

DATE: July 30, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12208

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Donna Lee Yesner, Esq.

SYNOPSIS

Applicant, a 26-year-old avionics engineer, has a grandmother, aunts, and uncles who are citizens and residents of the People's Republic of China. All members of his immediate family are naturalized U.S. citizens residing in the U.S. The Government failed to establish that Applicant has "close" ties of affection or obligation to any of his associates in the PRC. Even if it had, Applicant demonstrated that these associates do not make him vulnerable to coercion or exploitation. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. In accordance with the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) on 25 March 2003 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the foreign preference (Guideline C) and foreign influence (Guideline B) personnel security guidelines of the Directive.

Applicant answered the SOR in writing on 8 April 2003. The case was assigned to me on 2 May 2003. I scheduled a hearing on 19 June 2003, but it was delayed to accommodate the schedule of Applicant's counsel. On 30 June 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of three exhibits. Applicant testified on her own behalf and submitted 21 exhibits. DOHA received the transcript (Tr.) of the proceeding on 7 July 2003.

FINDINGS OF FACT

Applicant, an avionics engineer, was born in the People's Republic of China (PRC) in 1977. Tr. 25; Ex. 1 at 1. In 1987, his father came to the U.S. as a visiting scholar. His mother followed as a dependent in 1988. Tr. 26. From 1988 until

1989, when he was allowed to join his parents in the U.S., Applicant lived with his aunt in the PRC. Tr. 28, 32. In 1990, after the Tiananmen Square Massacre of June 1989, visiting Chinese scholars, such as Applicant's father, and their families were granted asylum by the U.S. Tr. 29. Applicant and both his parents became naturalized U.S. citizens.

In 1991, Applicant's only sibling came to the U.S. as a visiting scholar. She married, has two children, and has since become a naturalized U.S. citizen. Tr. 26-27. None of Applicant's immediate family live in the PRC. Applicant has no property or financial interests in the PRC and does not support any of his relatives there. To his knowledge, none of Applicant's relatives are or were members of the Communist Party.

Applicant immigrated to the U.S. on his PRC passport. He traveled on that passport with his parents to the PRC in 1995, when he was 18 years old, to visit relatives. Tr. 33. Applicant renewed his PRC passport in January 2000 and traveled on it to England for business in February 2001. Tr. 40; Ex G at 5. Applicant became a U.S. citizen in March 2001 and received his U.S. passport in April 2001. Ex. 1 at 1. In December 2002, Applicant traveled to the PRC with his mother to visit relatives. When he tried to get a visa for his U.S. passport, the Chinese authorities canceled his PRC passport. Tr. 37. Applicant did not travel on his PRC passport after becoming a U.S. citizen. Tr. 40.

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 under Guideline C that Applicant renewed his PRC passport and still maintains it despite having a U.S. passport (¶ 1.a.) and Applicant still maintained an unexpired PRC passport in his possession as of 12 March 2003 (¶ 1.b.). Individuals who act in ways that indicate a preference for a foreign country over the U.S. may be prone to provide information or make decisions that are harmful to the interests of the U.S. Directive ¶ E2.A3.1.1.

Although Applicant renewed his PRC passport after immigrating to the U.S., it was before he became a U.S. citizen and was entitled to a U.S. passport. Applicant believed the PRC passport was no longer valid after he became a U.S. citizen. *See Ex. M.* Regardless, the PRC canceled the passport in November 2002. Under the circumstances, there is no evidence Applicant meets any of the disqualifying conditions under Guideline C or that he has a foreign preference for the PRC. Finding is for Applicant.

Guideline B-Foreign Influence

In the SOR, DOHA alleged under Guideline B that Applicants parents and sibling are citizens of the PRC and naturalized U.S. citizens (SOR ¶ 2.a.) and he maintains contact with his grandmother, aunts, uncles, and cousins, who are citizens and residents of the PRC (SOR ¶ 2.b.). A security risk may exist when an applicant's immediate family and other persons to whom she may be bound by affection, influence, or obligation are not citizens of the U.S. or may be subject to duress. Such contacts have the potential to make an individual vulnerable to coercion, exploitation, or pressure.

The Government failed to establish by substantial evidence that any member of Applicant's immediate family is a citizen of the PRC. Under Article 9 of the Nationality Law of the People's Republic of China, Applicant, his parents, and his sibling lost their PRC citizenship upon their naturalizations. *Ex. M at 1-2.* Finding on ¶ 2.a. is for Applicant.

Applicant admitted that his grandmother, aunts, and uncles are citizens and residents of the PRC. He further admitted that he "still feel[s] affection" for his aunt and grandmother because "they are my aunt and grandmother." *Tr. 50.* An applicant who has "*close ties of affection or obligation*" to citizens or residents of a foreign country may be vulnerable to coercion, exploitation, or pressure. *DC 1.* The evidence, however, does not establish that Applicant's ties of affection are close. Other than his two visits to the PRC, that he made with his parents in the past 14 years, Applicants only communication with his aunt and grandmother has been through telephone calls his parents make while he is visiting them. He does not send them gifts or assist them financially in any way. None of the disqualifying conditions under Guideline B apply. Even if I were to find *DC 1* applicable to Applicant, he has sufficiently mitigated any security concerns raised by the disqualifying condition.

A determination that an applicant's foreign contacts are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force an applicant to choose between loyalty to the family member or associate and loyalty to the U.S. is a mitigating condition under Guideline B. *MC 1.* The inquiry in a foreign influence case, however, is not limited to consideration of whether the foreign contacts or connections are agents of a foreign power. Rather, the foreign contacts or connections must also be evaluated in terms of whether they place an applicant in a *position of vulnerability* to be influenced by coercive or noncoercive means, even if there is no evidence that a foreign country has sought to exploit that vulnerability. *ISCR Case No. 00-0628 at 5 (App. Bd. Feb. 24, 2003).* Thus, in addition to considering the nature of Applicant's contacts with the foreign individual, we must also evaluate (1) whether the country in which the foreign contacts live is hostile to and has interests inimical to those of the U.S., and (2) whether the applicant would have access to information of interest to, and targeted for collection by, that nation.

The PRC is hostile to, and has interests inimical, to those of, the U.S. The PRC is a totalitarian state that depends on the suppression of its people. The PRC has been involved in espionage against the U.S., both military and economic. Nevertheless, Applicant's associates in the PRC are not foreign agents (*MC 1*), his contacts with them are casual and infrequent (*MC 3*), he promptly reported all contacts with these associates and his trip to the PRC to proper authorities (*MC 4*), and he has no overseas financial interests (*MC 5*). After reviewing all the evidence, I am convinced Applicant's associates in the PRC are not such as to place him in a position of vulnerability that could force him to choose between loyalty to the associates and loyalty to the U.S. Finding is for 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

Subparagraph 1.b.: For Applicant

Paragraph 2. Guideline B: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

DECISION

In light of all of 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 Applicant. Clearance is granted.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.