister is married and the sister and her husband are duly registered as residents of the City of Jena, Germany; the sister is holding a permanent employment contract with a software developer; her husband is registered as a permanent resident, and maintains a business; they both have expressed an indication that they intend to live in Germany permanently; they both took proper measurements to live permanently in Germany; they never have been arrested or convicted of any crime, nor do they have a police record.

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as to the most pertinent facts of this particular case.

The guidelines, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

GUIDELINE C - FOREIGN PREFERENCE

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

Conditions that could raise a security concern and may be disqualifying include:

(2) Possession and/or use of a foreign passport;

Conditions that could mitigate security concerns include:

- (2) Indicators of possible foreign preference (e.g., foreign passport) occurred before obtaining United States citizenship;

GUIDELINE B - FOREIGN INFLUENCE

A security risk 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: (1) not citizens of the United States or (2) may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Conditions that could raise a security concern and may be disqualifying include:

- (1) An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in a foreign country;

Conditions that could mitigate security concerns include:

- (1) A determination that the immediate family member(s), cohabitant, or associate(s) in question would not constitute an unacceptable security risk;

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section 6.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct.

The circumstances surrounding the conduct, to include knowledgeable participation.

The frequency and recency of the conduct.

The individual's age and maturity at the time of the conduct.

The voluntariness of participation.

The presence or absence of rehabilitation and other pertinent behavioral changes.

The motivation for the conduct.

The potential for pressure, coercion, exploitation, or duress.

The likelihood of continuation or recurrence.

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

"It is difficult to see how the Board would be able to review security-

clearance determinations under a preponderance of the evidence

standard without departing from the 'clearly consistent with the

interest of the national security' test. The clearly consistent standard

indicates that security-clearance determinations should err, if they

must, on the side of denials. Placing the burden on the Government

to support the denial [of a security clearance] by a preponderance of

the evidence would inevitably shift the emphasis and involve the

Board in second-guessing the agency's national security determinations."

See *Dept. Of the Navy v. Egan*, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial

evidence but something less than a preponderance of the evidence-rather than as an indication of the Court's tolerance for error below.

The burden of going forward with the evidence then shifts to the Applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the case or through evidence of an affirmative defense. Assuming that the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an Applicant might deliberately or inadvertently fail to properly safeguard classified information, the Applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. (2)

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and during the subject hearing I had ample opportunity to evaluate the demeanor of the Applicant, observe her manner and deportment, appraise the way in which she responded to questions, assess her candor or evasiveness, read her answer to the SOR, and listen to her testimony. It is my impression that her explanations regarding her past foreign experience are consistent, and hence, considering the quality of the other evidence before me, have the solid resonance of truth. Therefore, the undersigned concludes that the Applicant has successfully rebutted and overcome the Government's case with regards to all the allegations contained the SOR.

A review of the guidelines under Guideline C, Foreign Preference, reveals that disqualifying condition number 2, possession of a foreign passport, is one of the disqualifying conditions that could raise a security concern in this case. However, Applicant did return and relinquish her Chinese passport to the proper Chinese authorities, and it was cancelled prior to the hearing. Further, she obtained a U.S. passport and used it for all her foreign travels after she became an American citizen. It is obvious that the Money Memorandum, which pertains to the possession and use of a foreign passport, is no longer applicable to the facts in this case. Likewise, disqualifying condition number 2, has also been mitigated and it is no longer applicable.

A review of the guidelines under Guideline B, Foreign Influence, reveals that disqualifying condition number one, an immediate family member, or a person to whom the individual has close ties or affection or obligation, is a citizen of, or resident or present in a foreign country, is one of the disqualifying conditions that could raise a security concern. However, mitigating condition number one mitigates the security concerns involved. It is uncontroverted that some of Applicant's immediate family members and persons to whom she has close ties of affection are citizens of China and residents of foreign countries. These simple facts standing alone, are sufficient to raise a security concern over the possibility of Applicant's vulnerability to coercion, exploitation, or pressure. However, the mere possession of family ties with a person or persons in a foreign county is not, as a matter of law, disqualifying under Guideline B. Applicant's father is a permanent resident of the U.S., and her sister is a permanent resident of Germany. Applicant's mother, presently residing in China, is clearly a security concern under foreign influence disqualifying condition number one. In this instance, after an examination of all the evidence, I determine that Applicant's mother, father and sister considering their citizenship and residency status, do not constitute an unacceptable security risk. Applicant's mother, even though she is presently residing in China does not pose an unacceptable security risk, as there has been sufficient evidence presented that the mother will, in the very near future, immigrate to the United States and will live with the Applicant in America. It appears that this is an acceptable security risk. None of Applicant's immediate family members have been associated with working for the Chinese government. There is no evidence to indicate that they are involved in any "intelligence work" and they apparently have no "official ties" to the Chinese or Germany governments. Applicant's immediate family has no continuing financial interest in foreign investments in China, nor do they own any foreign property in China. Moreover, Applicant is a naturalized American citizen, and she is married to an American citizen.

A review of all the evidence reveals Applicant's allegiance and loyalty to the United States are resolute, and supported by significant indicia of same. Applicant has maintained a residence in the United State since 1990; has been employed in the United States; attended graduate school since that time; became a citizen of the United States on September 17, 1999; and declared allegiance to the United States. Even though the Applicant retained her foreign passport after becoming an American citizen, the evidence reveals that she did not use it to travel after becoming a U.S. citizen, but used her U.S. passport for her foreign travel. Once the Applicant was advised on the procedure, she returned and relinquished her Chinese passport prior to the hearing in this matter.

Each clearance decision is required to take into consideration pertinent factors set forth in Section 6.3 of the Directive, and in the adjudicative process consideration and discussion of the factors in enclosure 2 to the Directive. These factors are identified on pages 5 and 6 *supra*. None of them are applicable to the facts in this particular case.

Thus, I conclude Applicant has through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case with respect to the issues of foreign preference and foreign influence. Accordingly, all the allegations of Paragraph 1, subparagraph 1.a., and of Paragraph 2, subparagraphs 2.a., 2.b., and 2.c., of the SOR are

concluded in favor of the Applicant.

For the reasons stated, I conclude Applicant is eligible for access to classified information.

FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item

25 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline C FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Paragraph 2, Guideline B FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

Subparagraph 2.c.: For the Applicant

DECISION

In light of all the circumstance presented by the record in this case, it is the determination of the undersigned that it is clearly consistent with the national interest to grant a security clearance for the Applicant.

William R. Kearney

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

2. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).