

KEYWORD: Foreign Preference; Foreign Influence

DIGEST: Applicant is a 40-year-old employee of a major defense contractor who has been in the United States since 1986. She is married to a U.S. born citizen who holds a security clearance. They have two daughters who were born in the U.S. Her parents and three siblings still live in China. None work for the government. Applicant traveled twice to China in the past seven years. She has taken necessary steps to eliminate all personal and professional contacts with China. She has rebutted the prima facie case presented by the government. Clearance is granted.

CASENO: 03-00179.h1

DATE: 09/17/2004

DATE: September 17, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-00179

**DECISION OF ADMINISTRATIVE JUDGE**

**CHARLES D. ABLARD**

**APPEARANCES**

**FOR GOVERNMENT**

Erin Hogan, Esq., Deputy Chief Department Counsel

## FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant is a 40-year-old employee of a major defense contractor who has been in the United States since 1986. She is married to a U.S. born citizen who holds a security clearance. They have two daughters who were born in the U.S. Her parents and three siblings still live in China. None work for the government. Applicant traveled twice to China in the past seven years. She has taken necessary steps to eliminate all personal and professional contacts with China. She has rebutted the prima facie case presented by the government. Clearance is granted.

### STATEMENT OF THE CASE

On November 25, 2003, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry* as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated January 20, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have her case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on March 12, 2004. A complete copy of the file of relevant material (FORM), consisting of nine documents, was provided to Applicant, and she was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. She did so with six documents on April 27, 2004. The case was assigned to, and received by, me on May 19, 2004.

## FINDINGS OF FACT

Applicant is a 40-year-old employee of a major defense contractor who has been in the United States since 1986. She is married to a U.S. born citizen who holds a security clearance. They have two daughters who were born in the U.S. She denied some and admitted some of the factual allegations pertaining to foreign influence under Guideline B and foreign preference under Guideline C but disputed conclusions drawn from them. The admissions are incorporated herein as findings of fact. After a complete review of the evidence in the record and upon due consideration of the record the following additional findings of fact are made:

The government has established that some members of Applicant's immediate family are not United States citizens and thus might be subject to duress. These relatives include her mother who is retired and has lived with Applicant for four years until 2003 when she returned to China for medical treatment she could not afford in the U.S. She intends to return to the U.S. to live with Applicant. She has permanent residency status in the U.S.

Applicant also has three siblings living in China. None of them work for, or are agents of, the government of China. Her sister is a pediatrician, one brother is an automotive technician, and the other brother is an unemployed engineer but hopes to start his own business. Affidavits of their employment were submitted by the Applicant. Applicant is in contact with her siblings once a year. A cousin is a U.S. citizen.

Applicant held a passport from China that she used before she was able to obtain a U.S. passport but she has not used it since 2000 when she obtained U.S. citizenship. She attempted to return the passport to the Chinese embassy. The embassy had no provision for taking it from her but canceled it by cutting and marking it "cancelled".

Applicant came to the U.S. almost 18 years ago to study, find a better life, and participate in the freedom and democracy of the U.S. She received a masters' degree from a U.S. university. She owes no allegiance to China or its government.

She traveled twice to China in the last seven years before becoming a U.S. citizen. The first trip was en route home from a business trip to Korea in 1997 for her employer. The second and last was in 1998 to introduce her husband to her family.

Applicant is considered completely loyal and trustworthy by her supervisor and fellow employers who have submitted statements on her behalf.

## **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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive. (E2.2.1) Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive (E2.2.2.) "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b).

## **CONCLUSIONS**

Based on the evidence of record, including Applicant's admissions, the Government has established reasons to deny her a security clearance because of foreign influence and foreign preference. Having established such reasons, the Applicant has the burden to establish security suitability through evidence which refutes, mitigates, or extenuates the disqualification and demonstrates that it is clearly consistent with the national interest to grant a security clearance. ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 at 33-34 (App. Bd. Feb. 8, 2001).

"A security risk may exist when an individual's immediate family and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States 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.) Having immediate family members who are citizens of, and residing in a foreign country, may raise a disqualifying security concern. Directive (E2.A2.1.2.1.)

Applicant has offered substantial evidence to mitigate the allegations of both Guideline C and Guideline B. While there is a heavy burden on an applicant to overcome the "clearly consistent with the national interest" standard it should not be impossible to do so. ISCR Case No. 02-04786 (June 27, 2003) at p. 7. Absent an absolute policy that no one with a close relative living in China may not hold a security clearance, reasonable analysis should permit a long-time resident and a citizen of the U.S. to hold a clearance.

With regard to Guideline C, security concerns may be mitigated by renunciation of dual citizenship and return or invalidation of a foreign passport. (E2.A3.1.3.) Applicant has taken actions on both to mitigate the concerns by attempting to return the passport to the Embassy of China where they had no provision for taking the passport but cut it and marked it as cancelled. She produced a copy of the passport.

One of allegations in the SOR (1.c) cited a trip to Canada in 2001 by the Applicant where she used her Chinese passport after obtaining U.S. citizenship. Applicant denied this allegation with a reasonable explanation that she had used no passport on the trip and an affidavit supporting her statement from her husband who traveled with her. The government conceded in the FORM that they had no proof of the allegation.

With regard to Guideline B, security concerns may be mitigated by a determination "that the immediate family members 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." (E2.A2.1.3.1)

Applicant came to the U.S. because of her concerns about the her country of origin and has found a new life in the U.S.

The fact that she still has three siblings in China with whom she has very

little contact and that her mother is there temporarily does not provide sufficient grounds to deny her a security clearance. A cousin was alleged in the SOR to be a Chinese citizen living in the U.S. but proof was provided that he became a U.S. citizen in 2000.

While the government presented a prima facie case, Applicant has sufficiently rebutted the presumption through evidence of her loyalty and dedication to the U.S., the status of her relatives, and her strong links to the U.S. after 18 years living in the U.S. A security clearance should be granted.

### **FORMAL FINDINGS**

Formal Findings as required by the Directive, (E3.1.25), are as follows:

Paragraph 1. Guideline C: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2. Guideline B: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

## **DECISION**

After full consideration of all the facts and documents presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Charles D. Ablard

Administrative Judge