

DATE: May 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-08558

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant is a native-born American, not of Chinese ancestry. His wife of four years is Chinese, but she has filed the appropriate paperwork to begin the process of becoming an American citizen. Their marriage is not viewed well by her family, and they have been ostracized. The contacts with her family are infrequent, and her family are not agents of a foreign power, or in a position to be coerced by a foreign power. Adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On December 20, 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 January 21, 2003, and requested a hearing. The case was received by the undersigned on February 26, 2003, and a Notice of Hearing was issued on March 5, 2003.

A hearing was held on March 25, 2003, at which the Government presented two documentary exhibits. Testimony was taken from the Applicant, who called one additional witness, and also submitted two exhibits. The transcript was received on April 14, 2003.

FINDINGS OF FACT

The Applicant is 29, married and has a Bachelor of Science degree in Physics. He is employed by a defense contractor as a software engineer, and he seeks to obtain 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 immediate family members who are not citizens of the United States, or may be subject to duress.

The Applicant is a native born American citizen. He is not of Chinese ancestry. The Applicant's wife is from the People's Republic of China. They were married in March 1999.

In 1998, the Applicant was attending undergraduate school and taking classes in Chinese. At the same time his future wife was taking classes in English. They met as conversational study partners, fell in love and were married. (Transcript at 54.)

The Applicant's wife's family still resides in China. Her father runs a small construction company, for which her stepmother is the accountant. Her brother is going to college in China and she has a younger step-sister. Her mother is a farmer. No member of the family works for the Chinese government, military or the Communist Party. According to the Applicant's wife, this is because her grandfather was a member of the Kuomintang party, the anti-Communist party in China. (Transcript at 57-58.)

The Applicant's wife's family did not react well to this inter-racial marriage. The Applicant testified, "So after about a year of knowing each other, we happily decided to get married. This was unfortunate news, unhappy news, to her parents, and we've been pretty much ostracized since. My wife's family doesn't, isn't happy about, again, that she has married a foreigner, especially a Caucasian, and so we don't talk much at all." (Transcript at 20.) The Applicant and his wife did not tell her parents they were married until two months after the civil ceremony. (Transcript at 48-50.) The family has still not gotten over their marriage. (Transcript at 66-67.)

The Applicant's wife has telephone contact with her mother about four times a year. She speaks to her father about twice a year and has a distant relationship with him. (Transcript at 38-40.) She and the Applicant have visited China twice since their marriage. The visits, especially the second in 2002, were strained. (Transcript at 70-71.)

The Applicant's wife intends to become an American citizen as soon as she is able to do so, which is May of 2003. She filed an Application to File Declaration of Intention on March 5, 2003. (Applicant's Exhibit A.) She testified firmly and credibly that she would not be a party to any attempt to persuade or coerce the Applicant to disclose classified information. (Transcript at 58-59.) The Applicant testified that he had been debriefed by his company at the conclusion of both trips to China and that he had reported no suspicious activity or contacts. (Transcript at 24.)

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 influences that show 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 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, and that she has immediate family members who live in China.

The Applicant, on the other hand, has successfully mitigated the Government's case. The Applicant is not of Chinese ancestry, and he and his wife have been ostracized by her family due to their inter-racial marriage. This has brought about a tremendous slow down in communication between the Applicant's wife and her family. While most family relationships cannot be said to be "casual," certainly the contact is infrequent. The family is not connected with the Chinese government, and the evidence indicates that they are not in a position to be exploited by a foreign government.

Though young, the Applicant and his wife are mature and understanding people. At the hearing, they both showed an understanding of his security responsibilities and a credible intention of fulfilling them. The Applicant's wife not only intends to become an American citizen, she has taken concrete acts towards doing so. 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

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: 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