

DATE: November 3, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31188

ECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant immigrated to the U.S. in 1980 and became a U.S. citizen in 1996. Applicant was unable to mitigate the foreign influence security concerns raised by his immediate family members (mother and sister) and others to whom he is bound by obligation (his wife's siblings) who are citizen residents of the People's Republic 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 26 April 2004, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing on 11 May 2004, and elected to have a hearing before an administrative judge. The case was assigned to me on 29 July 2004. On 20 September 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. DOHA received the hearing transcript (Tr.) on 30 September 2004.

FINDINGS OF FACT

Applicant is a 45-year-old senior staff engineer for a defense contractor. His supervisors recognize him as an honest, reliable, hardworking, and skilled employee.

Applicant was born in the People's Republic of China (PRC) of Chinese parents. Applicant's father owned a business prior to the revolution of 1949 when the Communists overthrew the regime of Chiang Kai-shek, and served as a colonel in the Nationalist army. He was forced to give up the business and he became an accountant at a factory. In 1966, during the Cultural Revolution, he was demoted to factory worker and separated from the rest of his family. He died in 1998. Applicant's mother was born into a family with large land holdings. Thus, she was also targeted during the Cultural Revolution. Applicant, his mother, and his siblings were sent to the countryside to perform manual labor. Applicant's

mother is now a retired accountant living on a small pension.

Applicant came to the U.S. in 1980. He married a native of the PRC in 1990. She became a naturalized U.S. citizen that same year. Applicant became a naturalized U.S. citizen in 1995. He was issued a U.S. passport in 1996. Applicant and his wife have two children, both born in the U.S. Applicant's wife's parents are deceased, but she has several siblings who are citizen residents of the PRC.

Applicant's mother, sister, and brother are citizen residents of the PRC. Applicant visited the PRC in 1996, shortly after he obtained his U.S. passport. He spent three weeks with his family and visited his wife's family for one week. Applicant visited the PRC twice in 2001. He traveled to Beijing to attend a commercial meeting of an organization that sets standards for the telecommunications industry. That same year, he traveled to the PRC with a friend to provide technical support as the friend explored the possibility of establishing a telecommunications business in the PRC. On this trip, Applicant stayed about a week. The trip did not develop any business opportunities.

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 personnel 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

In the SOR, DOHA alleged Applicant's mother and siblings are citizen residents of the PRC (¶ 1.a), he has contact with his mother and siblings by telephone (¶ 1.b), his wife's siblings are citizen residents of the PRC (¶ 1.c), he traveled to the PRC in 1996 and twice in 2001 (¶ 1.d), and he stayed for a week in the PRC with a friend to provide technical assistance for setting up a telecommunication company (¶ 1.e). 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.

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Applicant has immediate family members--his mother and his siblings--who are citizen residents of a foreign power. DC E2.A2.1.2.1. There is a rebuttable presumption that an applicant has ties of affection for, or at least obligation to, members of his wife's immediate family. ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). Applicant was unable to rebut that presumption as to his wife's siblings, who are citizen residents of the PRC. While Applicant's trips to the PRC to visit his family in 1996 and to take part in a conference and help a friend investigate business opportunities in 2001 may appear to be innocuous, they add to Applicant's vulnerability to exploitation.

None of the mitigating conditions under the guideline apply. Although none of Applicant's foreign associates are agents of a foreign power, they are *in a position to be exploited* by the PRC in a way that could force Applicant to choose between his loyalty to the U.S. and loyalty to his foreign associates. While there is no evidence to suggest Applicant is not a loyal U.S. citizen, his foreign associates--his mother, sister and his wife's siblings--are in a position to be exploited. Thus, although Applicant has not been involved in any misconduct such as to render him an inappropriate candidate for a security clearance, the condition of having vulnerable foreign associates does. The PRC has an abusive civil rights record (Ex. 5 at 3) and is among the most active collectors of intelligence from U.S. sources. Ex. 4 at 16. I find against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

DECISION

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

James A. Young

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 (Directive).