

DATE: July 17, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-03250

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant and his wife are naturalized American citizens. He has been in the United States for over 30 years. He has relatives who are British citizens or citizens of the Hong Kong Special Administrative Region of the People's Republic of China. All live in Hong Kong. His mother and youngest brother have Permanent Resident Alien Status with the United States. Contact with his relatives is infrequent, and he has persuasively shown that his relatives do not work for the Chinese government or the Communist Party. The Applicant has also shown that he is not subject to coercion because of his foreign connections. Adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On January 17, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on February 21, 2003, and originally requested a decision without a hearing. On April 24, 2003, the Applicant requested a hearing. The case was received by the undersigned on May 7, 2003, and a Notice of Hearing was issued on May 9, 2003.

A hearing was held on May 28, 2003, at which the Government presented one documentary exhibit. Testimony was taken from the Applicant, who also submitted 27 hearing exhibits and one post-hearing exhibit (Applicant's Exhibit BB is a one page letter from the Applicant dated May 29, 2003). The transcript was received on June 12, 2003.

RULINGS ON PROCEDURE

The Applicant and the Department Counsel stipulated that the allegations in the Statement of Reasons should be amended in accordance with Paragraph E3.1.17 of the Additional Procedural Guidance of DoD Directive 5220.6. They are set forth in their amended version below:

1.a. Your mother is a citizen of, and resides in, the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China.

1.b. Your brother, born in 1958, is a British National (Overseas) citizen and resides in the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China.

1.c. Your brother, born in 1954, is a citizen of, and resides in, the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China.

The Applicant admitted all three of the amended subparagraphs. (Transcript at 41-56, Applicant's Exhibit BB.)

FINDINGS OF FACT

The Applicant is 52, married and has a Doctorate in Physics. He is employed by a defense contractor as a Sensor Manager, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has immediate family members who are not citizens of the United States, or may be subject to duress.

The Applicant was born in Hong Kong. He moved from Hong Kong to the United States in 1971 to attend college. Eventually, he received a Doctoral Degree in Physics. He became an American citizen in 1986 and began working for his present employer in 1987. He has held a security clearance continually since that time. (Transcript at 66-70.)

The Applicant's wife is also a naturalized American citizen. His two daughters are native born Americans. His mother is not an American citizen, but has Permanent Resident Alien status in the United States. She currently lives in Hong Kong. His brother born in 1958 (Brother One) is not an American citizen, but also has Permanent Resident Alien status in the United States. He is a British National (Overseas) citizen, and currently resides in Hong Kong. His brother born in 1954 (Brother Two) is a citizen of, and resides in, the Hong Kong Special Administrative Region of the People's Republic of China.

The Applicant's 87 year old mother was born in China. She was displaced by the Communists in 1949 and moved to Hong Kong, where she worked as a farmer. She has Permanent Resident Alien status in the United States (Applicant's Exhibit R at 1). She has lived in the United States and has moved all of her financial assets to the United States (Applicant's Exhibit R at 4.) The Applicant's mother currently lives in Hong Kong and is obtaining medical treatment there. She does not currently possess a passport of any country, but she is a citizen of the HKSAR. With her Permanent Resident Alien card she has the ability to travel to the United States without restriction. The Applicant talks to his mother on the telephone on approximately a monthly basis. The Applicant's mother has never had any connections to the Communist Party, Chinese government or its intelligence agencies.

Brother One, born in 1958, is a British National (Overseas) citizen and carries a British passport. The United States Government views Brother One and his family as being British citizens. This brother and his family obtained Permanent Resident Alien status in the United States in 2000. (Applicant's Exhibit S.) Brother One lived in the United States for a brief time, but currently resides in Hong Kong with his wife and family. The Applicant's mother lives with this brother, and the Applicant will talk to him when calling his mother. This brother is employed as an automobile mechanic. He is not connected to the Communist Party, Chinese government or its intelligence agencies.

Brother Two, born in 1954, is a citizen of the Hong Kong Special Administrative Region. He is part owner of a print shop. He does not have Permanent Resident Alien status in the United States, despite intensive efforts by the Applicant to obtain such status for him. The evidence shows that Brother Two failed to appear for his immigration interviews despite the Applicant's efforts. The Applicant is deeply disappointed in Brother Two's failure to obtain such status, and is estranged from Brother Two because of his failure. The Applicant does not talk to Brother Two unless he happens to be present when the Applicant calls his mother. (Applicant's Exhibit T, Transcript at 103-105, 119-121.) Brother Two is also not a member of the Communist Party, Chinese government or its intelligence agencies.

Mitigation.

The Applicant submitted evidence showing that he is well respected by his co-workers (Applicant's Exhibit O). The evidence also shows that he is active in his community (Applicant's Exhibit M). He has been extremely successful at his job, receiving many awards and patents for his work (Applicant's Exhibit G).

There is evidence that the Applicant understands and properly applies International Trade Agreement Restrictions in his business related contacts with foreign nationals. He discussed occasions when he has properly conducted himself in such contacts. The Applicant specifically stated that when such concerns arise he reports them up the chain of command. (Transcript at 77-83.)

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline B (Foreign influence)

Conditions that could raise a security concern:

(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), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States;

(3) Contact and correspondence with foreign citizens are casual and infrequent.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

a. The nature, extent and seriousness of the conduct

b. The circumstances surrounding the conduct, to include knowledgeable participation

c. The frequency and recency of the conduct

- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be subject to foreign influence that indicates untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has immediate family members who are not American citizens and live in Hong Kong.

The Applicant, on the other hand, has successfully mitigated the Government's case. All the members of the Applicant's family live in Hong Kong. His two brothers are in small business. His mother and Brother One have Permanent Resident Alien status in the United States. Brother One is not a citizen of HKSAR at all, but of the United Kingdom. None of those living in Hong Kong are in the Communist Party, or involved with the Chinese government. All the available evidence indicates that they are not in a position to be exploited by a foreign government. I have specifically considered the Applicant's mother's medical care requirements.

The Applicant calls his mother on a monthly basis, and will talk to his brothers if they available. It is clear that he is deeply disappointed that his family has not taken advantage of the opportunities to live in the United States that he has obtained for them. This has caused a certain amount of coolness in the relationship. While it is difficult to call any family relationship "casual," this one is infrequent.

The Applicant is a mature and understanding person. The evidence shows that he has an understanding of his security responsibilities and a credible intention of fulfilling them. The Applicant has persuasively shown that he is not subject to coercion or pressure because of his foreign connections.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraphs 1.a. through 1.c.: 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 the Applicant.

Wilford H. Ross

Administrative Judge