

DATE: July 7, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22807

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 31-year-old naturalized U.S. citizen with family members in the People's Republic of China (PRC), failed to demonstrate she was not in a position of vulnerability to foreign influence. Clearance is denied.

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 12 February 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 influence (Guideline B) personnel security guideline of the Directive.

Applicant answered the SOR in writing on 7 March 2003. The case was originally assigned to another judge on 16 April 2003. He scheduled a hearing for 17 June 2003. The case was reassigned to me and I conducted the hearing on 17 June 2003 to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of six exhibits. Applicant testified on her own behalf, called three witnesses, and submitted a total of 25 exhibits. DOHA received the transcript (Tr.) of the proceeding on 24 June 2003.

FINDINGS OF FACT

Applicant is a 31-year-old naturalized U.S. citizen employed by a defense contractor as a software engineer. Ex. 1 at 1, 2. She is helping develop logistics software for use by the U.S. military. Tr. 75.

She was born in the People's Republic of China (PRC). Tr. 32. When Applicant was a small child, her mother went to medical school, and she was left to live with her grandparents because her father could not take care of her. *Id.* After graduating from medical school, Applicant's mother was ordered to a remote area to provide medical assistance to

families living in the high mountains of northwestern China. Tr. 36. In 1986, her mother moved to the U.S. as a visiting scholar and was in the U.S. during the military assault by the Chinese government on pro-democracy demonstrators in and around Tiananmen Square in Beijing in June 1989. As a result, Applicant's mother was permitted to apply for U.S. immigration status and eventually became a naturalized U.S. citizen. Ex. 1 at 4; Answer at 3. She now works for a U.S. Government agency. Tr. 35.

Applicant lived with her maternal grandparents from the age of 6 until she was 18 years old. On 21 May 1991, she immigrated to the U.S. under a program designed to permit immediate family members to join the Chinese visiting scholars. Applicant lived with her mother and step-father. *See* Tr. 76-77. She attended a community college for two years and then moved on to complete a degree in accounting at a four-year college. Tr. 31. Her schooling was financed by her mother, aid from the U.S. Government, and a scholarship from the college. Tr. 43.

In 1994, during her third year of college, Applicant interned for a national accounting firm for two months. The company sent her to its Shanghai, PRC, office because of her language skills. She lived with her grandparents while she was there because they lived only one block from her place of employment and apartments in that area were expensive and short-term leases were difficult to find. Answer at 2; Tr. 43. During this time, Applicant renewed her acquaintance with a young man she had met two months before she emigrated from China in 1991. When she returned to the U.S., she corresponded with this man for six months and then only through greeting cards. Ex. 2 at 2.

After Applicant graduated from college in 1995, the accounting firm hired her as an auditor. The firm was satisfied with her work and wanted her to be more involved in its international auditing business and accept a transfer to the Shanghai office. Applicant declined because she wanted to live in her adopted homeland forever. Tr. 44.

In December 1998, after calling off a marriage to another man, Applicant returned to the PRC for two weeks to visit the man she met in 1991. Ex. 2 at 2-3. He was a mechanical engineer for Ford. Ex. 2 at 3; Tr. 60. She traveled on her PRC passport, her only passport at the time. They became committed to each other before she returned to the U.S.

After Applicant became a U.S. citizen on 8 April 1999, she applied for a fiancé visa for her boyfriend in China. Ex. 1 at 1; Ex. 2 at 3. In May 1999, Applicant traveled to the PRC for three months on her U.S. passport to assist her fiancé in preparing all the paperwork necessary for his immigration to the U.S. She accompanied him to the interview at the U.S. Consulate because he did not speak English very well at the time. Tr. 57. On 7 August 1999, the couple flew to the U.S. They were married on 10 August 1999. Answer at 2. After their marriage they decided to go to graduate school. Ex. 2 at 3. They received their master's degrees in 2001. Answer at 4.

Applicant's husband became a permanent resident of the U.S. in April 2001. He is a senior software engineer for a government agency. Tr. 61. He intends to apply for U.S. citizenship in the next couple of months, when he becomes eligible. Tr. 62.

Applicant's 82-year-old grandfather is a retired accountant who is a citizen and resident of the PRC. He had been a businessman before the Communists gained control of the country in 1949. During the Cultural Revolution of 1968, he was sent to a labor camp for torture and "re-education." Ex. I; Answer at 3. Applicant's 81-year-old grandmother has not worked outside the home. Ex. J. They visited Applicant and her mother in the U.S. once.

Applicant's grandparents disliked the Communist government. While Applicant was growing up, her grandfather explained to her how democratic systems of government worked and "how freely a human being would live and be respected in a free country." Answer at 3. He had his friends teach Applicant English. *Id.*

Applicant's in-laws are citizens and residents of the PRC. Her father-in-law is a retired doctor of traditional Chinese medicine. Ex. L. Her mother-in-law is a retired elementary school teacher. Ex. M. Neither is a member of the Communist Party. Exs. L, M. Applicant does not have much contact with her in-laws, but her husband speaks to his parents via telephone approximately once every two months. Ex. 2 at 4. In the winter of 2001, the couple returned to the PRC because Applicant's father-in-law was hospitalized. Applicant stayed two weeks, her husband stayed longer. Tr. 85. Applicant's brother-in-law left the PRC for Japan over 11 years ago and is no longer in contact with Applicant's husband or his parents. Tr. 65

Applicant's father, a retired mechanical engineer, is not a member of the Communist Party. Ex. K. Applicant speaks to him via telephone infrequently as they do not have much to talk about. Except for school vacations, she never lived with him.

Applicant and her husband own a home in the U.S. Neither Applicant nor her husband have any financial assets in the PRC. Tr. 58, 67. They do not provide financial assistance to anyone in the PRC, nor do they receive any. Ex. 2 at 5; Tr. 86.

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. "[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

In the SOR, DOHA alleged under Guideline B that Applicant's husband is a citizen of the People's Republic of China (PRC) (¶ 1.a), her father, grandfather, grandmother, father-in-law, and mother-in-law are citizens and residents of the PRC (¶ 1.b.), she traveled to the PRC in 1998 for a two-week visit and in 1999 for a three-month visit (¶ 1.c.), she served as an intern in the PRC for a U.S. accounting firm in the summer of 1994 and lived with her grandparents (¶ 1.d.), she lived with her grandparents in the PRC from 1978 to 1991 (¶ 1.e.), she has telephone contact with her father monthly and her grandparents annually (¶ 1.f.), and her spouse communicates with his parents in the PRC every other month (¶ 1.g.). Under Guideline B, a security concern may exist when an applicant's immediate family, or other persons to whom she may be bound by affection, are not citizens of the U.S. or may be subject to duress. Contact with citizens of other countries may make an applicant potentially vulnerable to coercion, exploitation, or pressure. Directive ¶ E2.A2.1.1.

The Government established, through its evidence and Applicant's admissions, each of the allegations contained in the SOR. Applicant has immediate family members who are citizens/residents of the PRC—her husband is a citizen of the

PRC and her father is both. DC 1. Furthermore, the evidence supports a conclusion that she has close ties of affection and obligation to the grandparents who raised her from the age of 6 until she immigrated to the U.S. at age 18, and returned to live with them for two months during an internship in 1994-they are both citizens and residents of the PRC. DC 1. Thus, the burden shifted to Applicant to demonstrate that it is clearly in the national interest to grant her a clearance.

A determination that the immediate family members or associates 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. C 1. Applicant presented evidence that her immediate family members and associates would not do anything to harm Applicant or her husband and are not agents of a foreign power. Exs. I-M. Applicant also asserts her contacts with her family members in China are casual and infrequent (MC 3), she promptly reported all contacts with these associates to proper authorities (MC 4), and she has no overseas financial interests (MC 5).

The inquiry in a foreign influence case 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, 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 treatment Applicant's grandfather received during the Cultural Revolution of the 1960s and her mother received after graduating from medical school are examples of how this suppression affected Applicant. The PRC has been involved in espionage against the U.S., both military and economic. While Applicant's contacts in the PRC are not foreign agents, their presence in that country, subject to the pressures of the communist regime, places Applicant in a position of vulnerability that could force her to choose between loyalty to the persons involved and loyalty to the U.S.

Applicant is associated with three groups of people who are residents and citizens of China: her father, her grandparents, and her husband's parents. Applicant asserts that her contacts are casual and infrequent. MC 3. In this context, "casual" means "not close or intimate; passing." *American Heritage Dictionary of the English Language* 299 (3d ed. 1992). "Infrequent" means "not occurring regularly; occasional or rare." *Id.* at 927. Evidence that an applicant has contacts with an immediate family member in a foreign country raises a rebuttable presumption that those contacts are not casual in nature. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). The closer the relationship the less contact is necessary to conclude this mitigating condition fails. Similarly, the greater the contact the less close the relationship needs to be to cause the mitigating condition to fail.

(1) Applicant's contacts with her father consist of telephone calls-monthly until the SOR and quarterly by the time of the hearing. Despite the fact that Applicant's father did not play a large role in her upbringing, she obviously feels some filial obligation or she would not continue to call him. Applicant has not adequately rebutted the presumption that her relationship with her father is not casual.

(2) Normally, grandparents are not referred to as members of the immediate family (*see* MC 1), so the rebuttable presumption that the relationship is not casual would not apply. This case is different. For 12 years, Applicant's grandparents raised her. They fed her, clothed her, provided for her moral upbringing. They taught her about democracy and freedom. They gave Applicant "a piece of dream that one day, just maybe one day [she could] go and see western world with my own eyes." Answer at 3. Her grandparents encouraged Applicant's mother to give Applicant a chance to go the U.S. so that she could have "a better and freer life that they couldn't provide [her] under communist government." *Id.* Three years after she immigrated to the U.S., she returned to live with them for two months during her internship with a U.S. accounting firm. While her recent contacts with her grandparents have been infrequent-limited to a telephone call once a year on Chinese New Year-Applicant failed to demonstrate that her relationship with her

grandparents is casual.

(3) Applicant demonstrated that her relationship with her in-laws is casual and infrequent.

Although Applicant's husband is still a citizen of the PRC, he is a resident of the U.S. and intends to make his future with his wife here. He convincingly testified that he intends to become a U.S. citizen as soon as he is eligible.

Although Applicant's contacts with her in-laws are infrequent and casual, she is in a position of vulnerability to influence through her husband who has filial obligations to his parents. These filial obligations were evidenced by the couples return to the PRC in 2001 when Applicant's father-in-law was hospitalized. While I find nothing unusual or improper in a child visiting a hospitalized parent, it is evidence of the depth of her husband's filial obligations. While her contacts with her in-laws may be infrequent and casual, she was either influenced to travel with her husband back to the PRC or felt an obligation to do so. Applicant failed to demonstrate that her foreign contacts do not place her in a position of vulnerability to coercion or influence.

At the hearing, Applicant suggested that the decision to decline granting her a security clearance was based on her status as a Chinese-American. Tr. 68. She stated that she could not choose where she was born or whom her parents were. Tr. 90. She asked the administrative judge not to look at her as a Chinese-American. Tr. 92.

The U.S. Government does not unlawfully discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information. Exec. Or. 12968 § 3.1(c). The decision to deny applicant a security clearance is not based on her race or national origin. Nor is it based on a conclusion that Applicant has done anything wrong or is not a loyal U.S. citizen. *See* Exec. Or. 10865 § 7. The decision is merely an indication that because of her close familial ties to citizens and residents of the PRC, she is in a position of vulnerability to foreign influence.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: 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

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

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.

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.