

DATE: September 24, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01836

ECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Donald F. Russell, Personal Representative

SYNOPSIS

Applicant, born in the People's Republic of China (PRC), became a United States citizen in 1999. His mother and father, citizens and residents of PRC, are in the process of moving to the United States. His wife is a citizen of PRC, residing in the United States, and is becoming a United States citizen. None of these family members belong to, participate in, or are active with any government agency of PRC. They are not in a position to be exploited by PRC in a way that could force Applicant to choose between loyalty to these family members and his loyalty to the United States. Applicant's strong attachment to the United States and minimal ties to PRC makes it unlikely that he would respond favorably to any efforts to persuade him to act against United States interests. litigation has been shown. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated November 6, 2003, to the 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 the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, or denied.

Applicant filed a notarized response dated December 8, 2003, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On April 15, 2004, the case was assigned to me to conduct a hearing, and pursuant to formal notice dated June 7, 2004, a hearing was held on July 1, 2004.

At the hearing, Department Counsel offered seven documentary exhibits (Government Exhibits 1- 7) and no witnesses were called. Applicant offered nine documentary exhibits (Exhibits A-I) and offered his own testimony and that of three other witness. The transcript (TR) was received on July 22, 2004.

FINDINGS OF FACT

The SOR was based on foreign influence (Guideline B) concerns because of the foreign residency and/or citizenship of close family members and foreign preference (Guideline C) related to his exercise of dual citizenship with the United States and PRC. The SOR contains four allegations, 1.a., through 1.d., under Guideline B, and one allegation, 2.a. under Guideline C. Applicant admitted all of the SOR allegations with the exception of 1.d., with some explanations, which will be discussed in this decision. Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and testimony of Applicant and the additional witness, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 41 years old. He is employed as a Senior Software Engineer by a United States defense contractor that wants him to have a security clearance. He received two Masters degrees, in Physics and Materials Engineering, in 1990 and 1992, respectively, from two United States universities.

Paragraph 1 (Guideline B - Foreign Influence)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has immediate family members or people to whom he may be bound by affection or obligation, who are not citizens of the United States, or may be subject to duress.

Applicant was born in PRC. He came to the United States in 1988. He became a naturalized United States citizen in 2000. Applicant is married to a woman, who was born in PRC. She now resides in the United States and is in the process of becoming a naturalized United States citizen. Applicant and his wife have a four year old son who was born in the United States and is a United States citizen.

Applicant's parents are PRC citizens and residents. Both of them are retired and in poor health. His father was a teacher and his mother was an accountant, and neither of them ever worked for or had any affiliation with the PRC Government. In March 2004, Applicant applied for green cards for his parents to come to this country, because he wanted to remove any concern the United States Government may have of a potential threat if they remain in PRC. He plans for his parents to live with him when they arrive in the United States.

Applicant's parents-in-law are citizens of PRC, but reside in the United States with Applicant. Applicant's sister-in-law also resides in the United States and is married to a United States citizen. Applicant's wife formerly sent money to her parents, but she no longer does that since they live with her and Applicant.

Applicant has some relatives, who are citizens of and reside in PRC. He has not spoken to them for many years. He is not aware that any of these family members belong to, or are active with, any government agency of PRC.

Since Applicant came to the United States in 1988, he has traveled to PRC one time, in 1994, to visit his family.

Applicant does not anticipate receiving any inheritance or other financial interest from PRC. He has estimated his financial holdings in this country to be worth two hundred thousand dollars

Applicant had three individuals testify for him. They indicated that they believed he was trustworthy and reliable.

Paragraph 2 (Guideline C - Foreign Preference)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has acted in such a way as to indicate a preference for another country over the United States. The Government was concerned because, as of December 6, 2002, Applicant possessed a PRC passport, which is not scheduled to expire until October 25, 2004.

Since that date, Applicant instructed his parents, who maintained custody of the passport, to return it to the Facility Security Officer of his company. On February 23, 2004, the security officer returned the passport to PRC Consulate General, indicating that Applicant, as a citizen of the United States, no longer desired to keep the passport (Exhibits D

and E).

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 pertinent 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 (*See* Directive, Section E2.2.1. of Enclosure 2).

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of those who testified, I conclude the following with respect to guidelines B and C: Based on the evidence of record, the Government has established an initial reason to deny Applicant a security clearance because of Guideline B (Foreign Influence). Applicant's parents are citizens and residents of PRC. The PRC citizenship and residency of Applicant's family create the potential for foreign influence that could result in the compromise of classified information because it makes Applicant potentially vulnerable to coercion, exploitation, or pressure. The possession of such ties raises a security concern sufficient to require Applicant to present evidence in rebuttal, extenuation, or mitigation sufficient to meet his burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for him.

The evidence of existence of immediate family members, who are citizens of and reside in PRC comes within Disqualifying Condition (DC) E2.A2.1.2.1, immediate family members, or persons to whom the individual has close ties of affection or obligation, who are citizens of, or resident in, a foreign country. The fact that the foreign country in question is PRC, a country under Communist rule, is also a concern; but that fact is not automatically controlling.

Based on the nature of the overall record and the totality of the evidence, including: the lack of PRC government involvement of Applicant's parents, currently and in the past, the fact that his wife and in-laws now live in the United States and plan to remain here, his devotion to his son, his history since coming to the United States, and his strong feelings concerning this country, I have determined that his wife and his parents in PRC do not constitute an unacceptable security risk, and Mitigating Conditions (MC) E2.A2.1.3.1., a determination that the immediate family members. . . 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, applies.

After considering all of the evidence of record on this issue, I conclude that the mitigating evidence substantially outweighs the evidence supporting the SOR and even in the unlikely event pressure was exerted upon Applicant to compromise classified information, he would resist it, and would report the incident to the proper authorities.

Guideline C is based on actions taken by an individual that indicate a preference for a foreign country over the United States. Applicant's decision to retain his PRC passport raises foreign preference (Guideline C) concerns. At the time the SOR was issued, DC E2.A3.1.2.1., the exercise of dual citizenship could be argued to apply because he retained his PRC passport, and DC E2.A3.1.2.2., possession and/or use of a foreign passport applied. I conclude that since Applicant never used his passport, once he became a United States citizen, he never actually exercised foreign citizenship and DC E2.A3.1.2.1. does not apply. Since Applicant revoked his PRC passport, neither the Money Memorandum nor DC E2.A3.1.2.2 now applies in this case.

FORMAL FINDINGS

Paragraph 1. Guideline B: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Paragraph 2. Guideline C: FOR APPLICANT

Subparagraph 2.a.: For 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.

Martin H. Mogul

Administrative Judge