

DATE: May 12, 2003

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In Re:  
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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-04533

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Erin C. Hogan, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant has mitigated the concerns about possible foreign influence. His daughter is a native-born American citizen, residing with her father. He has instituted annulment proceedings against his wife, formerly co-habitant, who is a Chinese citizen. His two trips to China within ten years are not of security significance. Finally, his contacts with his brother are casual and infrequent. Adverse inference is overcome. Clearance is granted.

**STATEMENT OF THE CASE**

On or about September 4, 2002, 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 September 20, 2002, and requested that the case be decided without a hearing. The Government submitted its File of Relevant Material (FORM) to the Applicant on October 24, 2002. The Applicant was given 30 days from receipt of the FORM to submit any documents in rebuttal, extenuation or mitigation. The Applicant received the FORM on December 11, 2002, and did not submit any additional information. The case was received by the undersigned on January 22, 2003.

**FINDINGS OF FACT**

The Applicant is 46, married and has a Master's degree in Business Administration. He is employed by a defense contractor, and he seeks to obtain or retain a DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a 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 family members who are not citizens of the United States or may be subject to duress.

The Applicant was born in Hong Kong in 1956. He became a naturalized American citizen in 1993.

Subparagraph 1.a. of the SOR alleges that the Applicant's daughter is a citizen of the People's Republic of China and lives there. This is incorrect. Attached to Item 4, the Applicant's Answer, at page 3, is his daughter's American passport, indicating that she was born in the United States in 1997. He also submitted documentary evidence showing that his daughter currently lives with him in the United States. (Item 4 at 5.)

At the time the Applicant filled out the Security Clearance Application, June 25, 2001, he had a cohabitant who was a Chinese citizen. According to the Applicant's Answer, they were married in December 2001. (Item 4 at 6-7.) However, it appears that the wife only intended the marriage to be a device to obtain a visa. The wife moved out of the marital home in July 2002 and now resides in another state. The Applicant submitted documentation from the Superior Court of his State showing that he filed a Complaint for Annulment of the marriage in August 2002. (Item 4 at 8-11.) The Applicant has also notified the Immigration and Naturalization Service of his wife's attempting to remain in the United States improperly. (Item 4 at 1,4.)

The Applicant has a brother who is a Canadian citizen. In the Applicant's sworn Answer to the SOR he states, "Historically I do not communicate with my brother. My brother does not know where I work and live. Between 1996 and present I contacted my brother twice in 2001 to get his birthdate and the purpose of the contacts was to complete the security clearance application for working at [Applicant's employer]." (Item 4 at 1-2.)

The Applicant has visited the People's Republic of China twice in the past ten years. On each occasion it was to meet the families of his second and third wives. (Item 4 at 2.)

## 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)

#### Condition 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 demonstrates poor judgement, 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 granting or 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 a wife who is a Chinese citizen, a brother who is a Canadian citizen, and that he traveled to China in 1994 and 2000.

The Applicant, on the other hand, has successfully mitigated the Government's case. The Applicant's daughter is a native-born American citizen, residing with her father. The Applicant's contacts with his brother are casual and

infrequent. It appears that the Applicant's wife, who was his cohabitant when the Security Clearance Application was prepared, was using the Applicant as a way to obtain permanent residence in the United States. The Applicant has appropriately responded by filing for annulment of the marriage and reporting her conduct to the Federal Government. This case did not contain a sworn statement by the Applicant. However, his sworn Answer, and the extensive documentation that he attached to it, is sufficient to respond to the SOR. 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.d.: 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