

DATE: November 2, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29279

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

FOR APPLICANT

Ty Hyderally, Esq.

SYNOPSIS

Applicant was born and raised in the Peoples Republic of China. He mitigated foreign preference security concerns raised by cancelling his Chinese passport. Applicant was unable to mitigate the foreign influence security concerns raised by his brother, sister, mother-in-law, and father-in-law who are citizen residents of China. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On October 27, 2003, DOHA issued a Statement of Reasons (SOR) [\(1\)](#) detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence), Guideline C (Foreign Preference), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on November 14, 2003 and elected to have a hearing before an administrative judge. Applicant subsequently amplified his answers through counsel in an undated response. The case was assigned to me on March 22, 2004. On April 15, 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

At the hearing, the Government presented three exhibits, which were marked as Government Exhibits (GE) 1 and 2, and Exhibit 1 for administrative notice, without objection. Applicant presented ten exhibits, which were marked as Applicant Exhibits (AE) A through J, without objection. DOHA received the transcript (Tr.) of the proceeding on April 23, 2004.

FINDINGS OF FACT

Applicant is a 54-year-old principal engineer for a defense contractor. He was born and raised in the Peoples Republic of China (China). In 1982, he was awarded a bachelor of science degree majoring in computer science in China. He married his wife in China in 1978 and they have an 18-year-old son, who was born in China in 1986. GE 1. In 1986, Applicant immigrated to the United States.

Applicant cited two main reasons he left China. The first was the negative impact the Cultural Revolution had on his family when he was a teenager. The Chinese government confiscated all of his family's assets, money, and relocated his family to a top floor of their family home. His father, who was a teacher, was persecuted, humiliated, and required to perform menial tasks. The second occurred in 1984 after Applicant and two of his colleagues founded a computer engineering company and the Chinese government confiscated their company assets.

Applicant's wife's parents were intellectuals and were likewise persecuted by the Chinese government during the Cultural Revolution. Her parents owned a large house and her family was forced to live in one bedroom to make room for four-to-five other families to live in the rest of their house.

Following the confiscation of his company assets, Applicant applied to attend college in the United States in order to pursue a master of arts degree in computer science and technology. He was accepted, granted a student visa, and successfully completed his degree. In 1988, his wife and son joined him in the United States. Since 1987, Applicant has enjoyed a successful professional career as valued employee at approximately seven firms since completing his masters degree.

Applicant possessed a Chinese passport issued on December 28, 1999. He testified it was his understanding he was required to have a Chinese passport at the time he appeared for his examination for his naturalization application. Tr. 62-63, , GE 2, AE J. Applicant's Chinese passport at some point prior to this hearing was "cancelled." AE I.

Applicant has a brother, sister, father-in-law, and mother-in-law, who are citizens and residents in China.⁽²⁾ His brother is chief executive officer for a financial institution and his sister is medical director of nursing at a hospital. The government sent Applicant's sister to work on a distant farm when she was 13 years old from 1970 to 1986. Applicant was unable to see his sister until after he moved to the United States because, after the government confiscated all his family's money, they could not afford the train ticket to visit her or for his sister to visit them. Applicant maintains minimal telephone contact with his siblings averaging once a year.

Applicant's wife testified the Chinese government does not treat her parents, who are in their 80s, "the same like the other people" and treats her parents "different" than other people. Tr. 23, 24. Her mother is a housewife and her father is a retired construction developer. Tr. 19. Her father receives a small government pension. Tr. 22, 24, 26.

Applicant visited China in April 1995 and June 2000.⁽³⁾ The primary purpose for Applicant's visits to China was to visit his ailing mother, who was diagnosed with heart disease and later on with cancer.

Applicant became a naturalized United States citizen on April 17, 2000, his wife became a naturalized United States citizen on September 15, 2000, and his son became a naturalized United States citizen on January 22, 2002.

Applicant owns a home in the United States, is registered to vote, and maintains bank accounts in the United States. Applicant expressed great affection and loyalty for the United States. He has a demonstrated history of being a trusted and valued employee. AE E, F, G and H.

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 United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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.

CONCLUSIONS

Guideline C-Foreign Preference

In the SOR, DOHA alleged Applicant exercised foreign preference by possessing a Chinese passport in 1999 (¶ 1.a). When an Applicant acts in such a way to indicate a preference for a foreign country over the United States, then he may be prone to provide information or make decisions that are harmful to the interests of the United States. Directive ¶ E2.A3.1.1.

The Government established by substantial evidence and Applicant's admissions that he exercised foreign preference by possessing a Chinese passport. DC E2.A3.1.2.1; DC E2.A3.1.2.2. But a security clearance must "be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." Memorandum from Arthur L. Money, Assistant Secretary of Defense, Command, Control, Communications, and Intelligence, to Directors of Defense Agencies, *Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline* (Aug. 16, 2000).

Applicant took the appropriate steps and has cancelled his

Chinese passport. MC E2.A3.1.3.4. Applicant has mitigated the foreign preference security concerns.

Guideline B-Foreign Influence

In the SOR, DOHA alleged Applicant's brother, sister, mother-in-law, and father-in-law are citizen residents of China; (¶ 2.a)⁽⁴⁾; that Applicant maintains regular contact with his relatives in China (¶ 2.b); and Applicant traveled to China two times in 1995 and 2000 (¶ 2.c)⁽⁵⁾. 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 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. Directive ¶ E2.A2.1.1.

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR-Applicant has immediate family members who are citizen residents of a foreign country. DC E2.A2.1.2.1. While the

mere possession of family ties with persons in a foreign country is not, as a matter of law,

automatically disqualifying . . . [it] does raise a prima facie security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant.

ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 at **33-34 (App. Bd. Feb 8, 2001). It is a mitigating condition if the immediate family members or associates are not agents of a foreign power and are not in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to his family members and loyalty to the United States. MC E2.A2.1.3.1.

Security clearance decisions are not an exact science. Instead, they are predictive judgments about an Applicant's security suitability in light of that person's past conduct and *present circumstances*. *Egan*, 484 U.S. at 528-29. The evidence established that Applicant is a loyal United States citizen. At the same time, the evidence established Applicant has strong ties of affection or obligation to his family members who citizen residents of China. Although these foreign associates are not agents of a foreign power, Applicant failed to demonstrate that his foreign associates are not *in a position of vulnerability* such that he could be forced to choose between loyalty to the United States and loyalty to them. Under these circumstances, I find against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline C: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Paragraph 2. Guideline B: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Paragraph 3. Guideline E: Withdrawn by Government

Subparagraph 3.a.: Withdrawn by Government

DECISION

In light of all of 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.

Robert J. Tuider

Administrative Judge

1. Pursuant to Exec. Or. 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.
2. Applicant's mother was listed as being a citizen resident of China in SOR, ¶ 2.a. Applicant produced a Chinese death certificate that reported her death on January 18, 2004. AE K.
3. After the SOR was issued in October, 2003, Applicant visited China in November 2003 after receiving reports his mother's health was failing and in January 2004 to attend her funeral.
4. As indicated previously, Applicant's mother died in January 2004.
5. As indicated previously, after the SOR was issued, Applicant traveled to China two additional times, in November 2003 and January 2004.

