

DATE: April 15, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-19075

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

#### **FOR APPLICANT**

David L. Llewellyn, Jr., Esq.

### **SYNOPSIS**

Applicant, a 68-year-old married man, is employed as an investigator for a defense contractor. His son, daughter-in-law, and minor grandchildren are lawful residents in China pursuant to their work with a religious-based humanitarian organization. Based on the totality of facts and circumstances, Applicant has successfully mitigated the security concern for foreign influence under Guideline B. Clearance is granted.

### **STATEMENT OF THE CASE**

On August 11, 2003, 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. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline B for foreign influence based on the residence of Applicant's son, daughter-in-law, and minor grandchildren in China. Applicant answered the SOR on September 2, 2003, and, subsequently, on September 23, 2003, submitted an addendum to his answer. Applicant requested a clearance decision based on a hearing record.

Department Counsel indicated they were ready to proceed on or about October 22, 2003, and the case was initially assigned to another administrative judge the next day. On October 29, 2003, the case was reassigned to another administrative judge. Thereafter, on November 3, 2003, the case was assigned to me due to case load considerations, and on November 13, 2003, a notice of hearing was issued to the parties scheduling the hearing for December 16, 2003. Applicant's counsel filed his notice of appearance on November 17, 2003. Applicant appeared with counsel and the hearing took place as scheduled. DOHA received the transcript January 5, 2004.

### **FINDINGS OF FACT**

Applicant's answer to the SOR is mixed. In addition, after a thorough review of the record evidence, I make the following essential findings of fact:

Applicant is a 68-year-old married man and a native-born U.S. citizen. He attended college where he participated in the Air Force ROTC program and was a member of the college's corps of cadets. After graduating in 1957, he accepted a commission as an Air Force officer, immediately reported for active duty, and received pilot training. Subsequently, he served as a fighter pilot for about six years until his discharge in 1962. Applicant served in the inactive reserves until his retirement.

While on active duty, Applicant received various types of training, including the handling of classified information and how to conduct oneself if captured and interrogated as a prisoner of war. Applicant described himself and his fellow trainees at the time as "gung-ho" in that they were determined never to give up any information that might aid the enemy. Applicant adheres to the same conviction today.

From 1962 to 1988, Applicant worked as a deputy in a county sheriff's air auxiliary unit and later commanded the unit. In other words, he was a law-enforcement officer where he worked as a detective, performed search and rescue, transported prisoners, and also worked in undercover sting operations.

In 1988, Applicant moved to a western state where he accepted a position with a major defense contractor. He worked in safety and security from 1988 until about three years ago or so, and has since worked as a contract investigator conducting background investigations of people seeking to obtain or retain access to classified information. During his employment with the major defense contractor, and its successor in interest, Applicant described his duties as follows:

It was my job to design, oversee the construction of tempest vaults classified areas, to write the security procedure, to protect documents in that area, debrief the people working in that area, to assist them in preparing their SF-86 applications to secure security clearances and the most notable there was [that] we were the first facility that built a multi-functional closed area that was approved by DSS to have multiple programs in the same facility and meet all the guidelines of DSS. (2)

Applicant described his 46 years of employment as being in the business of "protecting and securing our country" in one capacity or another. (3) Applicant was initially granted a security clearance while an active duty Air Force officer. Applicant was also granted a security clearance for his employment with the major defense contractor.

Applicant and his spouse of 46 years are the parents of three sons born in 1959, 1962, and 1963. Applicant's second son, who is now 42 years old, is the subject of the SOR. This son and his wife and three children have lived in China since 1998, as they decided to follow their religious conviction to serve the poor and picked China as the place to do so.

The son is the president of a rural development organization working in a certain province in China. The organization is a Nevada nonprofit corporation, which is tax exempt under U.S. federal laws as a charitable organization, and is registered with the Chinese government as a humanitarian non governmental organization. According to the son, the organization is working in one of the poorest areas of China, and has developed programs to build schools and to train farmers as well as participating in disaster relief. The organization has a staff of about 30 persons from various countries, including the U.S. About half the employees are local Chinese citizens. Applicant's son and his family reside in China via the proper visas and work permits issued by the Chinese government.

The son's relationship with the Chinese government is otherwise limited to interactions involved with obtaining approval for and performance of the organization's humanitarian work. The son explained they do not use the term "missionary" in China as it would be misunderstood with 19<sup>th</sup> century western imperialism. Likewise, the son denied he or the organization practiced covert missionary work. (4) The son describes the organization as a strictly apolitical organization that works openly in compliance with Chinese law. The son's relationship with Chinese officials has been positive largely due to willingness to take on the various projects that help the local Chinese. In this regard, the son explained that "[w]e are very careful not to do anything that would cause the Chinese people and government officials with whom we work to lose face, and they likewise do not act in any way to pressure or even to embarrass us" (Exhibit C). If a situation became overly difficult, contentious, or untenable, the likely response from Chinese officials would be to ask the person or persons to leave China (Exhibit D).

Concerning the issue whether Applicant could be susceptible to pressure as a result of the family members' residence

and work in China, the son described that possibility as "ludicrous." The son denies ever having been subject to any type of pressure from Chinese officials, and asserts he would never do anything to place his father in a potentially compromising situation. To do otherwise would violate "the most basic tenets of patriotism, [religious] ethics and personal character that both my father and I share" (Exhibit C).

When the son informed Applicant of his intent to live and work in China serving the poor, Applicant discussed the possibility of a hostage situation. Based on his concern about Americans being kidnaped and held hostage while working overseas, coupled with his employment with the major defense contractor at the time, Applicant told his son that he could in no way help if the son or family were taken hostage. Both Applicant and son were reconciled to this possibility. Indeed, the entity that supports the son's organization has an official policy on the subject of hostage taking:

All our personnel serving overseas are briefed that should they be the victims of hostage taking or otherwise placed in a position where their custodians are demanding money or other thing of value in exchange for their freedom, our agency as a matter of policy will not accede to such demands, nor negotiate with those who seek to capitalize upon our personnel's vulnerability (Exhibit D).

At this time, Applicant believes his son and family plan to remain in China for the foreseeable future, although they do not intend to make China a permanent home.

Applicant believes there is no "conceivable event"<sup>(5)</sup> that could result in him compromising national security, including hostage taking as discussed above. If approached or confronted by someone desiring Applicant to compromise national security or classified information, Applicant would report the contact to the proper governmental agency.<sup>(6)</sup>

China, also known as the People's Republic of China (PRC), is hostile to the U.S., and has interests inimical to those of the U.S.; likewise, the PRC has a poor human rights record.<sup>(7)</sup> In addition, I took administrative or official notice of the following matters:

- Although the Chinese constitution affirms religious toleration, the Chinese government places restrictions on religious practices outside of officially recognized organizations (Exhibit 2, at pp. 2-3).
- There are religious humanitarian organizations that operate in China in compliance with Chinese law without the need for secrecy (Exhibit F).
- The PRC is known to engage in espionage, economic and otherwise, against the U.S. (Exhibit 3).

## 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. Considering the record evidence as a whole, the following security guidelines are most pertinent here: Guideline B for foreign influence.<sup>(8)</sup>

## 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<sup>(9)</sup> and there is no presumption in favor of granting or continuing access to classified information.<sup>(10)</sup> The government has the burden of proving controverted facts.<sup>(11)</sup> The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.<sup>(12)</sup> The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.<sup>(13)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(14)</sup> 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.<sup>(15)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(16)</sup>

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."<sup>(17)</sup> 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

Under Guideline B for foreign influence, 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. Contacts with citizens of other countries, or financial interests in other countries, are also relevant if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

In addition, 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. Concerning family ties, the language of Guideline B does not require a conclusion that an unacceptable security concern exist based solely on an applicant's family ties in a foreign country.<sup>(18)</sup> An administrative judge must consider the record evidence as a whole in deciding if the facts and circumstances of an applicant's family ties pose an unacceptable security concern under Guideline B.<sup>(19)</sup>

Here, based on the record evidence as a whole, the government has established its case under Guideline B because Applicant's son, daughter-in-law, and three minor grandchildren are residents in China. The son is an immediate family member, while the daughter-in-law and three minor grandchildren are family members that Applicant is bound to by close ties of affection. Accordingly, given these facts and circumstances, DC 1<sup>(20)</sup> applies against Applicant. I have reviewed the remaining DC under the guideline and conclude none apply.

I have reviewed the MC under the guideline and conclude that MC 1<sup>(21)</sup> applies for Applicant. It's clear that Applicant's son, daughter-in-law, and three minor grandchildren are not agents of the Chinese government or any other foreign power. In addition, I am persuaded the family members' residence in China does not put them in a position that could force Applicant to choose between loyalty to his family members and the U.S. This conclusion is based on several reasons, such as: (1) it is unlikely the religious-based humanitarian organization will provoke Chinese officials since the organization (including the son and daughter-in-law) does not practice covert missionary work; (2) it is unlikely the Chinese government will target the family members given the apolitical, benign nature of the organization's humanitarian work; and (3) in the unlikely event Applicant was faced with such a difficult situation, Applicant's strength of character and massive integrity assures he would choose loyalty to the U.S. Indeed, this type of situation (hostage taking) was contemplated by both Applicant and his son before the son's departure for China. I have reviewed the remaining MC under the guideline and conclude none apply.

Although MC 1 is the only applicable mitigating condition, the analysis does not necessarily end as other facts and circumstances may mitigate the security concern.<sup>(22)</sup> First, Applicant appears to be a mature, stable, responsible, and trustworthy individual. Second, Applicant's commitment and ties to the U.S. are substantial as evidenced by his affirmative choices. He chose to serve his country as an Air Force fighter pilot. He chose to serve as a law-enforcement officer. He chose to serve his country by working in safety and security for a major defense contractor. Indeed, as pointed out by Applicant, his 46-year history of employment has involved security in some capacity. Third, Applicant has a high degree of appreciation for the need to properly handle and safeguard classified information, and I have no doubt he can be relied upon to do so in the future. All these matters are relevant and material facts that weigh heavily in his favor under the whole-person concept.

To sum up, based on the record as a whole, it is my predictive judgment that Applicant has the willingness to

resist and report any potential foreign influence by either coercive or non coercive means. Likewise, it is my commonsense determination that the totality of facts and circumstances show that the presence of Applicant's family members in China does not pose an unacceptable security concern or risk of foreign influence. In reaching this decision, I considered the hostility of the Chinese government toward the U.S. as well as China's ongoing efforts to conduct various forms of espionage against the U.S. Nevertheless, Applicant has overcome the case against him and met his ultimate burden of persuasion to obtain a favorable clearance decision. Accordingly, Guideline B is decided for Applicant.

### **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: For the Applicant

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: For the Applicant

### **DECISION**

In light of all 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.

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. Transcript at p. 62. DSS is the acronym for the Defense Security Service, the defense agency responsible for, among other things, conducting background investigations of persons seeking access to classified information.
3. Transcript at pp. 62-63.
4. The record evidence is insufficient to prove the "covert missionary" allegations in the SOR. Exhibits C and D, coupled with Applicant's vivid recollection of his DSS interview, is far more persuasive on this point than Exhibit 4 and the testimony of the DSS agent.
5. Transcript at p. 89.
6. Transcript at p. 92.
7. Although not asked to take administrative or official notice, these matters are known to this agency through its cumulative expertise in deciding security-clearance cases involving foreign influence. ISCR Case No. 99-0452 (March 21, 2000) at p. 4 (citations omitted).
8. Directive, Enclosure 2, Attachment 2, at pp. 21-22.
9. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
10. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

11. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
12. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
13. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
14. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
15. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
16. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
17. *Egan*, 484 U.S. at 528, 531.
18. ISCR Case No. 98-0419 (April 30, 1999) at p. 5.
19. *Id.*
20. "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." (Directive, Enclosure 2, E2.A2.1.2.1).
21. "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."
22. The Appeal Board has held in several cases that an administrative judge is not limited to the guideline's mitigating conditions when deciding whether an applicant has demonstrated extenuation, mitigation, or changed circumstances. ISCR Case No. 01-24358 (April 13, 2004) at p. 7 n. 13 (citations omitted).