KEYWORD: Foreign Influence; Personal Conduct; Criminal Conduct

DIGEST: Applicant successfully rebutted the allegation that he deliberately falsified his security-clearance application. But he is unable to successfully mitigate the foreign influence security concern due to his family ties to the People's Republic of China (PRC or China), a country that is ruled by an authoritarian government with a poor record of human rights. Clearance is denied.

CASENO: 03-19192.h1

DATE: 12/07/2005

DATE: December 7, 2005

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-19192

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant successfully rebutted the allegation that he deliberately falsified his security-clearance application. But he is unable to successfully mitigate the foreign influence security concern due to his family ties to the People's Republic of China (PRC or China), a country that is ruled by an authoritarian government with a poor record of human rights. Clearance is denied.

STATEMENT OF THE CASE

On February 28, 2005, 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.[(1)] The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline B for foreign influence, Guideline E for personal conduct (falsification), and Guideline J for criminal conduct (violation of 18 U.S.C. § 1001 based on the falsification). In his Answer, dated March 14, 2005, Applicant admitted the factual allegations under Guideline B, denied the remaining allegations, and requested a hearing.

Department Counsel indicated he was ready to proceed on June 13, 2005, and the case was assigned to me June 15, 2005. A notice of hearing was issued on June 27, 2005, scheduling the hearing for August 1, 2005. Applicant appeared without counsel and the hearing took place as scheduled. Another hearing session took place on August 17, 2005. DOHA received the transcripts on August 22, 2005, and August 25, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the record evidence, I make the following findings of fact:

Applicant's testimony is found to be credible. In making this finding, I gave due consideration to the fact that Applicant's native language is not English and allowances have been made for potential communication problems.

Applicant is a 27-year-old married man employed as a senior software engineer for a large company engaged in defense contracting. He was born in China in 1978. His parents were farmers who lived in a small, rural village. The family household consisted of Applicant, his parents, two grandparents, and two brothers. Applicant described his family as quite poor, barely making a living by farming, and residing in an old house with flimsy walls. That situation changed in 1992 when Applicant and his parents and brothers immigrated to the U.S.

Applicant was 14 years old when he arrived in the U.S. He became a naturalized U.S. citizen in 1997. He enrolled in college, and in May 2001 earned a B.S. degree in computer science. In May 2003, he earned an M.S. degree in computer science. He accepted a position with his current employer in June 2001. Hired as an associate software engineer, he has since been promoted to senior software engineer.

On April 5, 2002, Applicant submitted his first security-clearance application (Exhibit 2), which was an electronic document completed using a software program. In it, he disclosed his birth in China, his U.S. citizenship, and his parents' citizenship and residential status in the U.S. Applicant had not yet married, and so indicated in response to Question 8. Applicant was granted a secret-level security clearance on April 21, 2002 (Appellate Exhibit I).

On May 30, 2002, Applicant married his current spouse (Exhibit 4). Like Applicant, she was born in China. She came to the U.S. on a student visa to attend college where she met Applicant. In December 2002, Applicant's spouse obtained permanent resident status (Exhibit 5). In approximately July 2005, Applicant's spouse, with the assistance of legal counsel, submitted the necessary paperwork to become a naturalized U.S. citizen, a process that will take about six months (Exhibit A).[(2)]

In October 2002, for reasons not clear from the record, Applicant submitted a second security-clearance application (Exhibit 3), which was completed by hand. In response to Question 14, he indicated he was now married and provided the required details about his marriage.

In March 2003, Applicant submitted his third security-clearance application (Exhibit 1), which was an electronic document completed using a software program. This application was submitted to upgrade Applicant's clearance from secret to top-secret. In response to Question 8, Applicant indicated he was a never-married man, an answer that was clearly incorrect. Applicant did, however, list his spouse by name as a reference in response to Question 4 (Where You Have Lived). Also, he listed her by name as a reference in response to Question 5 (Where You Went to School). For both questions, he provided her residential address, which was the same as his.

Applicant denies any intention to conceal his marriage on his security-clearance application. He explained his incorrect answer to Question 8 was due to accidental oversight. He completed Exhibit 1 by using an electronic copy of Exhibit 2, his first security-clearance application. In completing Exhibit 1, he updated the information that had changed since completing Exhibit 2, but he overlooked Question 8 when doing so.

Applicant's grandparents remained in China when Applicant and his family immigrated to the U.S. Both were citizens of and residents in China. His grandfather passed away some years ago. His grandmother passed away in December 2004. (3)

His parents have lived in the U.S. since 1992. His father is a naturalized U.S. citizen and his mother is a lawful permanent resident. His parents own and operate a small Chinese carry-out restaurant.(4) His two brothers are both naturalized U.S. citizens and they live in the U.S.

Applicant's parents-in-law are citizens of and residents in China. His father-in-law works in a broker-type position for a real estate company. His mother-in-law is retired from her employment as an accountant with a company. According to Applicant, before the Chinese Communist Party took over China in 1949, his parents-in-law were both from wealthy and educated Christian families. After 1949, their families became the target of persecution by Chinese authorities resulting in the loss of all family possessions and property. The persecution included beatings and humiliation. According to Applicant, his parents-in-law were forbidden to attend college, and they were referred to as capitalist bastards.

Applicant and his wife traveled to China in 2002 to visit his parents-in-law. This was his first trip to China since leaving in 1992. His wife went to China to visit her parents in 2003.

As requested by Department Counsel, I took administrative or official notice of certain matters about China and the nature of its government as set forth in Exhibits 6, 7, 8, 9, 10, 11, 12, and 13.

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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.[(5)] Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

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.[(6)] There is no presumption in favor of granting or continuing access to classified information.[(7)] The government has the burden of proving controverted facts.[(8)] The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.[(9)] The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.[(10)] "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."[(11)] 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.[(12)] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[(13)]

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."[(14)] 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

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. Omission of a past arrest or past drug use, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, based on the record as a whole, Applicant successfully rebutted the allegation he deliberately made a false statement about his marital status when completing his security-clearance application (Exhibit 1). I reach that conclusion based on the following: (1) he disclosed his marital status in October 2002 when he completed his second security-clearance application; (2) he twice listed his spouse by name as a reference in the same security-clearance application he is accused of falsifying; and (3) his accidental oversight explanation was entirely plausible. Based on the record evidence as a whole, including Department Counsel's rigorous cross-examination of Applicant, I do not believe Applicant was attempting to conceal his marital status from the government. Accordingly, Guideline E is decided for Applicant. Using the same rationale, Guideline J (violation of 18 U.S.C. § 1001 based on the falsification) is decided for Applicant.

Under Guideline B, 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.

Here, the government established its case under Guideline B, because Applicant has ongoing family ties to China through his parents-in-law who are citizens of and residents in China. The strength of the family ties is demonstrated by the travel to China for family visits. Although these circumstances are completely legal and honorable, these circumstances raise a security concern under DC 1.[(15)] The remaining DC do not apply based on the facts and circumstances here.

I reviewed the mitigating conditions under Guideline B and conclude that only MC 5[(16)] applies. Applicant receives some credit under MC 5 because neither he nor his wife has business or financial interests in China. The remaining MC do not apply. In particular, I gave consideration to MC 1,[(17)] but it does not apply. It appears his parents-in-law are not agents of the Chinese government or any other foreign power.[(18)] That does not end the analysis, however, as Applicant must show his parents-in-law in China are not in position to be exploited.

In deciding if an applicant has met the second prong of MC 1, it is proper to consider how the foreign country at issue is governed. The focus is not the country or its people, but its rulers and the nature of the government they impose. This

approach recognizes it is nonsensical to treat North Korea as if it were Norway. Here, we know China is an authoritarian state in which the Chinese Communist Party is the paramount source of power (Exhibit 13). We know the United States is a primary target of Chinese intelligence collection efforts (Exhibit 8, at p. 7). And we know China's record of human rights, according to a 2004 report from the U.S. State Department, remains poor and the government continues to commit numerous and serious abuses (Exhibit 13). Due to these circumstances, which are beyond his control, Applicant's parents-in-law in China are in a position where there is a potential for them to be exploited in a way that could force Applicant to choose between loyalty to his wife's parents and the interests of the U.S. In addition, the information we know about his wife's family in China is a concern. The persecution of those family members, although in the past, remains a concern since it is quite possible that his parents-in-law are known by Chinese officials and this puts them at risk. Accordingly, Applicant has not shown that his parents-in-law are not in a position to be exploited by the Chinese government in a way that could

force him to choose between loyalty to his wife's family and the interests of the U.S. For these reasons, Guideline B is decided against Applicant.

Although I decided this case against Applicant, this decision should not be construed as an indictment of his loyalty and patriotism to the U.S., as those matters are not at issue. Instead, the clearly-consistent standard requires I resolve any doubt against Applicant, and his family ties to China, an authoritarian state with a poor record of human rights, creates such doubt. To conclude, Applicant failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline B: Against Applicant

Subparagraph a: For Applicant

Subparagraph b: Against Applicant

Subparagraph c: For Applicant

Subparagraph d: For Applicant

Subparagraph e: Against Applicant

SOR ¶ 2-Guideline E: For Applicant

Subparagraph a: For Applicant

SOR ¶ 3-Guideline J: For Applicant

Subparagraph a: For Applicant

DECISION

In light of all 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.

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. Given these circumstances, subparagraph 1.a. is decided for Applicant.

3. Given the grandmother's recent passing, subparagraph 1.c is decided for Applicant.

4. Given his mother's longtime lawful residence in the U.S., subparagraph 1.d is decided for Applicant.

5. Executive Order 10865, § 7.

6. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

7. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

8. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

9. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

10. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

11. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

12. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

13. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

14. *Egan*, 484 U.S. at 528, 531.

15. E2.A2.1.2.1. 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.

16. E2.A2.1.3.5. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

17. E2.A2.1.3.1. 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.

18. 50 U.S.C. § 1801(b) defines the term "agent of a foreign power."