

DATE: March 16, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06478

REMAND DECISION OF ADMINISTRATIVE JUDGE

ROGER E. WILLMETH

APPEARANCES

FOR GOVERNMENT

Peregrine Russell-Hunter, Chief Department Counsel

Jonathan Beyer, Department Counsel

FOR APPLICANT

Neil I. Jacobs, Esq.

David C. Merkin, Esq.

SYNOPSIS

Thirty-nine year old naturalized American Applicant demonstrated that he is a man of good character and personal integrity. However, he has not met the burden imposed on an applicant by the Directive to mitigate disqualifying conditions, which are established because his parents are citizens and residents of Peoples' Republic of China and because of Applicant's trips to China. Clearance is denied.

STATEMENT OF THE CASE

On August 22, 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 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 Reasons (SOR) to Applicant. The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant him access to any classified information and recommends that his case be submitted to an Administrative Judge. On September 10, 2002, the Applicant provided a response to the SOR, admitting all allegations and requested a hearing. This case was assigned me on November 22, 2002. A notice of hearing was issued on December 2, 2002, and the hearing was held on December 23, 2002. During the hearing, two Government exhibits, eleven Applicant exhibits, and the testimony of the two Applicant witnesses, including the Applicant, were received. The transcript (Tr.) was received on January 2, 2003.

On May 19, 2003, I issued a decision in which I found it was not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed and on December 15, 2003, the DOHA Appeal Board issued an Appeal Board Decision and Remand Order. The case file was returned to me on January 2, 2004. The Appeal Board's remand order directs me: (1) to disregard two op-ed pieces submitted by the Government; (2) to make available

to the parties the report cited in footnote 25 of my May 19, 2003 decision; (3) to allow the parties a reasonable opportunity to be heard on the propriety of admitting the report into evidence; (4) to rule on any objection to the report; and (5) to issue a new decision, consistent with the requirements of Items E3.1.35 and E3.1.25 of the Directive's Additional Procedure Guidance. As explained below, I have complied with those directions in issuing this decision.

PROCEDURAL ISSUES

By written notice provided on February 18, 2004, I notified the parties that I proposed to take administrative notice of the following facts: (1) the Peoples Republic of China (PRC) is a communist totalitarian regime; (2) the PRC is engaged in political, military, and economic espionage against the United States. With regard to the PRC's espionage against the United States, I further proposed to cite an unclassified joint report to Congress from the Director of the Central Intelligence Agency and Director of the Federal Bureau of Investigation, dated December 12, 1999, which I furnished to the parties. The notice and a copy of the report have been included in the file. I requested objections or comments on the proposed findings of fact and report by February 25, 2004. Applicant requested a delay until March 3, 2004. Department Counsel did not object and I granted the delay.

On March 3, 2004, Applicant filed objections to the notice and requested my recusal. Applicant contends that Federal Rule of Evidence 201 is "controlling." Applicant asserts the two proposed "issues" are not "adjudicative facts" and are not "kinds of facts" for "judicial notice." Applicant argues they are "subjective in nature." Applicant's objections are overruled for the reasons discussed below.

First of all, advance notice of the two proposed facts and an opportunity to respond is probably unnecessary. The DOHA Appeal Board that such notice is not necessary for matters subject to official notice or matters known to an agency through its cumulative expertise. DISCR Case No. 90-1550 (March 25, 1992) at p. 5. The proposed facts are certainly known to those charged with processing security clearance applications on behalf of the United States Government.

The Federal Rules of Evidence (FRE) are a guide, but not "controlling" in ISCR cases. E3.1.19 of the Directive. Using FRE 201 as a guide permits administrative notice of a fact "not subject to reasonable dispute." This includes a fact "generally known." Certainly, the nature of the government of the PRC falls within that category. The fact that the PRC has been engaged in successful espionage against the United States is also known to informed citizens. This nation's elected officials have addressed successful efforts by the PRC to obtain our missile technology and information technology. If not generally known, such espionage is "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonable questioned." This raises the issue of the CIA/FBI report to Congress on the PRC's espionage against the United States.

Relying on one item from the report, Applicant objects to the report as "irrelevant." He also argues it is "hearsay" and that it is the same type of evidence as that rejected by the DOHA Appeal Board.

Evidence that the country in which members of Applicant's immediate family reside is actively engaged in espionage against the United States is relevant for determining whether a security concern exists with regard to Applicant. The report also falls within the hearsay exceptions in accordance with FRE Rule 803(8). This exception to the hearsay rule includes "matters observed pursuant to duty imposed by law as to which matters there was a duty to report." In this case, the Director of the CIA and Director of the FBI were required by Section 308 of the Intelligence Authorization Act for Fiscal year 1998 to make the unclassified report on PRC espionage directed against or affecting the interests of the United States. Clearly, it is distinguishable from the op-ed pieces rejected by the DOHA Appeal Board.

Finally, Applicant requests my recusal from the case based on prior consideration and use of inappropriate evidence my "seeming independent research and investigation of disputed issues, as summarized" in the Administrative Notice. In addressing this request, I have reviewed 28 U.S.C. 455, the federal recusal statute, as a guide. I find no basis for my recusal. An administrative judge's recognition of the nature of the government of a country in a foreign influence case and the fact that it is engaged in espionage against the United States is not a determination for which his impartiality might "reasonably be questioned."

For the above reasons, the two facts are appropriate for official notice or administrative notice. Applicant's objections are overruled. I also overrule Applicant's objections to the CIA/FBI report to Congress. The report supports the second

fact and is the type of source referred to in FRE Rule 201(b). Therefore, I will reference it as a footnote in my findings of fact and will include a copy of it with the other exhibits in the file. Applicant has failed to offer nor is there a valid basis for recusal. That request is denied.

FINDINGS OF FACT

Having thoroughly considered the evidence in the record, except for the two op-ed pieces offered by the Government, which I have disregarded, I make the following findings of fact:

Applicant is a 39-year-old database administrator who is employed by a federal contractor with the State Department.⁽¹⁾ He was born in the People's Republic of China (PRC).⁽²⁾ After attending a Chinese university, Applicant came to the United States to attend graduate school in 1987.⁽³⁾

In 1991, Applicant received his master's degree, specializing in physical chemistry.⁽⁴⁾ Specializing in chemistry and bio-chemistry, he received his doctorate degree in 1994.⁽⁵⁾ Applicant became a naturalized citizen of the United States in 1999.⁽⁶⁾

From 1994-1996, Applicant was employed as a research associate by a federal health agency. He worked as a programmer for a federal contractor with another federal health agency from 1996-1997 and as a database administrator for a federal contractor with the Department of Transportation from 1997-1999. Applicant was a consultant for another federal contractor in 1999 and obtained his current position later that same year.⁽⁷⁾

Applicant married in 1997.⁽⁸⁾ His wife was born in the PRC and came to the United States as a student in 1986.⁽⁹⁾ Applicant's wife became a naturalized citizen of the United States in 1999.⁽¹⁰⁾ They have a three-year-old son who is a native-born citizen of the United States.⁽¹¹⁾

Applicant's parents are both citizens and residents of the PRC.⁽¹²⁾ His father is a 66-year-old retired electrical engineer, who has never worked for the Chinese government.⁽¹³⁾ Applicant's mother is a 67-year-old retired editor for a Chinese university.⁽¹⁴⁾ She suffered a heart attack in 2001.⁽¹⁵⁾

Applicant telephonically communicates with his parents once a month.⁽¹⁶⁾ He has provided financial support to his parents of as much as \$100.00 per month over a one to two year period.⁽¹⁷⁾ Applicant's mother came to the United States for the birth of his son in 1999 and developed a strong tie to her grandson.⁽¹⁸⁾

Applicant has returned to the PRC to visit his parents on four occasions since 1994.⁽¹⁹⁾ He does not visit anyone but his parents when he returns to the PRC.⁽²⁰⁾ On these occasions, Applicant is required to register with a local security office in China.⁽²¹⁾ He expects to make another trip to the PRC when his son is a little older.⁽²²⁾ Aside from his parents, all of Applicant's friends and other contacts are in the United States.⁽²³⁾ He would like to bring his parents to the United States but neither he nor they can afford a home and medical coverage for them in America.⁽²⁴⁾

The PRC is a totalitarian communist regime who's interests are inimical to those of the United States. For decades, the PRC has conducted extensive political, military, and economic espionage against the United States.⁽²⁵⁾ Americans who visit the PRC and stay with friends or relatives, must register with local police.⁽²⁶⁾

POLICIES

Eligibility for access to classified information is predicated upon an individual meeting adjudicative guidelines discussed in Enclosure 2 of the Directive. An evaluation of whether an applicant meets these guidelines includes the consideration of a number of variables known as the "whole person concept." Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a decision. This assessment

should include the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Enclosure 2 provides conditions for each guideline that could raise a concern and may be disqualifying, as well as further conditions that could mitigate a concern and support granting a clearance. The following guideline is applicable to this case:

Guideline B: Foreign Influence

A security risk may exist when an individual's immediate family, including co-habitants, 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. 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 E2.A2.1.2.1, 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 (Disqualifying Condition 1).

They also include E2.A2.1.2.6, conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government. (Disqualifying Condition 6).

Conditions that could mitigate security concerns include E2.A2.1.3.1, 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 (Mitigating Condition 1).

CONCLUSIONS

Undisputed evidence in this case presents two disqualifying conditions pertaining to the Applicant. Disqualifying Condition 1 applies because Applicant's parents, with whom he maintains a close relationship, are citizens and residents of the PRC. Disqualifying Condition 6 also applies. Given conditions in the PRC, Applicant's travels there, including four trips between 1994 and 1999, may make him vulnerable to coercion, exploitation, or pressure by the PRC.

Applicant has offered evidence in an effort to mitigate the disqualifying conditions. To establish Mitigating Condition 1, he has presented evidence that his parents are not agents of the PRC and he argues that the evidence shows that they are not in a position to be exploited by the PRC. The evidence to which Applicant refers is that Applicant's parents are both retired and receiving retirement benefits. However, I fail to see how this evidence demonstrates that Applicant's parents are not in a position to be exploited. To the contrary, the fact that they are reliant upon retirement income and medical benefits in China would appear to make them vulnerable to exploitation by the PRC, which has not been hesitant to treat its citizens harshly in order to further its own ends.

Applicant has also attempted to demonstrate that the nature of his visits to his parents does not make him subject to coercion, exploitation, or pressure by the PRC. ⁽²⁷⁾ He emphasizes that he does not contact anyone other than his parents and family on these visits. Although Applicant may attempt to keep a low-profile during his return visits to China, he has not mitigated the fact they expose him to coercion, exploitation, or pressure by the PRC. Although he describes it as being like a home [owners] association, Applicant acknowledges that he has had to register with the local security office where his parents reside during these visits. This confirms other evidence of record that foreign visitors who stay with friends or family in the PRC must register with the local police. Given such monitoring in the PRC and the nature of its espionage aimed at foreign visitors to China, Applicant has failed to demonstrate that even his low-profile visits do not make him vulnerable to possible coercion, exploitation or pressure.

Applicant argues the applicability of the decisions of administrative judges in ISCR Case No. 01-23911 (April 30, 2002) and ISCR Case No. 01-26031 (May 30, 2002). Another administrative judge's decision is not binding but may be considered as persuasive authority. ISCR Case No. 01-26893 (October 16, 2002) at 4. However, the cases cited by Applicant are distinguishable from the facts of his case. ISCR Case No. 01-23911 involved a native-born U.S. citizen who subsequently became a dual citizen of New Zealand, a country which does not present the threat to the national security of the United States that does the PRC. In ISCR Case No. 01-26031, the applicant's father had left the PRC and had become a permanent resident of the United States and her sister had become a permanent resident of Germany. Although applicant's mother was still residing in China, arrangements had been made for her to obtain a visa and immigrate to the United States to live with the applicant. Therefore, the facts are significantly distinguishable from this case, since Applicant's parents reside in the PRC and there is no evidence that they are about to emigrate.

Although there is no basis in the record to question Applicant's character and integrity, the DOHA Appeal Board has recognized that "an applicant with good character and personal integrity can pose a security risk because the applicant has close relatives in a country hostile to the United States." ISCR Case No. 01-26893 at 8. Family ties in a foreign country raises a prima facie security concern that requires the applicant "to present evidence of rebuttal, extenuation or mitigation sufficient to meet the burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for him." ISCR Case No. 99-0532 (February 27, 2001) at 6. This is especially critical given the espionage effort against the United States in which the PRC is engaged and the threat to the national interest of the United States that it represents. Applicant has failed to meet his burden of persuasion in this case. Therefore, I find against Applicant.

FORMAL FINDINGS

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

DECISION

In light of all the evidence in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Signed

Roger E. Willmeth

Administrative Judge

1. Tr. 23.
2. Tr. 19.
3. Tr. 20.
4. Applicant Exhibit H; Tr. 21.
5. Applicant Exhibit I; Tr. 21.
6. Applicant Exhibit J; Tr. 19.
7. Tr. 21-23.

8. Tr. 27.
9. Tr. 26-27.
10. Applicant Exhibit K; Tr. 27.
11. Tr. 27-28; Applicant Exhibit A.
12. Tr. 28; Government Exhibit 1.
13. Applicant Exhibits C and D; Tr. 28-30.
14. Applicant Exhibits E and F; Tr. 30-31.
15. Tr. 46.
16. Tr. 31.
17. Tr. 48.
18. Tr. 32; Applicant Exhibit B.
19. Tr. 46.
20. Tr. 39.
21. Id.
22. Tr. 50.
23. Tr. 38-39.
24. Tr. 46-47.
25. Director of Central Intelligence/Director of the Federal Bureau of Investigation, *Report to Congress on Chinese Espionage Activities Against the United States* (Dec. 12, 1999).
26. U.S. State Department, *Consular Information Sheet - China* (Apr. 11, 2002).
27. Although Applicant addresses Mitigating Conditions 3, 4, and 5 in his final argument, none of these are applicable to this case. Based on Applicant's own testimony, Mitigating Condition 3 is not applicable because his contact with his parents is not casual and infrequent. Mitigating Condition 4 has no applicability because Applicant acknowledges that he has never been contacted by the PRC or any other country. Mitigating Condition 5 is irrelevant because the Government is not alleging nor is there any evidence that Applicant has a substantial financial interest in the PRC or any in other foreign country.