

DATE: October 19, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27515

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Michael W. Lu, Esq.

SYNOPSIS

Applicant successfully rebutted the allegations that he deliberately made false statements (1) when he incorrectly answered a question concerning foreign passports on his security-clearance application, and (2) during an interview with investigator. But Applicant is unable to successfully mitigate the foreign influence security concern raised by his close and continuing family ties to China. Clearance is denied.

STATEMENT OF THE CASE

On July 14, 2004, 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. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B for foreign influence and Guideline E for personal conduct. In his answer to the SOR, dated August 2, 2004, Applicant admitted, with explanation, the foreign influence allegations in subparagraphs 1.a, 1.b, 1.d, and 1.e; he denied, with explanation, the personal conduct allegations in subparagraphs 2.a and 2.b; he also requested a hearing.

Department Counsel indicated he was ready to proceed on August 24, 2004, and the case was assigned to me August 27, 2004. A notice of hearing was issued on September 7, 2004, scheduling the hearing for September 20, 2004. Applicant appeared with counsel and the hearing took place as scheduled. I received the transcript October 4, 2004.

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. In making this finding, I have given due consideration to the fact that Applicant's native language is Chinese, he has not received formal education in English, and he speaks English with a

heavy Chinese accent that can be fairly described as broken English. Given these circumstances, allowances have been made for potential communication problems.

Applicant is a 59-year-old married man and a naturalized U.S. citizen. He was born in the People's Republic China (PRC or China) in 1945, and he obtained U.S. citizenship in March 1999. He has lived continuously in the U.S. since approximately June 1989. Since February 2000, Applicant has worked as a senior database administrator for a federal contractor.

Applicant was born, raised, and educated in China. Applicant has not worked for the Chinese government, nor has he served in the Chinese military. In 1985, he earned a Ph.D. from a university in China. He departed China and arrived in Canada in approximately December 1987. He remained in Canada for about 18 months before arriving in the U.S.

Applicant met and married his wife while living in China. She obtained U.S. citizenship in March 1999. She is currently employed by consulting engineering company as a structural engineer. Applicant and his wife have one son, age 21, who is currently a student at a prestigious U.S. university. Applicant's son has also obtained U.S. citizenship.

Both Applicant and his wife have immediate family members who are citizens of and residents in China. Applicant's mother, father, brother, and sister are citizens of and residents in China. Applicant's mother, age 84, and father, age 85, are both retired. His mother worked as an accountant and his father worked as a agriculture economist and contractor. One brother is a retired electrical worker and is the owner of a small family grocery. A second brother died of liver cancer in April 2003. The sister is a cashier at a commercial marker place. None of these family members have worked for the PRC government or military.

In 1957, Applicant's father, then working as deputy manager for an agriculture production material trading company, was charged as a Rightist during a crackdown against intellectuals by the Chinese Communist Party. During this time, more than 500,000 Chinese intellectuals were suppressed for expressing their opinions against the Communist Party or the government. As punishment, the father lost his job, had his salary reduced four levels, and he was sent to a forced labor camp for approximately three years. This action resulted in Applicant's family experiencing much suffering and hardship. In March 1979, the Chinese Communist Party issued a document correcting their previous conclusion and punishment (Exhibit H). The "corrective action" withdrew the previous punishment decision and punishment, restored his reputation, restored his salary to the previous level, and arranged an appropriate job for him.

Applicant's mother-in-law, age 83, and father-in-law, age 84, are also citizen residents of China. Applicant's parents-in-law are retired from their jobs as accountants for a small company.

Neither worked for the PRC government or military.

Since departing China in 1987, Applicant has traveled to China four times. The trips took place during 1994, 1998, 1999, and 2002. He made the trips to visit family members. He experienced no problems with Chinese authorities or officials during these trips. He used his Chinese passport to travel until he obtained his U.S. passport; thereafter, he used his U.S. passport.

In approximately September 2001, a Chinese citizen, who is a former classmate of Applicant, stayed with Applicant and his wife for a few days during a sightseeing visit. The classmate was in the U.S. for academic research. Applicant has had no contact with this person since and is unaware of his whereabouts. Under these circumstances, there is little, if any, security significance to this matter and I find for Applicant on SOR subparagraph 2.e.

In October 2001, Applicant completed a security-clearance application. In response to Question 15, Applicant denied possessing an active passport issued by a foreign government during the last seven years. In June 2004, in response to interrogatories sent to him by DOHA, Applicant indicated he had possessed a PRC passport, date of issue October 28, 1987, date of expiration October 28, 1995, renewed May 14, 1994, with a date of expiration of May 14, 1999. In his Answer to the SOR, Applicant explained he misunderstood the English grammar in the question. He elaborated on this during his hearing testimony. He experienced a similar misunderstanding when he was questioned by an investigator about foreign passports in July 2002.

China is ruled by a totalitarian government with a poor record of human rights. China is known to engage in espionage against the U.S., economic and otherwise.

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.

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.⁽²⁾ There is no presumption in favor of granting or continuing access to classified information.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁵⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ 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.⁽⁸⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

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."⁽¹⁰⁾ 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

Personal conduct under Guideline E⁽¹¹⁾ is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. Omission of a past arrest or past drug use, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, based on the record as a whole, Applicant has successfully rebutted the allegations he made deliberately false statements when completing his security-clearance application and during an interview with an investigator. Given Applicant's command of the English language, it appears Applicant misunderstood the question on the application as well as during the interview. Indeed, I had to repeatedly interrupt Applicant's testimony and ask him to repeat or clarify testimony I did not understand. Accordingly, Guideline E is decided for Applicant.

Under Guideline B for foreign influence,⁽¹²⁾ 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. In addition, common sense suggests that 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.

Here, based on the record as a whole, the government has established its case under Guideline B. Applicant has close

and continuing family ties to China. The closeness of the ties is evidenced by not merely the family relationship, but also by Applicant's trips to China for family visits. These circumstances raise a security concern under DC 1. (13)

I have reviewed the mitigating conditions under Guideline B and conclude none apply. The only MC deserving serious consideration is MC 1, (14) but it does not apply. It does appear that none of the family members are agents of the Chinese government or any other foreign power. (15) But that does not end the analysis, as Applicant must show his family members are not in position to be exploited by a foreign power.

In foreign influence cases, it is proper to consider how foreign country at issue is governed. The focus is not the country or its people, but its rulers and the nature of the government they impose. This approach recognizes it is nonsensical to treat North Korea as if it were Norway. Here, we know that China is ruled by a totalitarian government with a poor record of human rights. We also know that China is known to engage in espionage against the U.S. In addition, the information we have about Applicant's immediate family members in China is a concern. Although Applicant and his family likely despise the Chinese Communist Party due to the father's persecution as a Rightist, the same facts establish that Applicant's immediate family members in China are known by the Communist Party. Unfortunately, this puts them at risk. Given these circumstances, Applicant has not established that his family members are not in a position to be exploited by the Chinese government in a way that would force him to choose between loyalty to his family and the interests of the U.S. Accordingly, Guideline B is decided against Applicant.

To conclude, the clearly-consistent standard requires I resolve any doubt in favor of protecting national security, and the record evidence of Applicant's close and continuing family ties to a foreign country ruled by a totalitarian government with a poor record of human rights creates doubt. And the security concern here is heightened due to the father's persecution by the Chinese Communist Party. In reaching my decision, I have considered the evidence as a whole (including the favorable employment and character evidence presented by Applicant), the whole-person concept, and the appropriate factors and guidelines in the Directive.

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: Against the Applicant

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: For the Applicant

SOR ¶ 2-Guideline E: For the Applicant

Subparagraph 2.a: For the Applicant

Subparagraph 2.b: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

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. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
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. Directive, Enclosure 2, Attachment 5.
12. Directive, Enclosure 2, Attachment 2.
13. 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.
14. 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.
15. *See* 50 U.S.C. § 1801(b).