

DATE: March 9, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 01-26243

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

**APPEARANCES**

**FOR GOVERNMENT**

Eric H. Borgstrom, Esq., Department Counsel

**FOR APPLICANT**

Daniel C. Schwartz, Esq., Colleen M. Redden, Esq.

**SYNOPSIS**

Applicant, a 49-year-old married woman, is employed as a lead information systems engineer for a defense contractor. Her connections to or contacts with China are rather minimal, tenuous, or insignificant and do not pose an unacceptable security risk or concern for foreign influence under Guideline B. Clearance is granted.

**STATEMENT OF THE CASE**

On April 3, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B for foreign influence. Applicant, through counsel, answered the SOR on May 15, 2003, and she requested a clearance decision based on a hearing record. Her seven-page answer to the SOR was mixed; she denied, admitted in part, denied in part, and provided explanations to the various allegations subparagraphs 1.a through 1.f.

Department Counsel indicated they were ready to proceed on or about August 12, 2003, and the case was initially assigned to another administrative judge that same day. Thereafter, on September 9, 2003, a notice of hearing was issued to the parties scheduling the hearing for Tuesday, October 28, 2003, which was agreed upon by the parties. Due to caseload considerations, the case was reassigned to me October 7, 2003, to conduct the hearing and issue a written decision. Applicant appeared with counsel and the hearing took place as scheduled. DOHA received the transcript November 4, 2003. Applicant's counsel submitted errata to the transcript on or about November 12, 2003. No objection being received from Department Counsel, the errata are accepted and incorporated into the transcript.

**FINDINGS OF FACT**

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the record, I make the following essential findings of fact:

Applicant's testimony is found to be credible and it is accepted as true. In making this finding, I have given due consideration to the fact that English is Applicant's second language and some allowances have been made for potential communication problems.

Applicant is a 49-year-old married woman and a naturalized U.S. citizen. She was born in China in 1954, and she obtained her U.S. citizenship in August 1999. She has lived continuously in the U.S. since 1990. Since April 2001, Applicant has worked as a lead information systems engineer for a defense contractor. The firm provides systems engineering, research and development, and information technology support to the government.

Applicant has an impressive educational and professional background. She earned B.S., M.S., and Ph.D. degrees in mechanical engineering in China. She was employed at a Chinese technology university for several years as an associate professor and director of a machining lab. After working in the U.S. for several years, she became concerned that mechanical engineering was becoming outdated and no longer challenging for her, and so, she obtained an M.S. degree in computer science in 2000. She holds six different certificates in computer design or networking. She is also a registered professional engineer in mechanical engineering. She's a prolific researcher and writer publishing numerous articles in various technical and professional journals. Currently, besides her full-time employment, she serves as an adjunct professor at two universities where she teaches undergraduate and graduate courses in computer communication, networking, and data communication. In addition, Applicant was recently appointed to serve on the board of directors for one of the universities where she teaches.

Applicant has one daughter from her first marriage, which ended in divorce in 1992. Her daughter, born in China in 1984, is now enrolled in a U.S. university studying biology. Her daughter is also a naturalized U.S. citizen. Applicant describes her daughter as an "American girl," meaning fully assimilated into American language and culture. Applicant has two brothers, one has passed away and the other, also a Ph.D., has been a U.S. citizen and resident for many years.

Applicant married a native-born U.S. citizen in 1997. Her spouse is employed as an economist for the federal government. The couple have substantial financial assets in the U.S. as evidenced by a primary residence, a residential rental property, and investment accounts. Applicant has zero financial investments or interests in China.

As a young child, Applicant, like many other Chinese, was a victim of the Cultural Revolution. The result for Applicant was she was deprived of formal education starting at about the fourth grade. Although she went to some sort of a middle school during this time, it was part of the so-called reeducation process. She and her family also suffered from lack of food and prolonged hunger. Applicant testified that half the people in her father's village died of starvation. She also described having to eat boiled down tree bark and leaves because food was in such short supply.

At the age of 17 or 18 years old, Applicant was assigned to work at a locomotive factory in the city. Her job was a mechanical technician, and she was one of the small percentage of female workers among the 7,000 employees. The factory had a policy of sending one employee per year to college based on their work performance. Applicant decided she would be the one selected. She worked extremely hard as the work involved heavy, physical labor, yet she routinely outworked her male counterparts. She was also able to memorize the various parts of the machines (sometimes up to 2,000 parts per machine), which allowed her to take apart, identify, and reassemble the machine. In 1975, Applicant came close to selection, but lost out to another employee with connections. The next year, 1976, she continued working hard and was selected to attend college.

Applicant was 22 years old when she started college. She earned her B.S. in mechanical engineering in about 3.5 years. She describes that time as a period of intense study rarely taking time off. Upon completing her degree, Applicant briefly returned to the locomotive factory and worked for a few months while she studied to take an exam for further university study. She passed the exam and was admitted to a graduate program at the technology university. She was awarded an M.S. in mechanical engineering in 1983. The university asked her to stay on as a lecturer and researcher, and later on she became a Ph.D. student when the university started the program. Applicant was the first person admitted to that particular Ph.D. program.

In 1984, Applicant was asked to present a paper at an international conference in Japan. In 1986, Applicant tested and competed for a scholarship to study in the U.K. She was awarded the scholarship and traveled to Birmingham, England,

where she continued her Ph.D. studies for about 14 months during 1987 - 1988. That experience, combined with her trip to Japan, was enlightening for Applicant. She not only learned a lot about new technology in mechanical engineering, but she learned about capitalism, and she observed that people seemed happier and society more advanced. These experiences planted the seed in Applicant's mind that she wanted to leave China.

In 1990, Applicant was selected to present a paper in the U.S., and she decided this was her chance to leave China. The technology university permitted her to attend, but only at her expense. Applicant spent a good deal of the family's savings to buy the round-trip ticket. Applicant arrived in the U.S., presented her paper, and attempted to find a job by networking with various people at the conference. She was unsuccessful and subsequently ended up relocating to another part of the U.S. Applicant spent most of November 1990 to June 1991 searching for employment. During this time she lived with an older Chinese couple until she found a job and moved out into a rental unit.

Applicant found her first job working as a heating, ventilation, and air-conditioning engineer or technician. Professionally, this was a step down for Applicant as it often involved hands-on, physical labor, but she gladly accepted the position. The company sponsored her to obtain resident alien status (the green card), and Applicant worked at the company from June 1991 to 1995. Thereafter, Applicant worked as a mechanical engineer for an engineering company and, most recently until April 2001, as a network engineer for a large telecommunications company.

Applicant has possessed a U.S. passport since September 1999. As a Chinese citizen in 1990, she used her Chinese passport to enter the U.S. Subsequently, her Chinese passport expired in December 1999. Applicant surrendered her expired Chinese passport by mailing it to China's Embassy in Washington, D.C., on or about May 15, 2003.

**SOR ¶ 1.a-Applicant's travel to China:** Starting in June 1997 and ending in July 2001, Applicant made six trips to China where she typically stayed for about two weeks. Her motivation to travel was to visit her mother who was suffering from cancer and eventually passed away in July 1999. Her five trips during 1997, 1998, and 1999, all took place before Applicant was naturalized and so, she used her Chinese passport. She used her U.S. passport during the June 21 - July 11, 2001, trip. Likewise, the first five trips took place before she has been granted an interim security clearance. Although she was granted an interim security clearance in June 2001, she had yet to receive access to any classified information before traveling to China. The purpose of the last trip was to resolve matters relating to her mother's death as well as to obtain a tutor to teach Chinese to her daughter, which will be discussed below. Applicant does not plan to travel to China in the future.

**SOR ¶ 1.b-The unsolicited fax from China:** On or about July 25, 2001, Applicant received an unsolicited fax from a person in China (Exhibit 3). The author of the fax identified himself as a former student who obtained the Applicant's contact information from a mutual professor at the technology university. The nature of the fax is a business or marketing lead inviting Applicant to respond. Applicant does not recall the former student, and she did not respond to the fax. She kept the fax in her office in a stack of papers and forgot about it until the subject of contacts from China was discussed during her background interview in October 2001. She has heard nothing more from this person.

**SOR ¶ 1.c-Contact with a former classmate in China:** Applicant has contact via e-mail with a former classmate in China. The person was also a Ph.D. student at the same technology university, although one year behind Applicant. While in school, they often studied together and discussed technical and research issues. After leaving China, Applicant had little to no contact with the former classmate. More recently, since e-mail to China has become available, Applicant exchanges e-mail with this person approximately six times per year, an example of which is Exhibit 4. Applicant had contact with this person in 2001 as he helped Applicant locate a tutor to teach Chinese to her daughter, which will be discussed below. Applicant does not feel bound by affection or obligation to this person.

**SOR ¶¶ 1.d & 1.e-Applicant's daughter in China:** Applicant's daughter also traveled with Applicant to China in June - July 2001. The daughter came along because Applicant wanted her daughter to improve her Chinese language skills to make her more competitive for college in the U.S. Applicant, through her former classmate, located a tutor at the same technology university. She and her daughter interviewed the prospective tutor, a 20-something-year-old university student, before agreeing to hire her. To facilitate her daughter's study, Applicant then rented a small apartment near the university for her daughter and the tutor to live in for the summer period. Her daughter's stay in China went as planned without an adverse incident. The daughter returned to the U.S. on or about August 25, 2001, and has not returned.

Applicant does not feel bound by affection or obligation to the tutor.

**SOR ¶ 1.f-Applicant's Aunt in China:** The only family member Applicant has in China is her maternal aunt, her mother's sister, who is approximately 14 years older than Applicant. Applicant has no contact with any family members from her father's side of the family. The aunt is a retired factory worker. She lives with her husband; she also has two adult children both of whom live in China. Applicant had very little contact with her aunt until Applicant's mother became ill with cancer when the aunt cared for Applicant's mother. The aunt did so out of a sense of obligation because Applicant's mother took action years earlier resulting in the aunt obtaining a formal education. Applicant saw her aunt during her trips to China, but she has not seen her aunt since her mother's death in July 1999. She does not feel emotionally close to the aunt. Applicant telephones her aunt perhaps twice per year. She has also sent her aunt \$500 as a gift on two occasions. Applicant does not feel bound by affection or obligation to her aunt.

China, also known as the People's Republic of China (PRC), is hostile to the U.S., and has interests inimical to those of the U.S. The PRC is a totalitarian state that depends on the suppression of its people. It has a poor record of human rights that features, among other things, repression of political and religious dissenters. The PRC is known to engage in espionage, economic and otherwise. (See Exhibits 5, 6, 7, 10, 11, and 12). Currently, U.S.-Chinese relations are complex, marked by complementary, and sometimes common, policies on a wide range of issues that are critical to U.S. national interests; the war on terrorism and regional security issues are two examples. (See Exhibits J and K).

### POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the record evidence as a whole, the following security guidelines are most pertinent here: Guideline B for foreign influence. <sup>(2)</sup>

### BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. <sup>(3)</sup> The government has the burden of proving controverted facts. <sup>(4)</sup> The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence. <sup>(5)</sup> The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard. <sup>(6)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence." <sup>(7)</sup> Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him. <sup>(8)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. <sup>(9)</sup>

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." <sup>(10)</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

### CONCLUSIONS

Under Guideline B for foreign influence, a security concern 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 U.S. or 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 if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

In addition, the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service. Concerning family ties, the language of Guideline B does not require a conclusion that an unacceptable security concern exist based solely on an applicant's family ties in a foreign country.<sup>(11)</sup> An administrative judge must consider the record evidence as a whole in deciding if the facts and circumstances of an applicant's family ties pose an unacceptable security concern under Guideline B.<sup>(12)</sup>

Here, based on the record as a whole, the government has not established its case under Guideline B as none of the disqualifying conditions (DC) apply. First, none of the people alleged in the SOR, (1) the former student who sent the fax, (2) the former Ph.D. classmate, (3) the tutor, and (4) the aunt, are immediate family members (spouse, father, mother, sons, daughters, brothers, sisters). Second, the record evidence fails to establish that Applicant has strong or close ties of affection or obligation to any of the four people alleged in the SOR. Of the four people, the only family member is the aunt. Moreover, the presence of the aunt in China does not pose a security concern given the rather distant nature of the relationship and the lack of any close ties of emotional attachment or close ties of obligation to the aunt by Applicant. In reaching this conclusion, I considered the fact that the aunt is not emotionally or financially dependent on Applicant as the aunt has a husband and two adult children present in China to rely on. Accordingly, given these circumstances, DC 1<sup>(13)</sup> does not apply against Applicant.

Travel to a foreign country, especially a country like China, may raise a security concern or risk because it could make the individual vulnerable to coercion, exploitation, or pressure by that foreign government. But that is not the case here. First, the five trips to China in 1997, 1998, and 1999, took place before Applicant became a U.S. citizen and thus have little, if any, security significance. Second, the sixth and last trip during 2001 and her daughter's study in China that summer, took place while Applicant was a U.S. citizen, but before she had access to any classified information via the interim security clearance. Given these facts and circumstances, although Applicant's travel to China could have made her vulnerable in a general sense, the travel did not make her vulnerable to foreign influence within the meaning of Guideline B. Accordingly, DC 6<sup>(14)</sup> does not apply against Applicant. Finally, I have reviewed the remaining DC under Guideline B and conclude that none apply given the record evidence.

To sum up, Applicant's connections to or contacts with China are rather minimal, tenuous, or insignificant when compared with her significant connections to the U.S. In other words, the absence of any close or significant connections to or contacts with China is the key to understanding the evidence in this case. Applicant's connections to or contacts with China, as alleged in the SOR and based on the record evidence as a whole, do not pose an unacceptable security risk or concern for foreign influence. Accordingly, Guideline B is decided for Applicant.

### **FORMAL FINDINGS**

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline B: For the Applicant

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: For the Applicant

Subparagraph 1.e: For the Applicant

Subparagraph 1.f: For the Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Directive, Enclosure 2, Attachment 2, at pp. 21-22.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
10. *Egan*, 484 U.S. at 528, 531.
11. ISCR Case No. 98-0419 (April 30, 1999) at p. 5.
12. *Id.*
13. "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." (Directive, Enclosure 2, E2.A2.1.2.1).
14. "Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government." (Directive, Enclosure 2, E2.A2.1.2.6).