

DATE: November 1, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28137

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a computer programmer/analyst for a government contractor. Both Applicant and his wife were born in the Peoples Republic of China (PRC), emigrated to the U.S., and became U.S. citizens. Applicant's parents and two sisters are residents and citizens of the PRC. His parents are retired, aged, and hospitalized. His sisters both work in a government hospital. Applicant talks to his parents and sisters by telephone twice a month. Security concerns based on foreign influence are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On June 4, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guideline B (Foreign Influence). Applicant answered the SOR in writing on June 17, 2004, admitted the allegations, and requested a hearing. The case was assigned to me on August 11, 2004. On August 12, 2004, DOHA issued a notice of hearing setting the case for on September 8, 2004. Applicant appeared as scheduled and testified in his own behalf. DOHA received the transcript on September 17, 2004.

FINDINGS OF FACT

Applicant's admissions of the facts alleged in the SOR are incorporated into my findings of fact. I also make the following findings:

Applicant is a computer programmer/analyst for a government contractor. He has worked for his current employer since May 10, 2001. He enjoys a reputation among his co-workers and supervisors as loyal, dependable, reliable, conscientious, and honest. (Tr. 36-37, 42, Applicant's Exhibit A)

Applicant was born in the PRC on January 27, 1961. He received an associate degree in mechanical engineering from Hong Kong University in 1984. He emigrated to the U.S. in December 1989 and became a naturalized U.S. citizen on July 21, 1995. He was sponsored by his aunt and uncle, who emigrated to the U.S. in 1986 and became citizens. Applicant continued his education in the U.S. and received a bachelor's degree in computer information systems on July 31, 1996. (Tr. 50-53; Government Exhibit 1, pp. 1, 3)

Applicant was married to a Chinese resident and citizen on December 22, 1993, in Hangzhou, PRC. He visited his wife and family annually in the PRC between 1993 and 1996. Applicant's wife emigrated to the U.S. in April 1996 and became a naturalized U.S. citizen on July 6, 2000. (Tr. 46-47; Government Exhibit 1, pp. 4, 6) They purchased a home in the U.S. in 2001. They have two children, a daughter born in 1996 and a son born in 2001, native-born U.S. citizens. Their children speak only English at home. (Tr. 57)

Applicant's father is 83 years old and his mother is 78. (Government Exhibit 1, p. 5) Both are retired physicians. (Tr. 62) Both parents worked in a government hospital. Although the hospital was a military hospital at one time, Applicant's father worked as a civilian employee. (Tr. 66) Neither parent receives a government pension. (Tr. 67) Applicant's father has a brain disease and has been paralyzed since 2001 (Tr. 47), and his mother has serious heart disease. (Tr. 48) They both are hospitalized in Hong Kong. (Tr. 49, 52) Applicant's parents are financially independent and do not need or receive any money from him. (Tr. 68)

Applicant's two sisters live and work in Hangzhou, PRC, near Hong Kong. One is a nurse who is now working as a low-level administrator, and the other is a pharmacist. (Tr. 63) They both work in a government hospital. (Tr. 64) Applicant traveled to China to visit his parents and sisters in September 1999, September 2000, February 2002, and March 2002. (Government Exhibit 2, p. 2) Applicant talks by telephone with his parents and his sisters about twice a month. (Tr. 67)

Applicant's father-in-law and mother-in-law reside in Hangzhou and are both retired. (Tr. 70; Government Exhibit 1, p. 6) Applicant visited his in-laws only twice, once in 1993 and once in 2000. (Tr. 70) His wife talks to her parents twice a year. (Tr. 70)

Applicant's wife has a half-brother in China but she has no contact with him. (Tr. 71) Applicant has two uncles in China but has no contact with them. (Tr. 71)

Except for his parents and sisters, Applicant has no contacts with friends or relatives in the PRC. (Tr. 72) Applicant has no financial interests in the PRC. (Tr. 55) When Applicant last visited the PRC in March 2002, and he reported his visit to his supervisor. (Tr. 59)

No members of Applicant's family are members of the Communist Party, members of the military, or government officials. None have been mistreated by the government. (Tr. 72)

Applicant is willing to bear arms for the U.S. and support the interests of the U.S. against any other nation. In the event of a conflict between the PRC and U.S., Applicant would attempt to move his family to the U.S. if they appeared to be in danger. (Government Exhibit 2, p. 3) He believes that it would be "dishonorable" to abandon his family in the event of a conflict between the U.S. and the PRC. (Tr. 74-75) He believes that his parents' age, poor health, and good reputation would protect them from coercion. (Tr. 75). His parents would die without medical treatment, but they have told Appellant to not worry about them and to stay in the U.S. where there is a "better life." (Tr. 75-76)

The PRC is a repressive, Communist government with foreign policy goals that are frequently at odds with the U.S. Its intelligence services actively target the U.S. government, economic and industrial entities, and its own citizens. Theft of U.S. information and technology is common. (Government Exhibit 4, p. 4-5; Government Exhibit 5, p. 1; Government Exhibit 6, pp. ii-iii, xii, xxxiii) Hong Kong is a Special Administrative Region of the PRC and enjoys a high degree of autonomy. While part of the PRC, Hong Kong does not share its record of human rights abuses. (Government Exhibit 5, pp. 46-61)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander-in-Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to U.S. citizens "whose personal and professional history affirmatively indicates loyalty to the U.S., strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

A security risk may exist when an applicant's immediate family, or other persons to whom he 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. Directive ¶ E2.A2.1.1. A disqualifying condition (DC 1) may arise when "[a]n 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." Directive ¶ E2.A2.1.2.1. A disqualifying condition (DC 3) also may arise if an individual has relatives "who are connected with any foreign government." Directive ¶ E2.A2.1.2.3.

An administrative judge "is not compelled, as a matter of law, to conclude [an applicant's] family ties in a foreign country pose an unacceptable security risk." ISCR Case No. 98-0419 at 5 (App. Bd. Apr. 30, 1999), 1999 WL 511297 (D.I.S.C.R.). Instead, an administrative judge must "consider the evidence as a whole to reach a reasoned decision as to whether the particular facts and circumstances of family ties in a foreign country raise security concerns within the meaning of [Guideline] B." *Id.*

Because Applicant's father, mother, and two sisters are citizens and residents of the PRC, DC 1 is established. Applicant's parents are retired and do not receive a pension from the Chinese government. Thus, DC 3 is not established with respect to Applicant's parents. However, Applicant's two sisters are employed in a government-owned hospital, and accordingly they are "connected" as employees with the Chinese government. Therefore, DC 3 is established with respect to Applicant's two sisters.

Applicant's mother-in-law and father-in-law are not members of his "immediate family" within the meaning of Guideline B. They, like Applicant's parents, are also retired and not "connected" as employees with the Chinese government. There is a rebuttable presumption that an applicant has ties of affection for or obligation to, his spouse's immediate family members. ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002). That presumption is rebutted in this case by evidence that Applicant has met his in-laws only twice, in 1993 and 2000, he has had no contact with them since 2000. Applicant's spouse talks to her parents only twice a year. Thus, I conclude that DC 1 and DC 3 are not established with respect to his spouse's parents.

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members (spouse, father, mother, sons, daughters, brothers, sisters) . . . 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." Directive ¶ E2A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1 ("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to choose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power"). Since the Government has produced substantial evidence to establish DC 1 with respect to his parents as well as DC 1 and DC 3 with respect to his sisters, the burden has shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

Applicant's parents are not agents of a foreign power as that term is defined in 50 U.S.C. § 1801(b). The possibility that they would be coerced or exploited is reduced because they are self-supporting, not dependant on the government for a salary or pension, and they reside in the semi-autonomous region of Hong Kong.

Applicant's sisters are likewise not agents of a foreign power, but they are dependent on the PRC government for their livelihood. Applicant's concern for his family in the event of a PRC-US conflict is laudable, but it also demonstrates the potential for coercion or exploitation. The vulnerability of Applicant's sisters to government coercion or exploitation must be assessed in the context of the vulnerabilities of Applicant's parents to coercion or exploitation. While Applicant's parents reside in a less repressive region of the PRC, they are not completely insulated from government exploitation. All four members of Applicant's immediate family are vulnerable to some level of government exploitation. The burden of establishing a mitigating condition is on Applicant. Doubtful cases must be resolved in favor of national security. Thus, although it is a close call, I conclude that MC 1 is not established regarding Applicant's immediate family.

The fact that Applicant's parents and in-laws are elderly and retired, standing alone, does not mitigate security concerns under Guideline B. ISCR Case No. 03-05645 at 6 (App. Bd. Sep. 15, 2004). A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." However, MC 3 is not established because Applicant's contacts with his parents and sisters are neither casual nor infrequent. Since no mitigating conditions are established, I resolve the allegations in the SOR, ¶¶ 1.a., 1.b., and 1.c. against Applicant.

The allegation in the SOR, ¶ 1.d. is ambiguous. It is partly favorable to Applicant (his willingness to bear arms for the U.S.) and partly adverse (his concern for his family). Although willingness to bear arms for a foreign country is a disqualifying condition under Guideline C, willingness to bear arms for the U.S. is neither a disqualifying condition nor a mitigating condition under Guideline B. Since Applicant's concern for his family is encompassed in the SOR, ¶¶ 1.a., 1.b., and 1.c., I have resolved this allegation in Applicant's favor, based on his willingness to bear arms for the U.S.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline B (Foreign Influence): AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: For Applicant

DECISION

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

LeRoy F. Foreman

Administrative Judge