

DATE: March 29, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-04132

## **DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric H. Borgstrom, Esq., Department Counsel

#### **FOR APPLICANT**

Sheldon I. Cohen, Esq.

### **SYNOPSIS**

Applicant was born, raised, and for the most part educated in the People's Republic of China. He emigrated from the PRC to the U.S. in 1992. In 1997, he married a woman from the PRC. Applicant's parents, oldest brother, and parents-in-law are citizen residents of the PRC. Applicant failed to mitigate the foreign influence security concerns. He did mitigate the foreign preference security concern by surrendering his passport to appropriate PRC authorities. Clearance is denied.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 25 September 2003, DOHA issued a Statement of Reasons (SOR) <sup>(1)</sup> detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) of the Directive. Applicant answered the SOR in writing on 15 October 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 22 December 2003. On 17 February 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 24 February 2004.

### **RULING ON PROCEDURE**

Prior to the hearing, Applicant moved for me to recuse myself from the case because he believed he could not "get a fair and impartial hearing." App. Ex. I at 1. "With Judge Young's expressed opinion of the PRC (the People's Republic of China), there is no way that applicant can get a full, fair, and impartial hearing on the merits of his security clearance regardless what other factors exist." *Id.* at 1-2. I denied the motion pre-hearing, but permitted Applicant to raise the issue at the hearing.

At the hearing, Applicant again raised the issue. Applicant asserted the nature of the PRC was a critical issue in his case

and my adverse finding on this issue in another case-ISCR Case No. 02-22807 at 6 (Young, A.J. Jul. 7, 2003)-would inevitably lead to an adverse decision in Applicant's case. In ISCR Case No. 02-22807, DOHA declined to grant the applicant a clearance asserting a security risk could exist due to members of her immediate family who were citizens and residents of the PRC. Applicant sought mitigation of this disqualifying condition by showing the immediate family members and associates were not agents of a foreign power or in a position to be exploited by a foreign power. Mitigating Condition E2.A2.1.3.1. This is a two-part test. The second part requires the applicant to demonstrate, and the administrative judge to determine, the foreign connections do not place the applicant in a position of vulnerability to be influenced by coercive or noncoercive means. ISCR Case No. 00-0628 at 5 (App. Bd. Feb. 24, 2003).

Whether an applicant's foreign associates are in a position to be exploited by a foreign power is, in large measure, a function of the country in which the foreign associates are located. Thus, it is incumbent upon the administrative judge to make findings as to the nature of the particular country involved. Countries such as Canada, Great Britain, and Italy, for example, are representative democracies that pride themselves on the protection of civil liberties. An applicant's foreign associates in those countries would face considerably less risk of exploitation than those in the PRC, which is known as a repressive regime in which individual rights of citizens are not honored. In ISCR Case No. 02-22807, I made the following statement regarding the PRC:

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.

"Due process entitles an individual in an administrative proceeding to a fair hearing before an impartial tribunal." *Roach v. Nat'l Transp. Safety Bd.*, 804 F.2d 1147, 1160 (10<sup>th</sup> Cir. 1986). *See Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). There is a presumption the administrative judge is impartial and it is for the applicant to demonstrate the contrary. *See Roberts v. Morton*, 549 F.2d 158, 164 (10<sup>th</sup> Cir. 1976).

Making a determination that the PRC is hostile to the U.S. and has interests inimical to those of the U.S. does not necessarily make the judge who made that determination "biased or prejudiced."

The words [bias and prejudice], connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts).

*Liteky v. United States*, 510 U.S. 540, 550 (1994). A judge is not recusable for bias or prejudice when "his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings." *Id.* at 551.

Applicant failed to make the required showing of impartiality, bias, or prejudice. I never heard of Applicant until I was assigned his case, and I have no personal bias against him or other applicants who have foreign connections with the PRC. My decision, in the previous case, that the PRC is hostile to the U.S. and has interests inimical to those of the U.S., was based on the evidence presented in that case. My decision was not "wrongful or inappropriate." It in no way signals a decision to deny security clearances to all applicants with foreign connections to the PRC. *See ISCR Case No. 02-12208* at 5 (Young, A.J., Jul. 30, 2003) (granting clearance in foreign influence case to an applicant with associates in the PRC, despite finding the PRC was hostile to the U.S.).

### **FINDINGS OF FACT**

Applicant is a 36-year-old senior database administrator for a defense contractor. Ex. 1 at 1; Tr. 51. He is an excellent

employee. Tr. 51, 71, 181. He does the work of three or four other employees. Tr. 75.

Applicant was born in the PRC. He graduated from a university in the PRC with a Ph. D. in biochemistry. Tr. 184. He came to the U.S. in 1992 as a visiting scholar. Tr. 182. In 2000, he received a master's degree in computer science from a U.S. university. Ex. N.

Since arriving in the U.S. in 1992, Applicant has returned to the PRC on eight occasions: Twice in 1997, three times in 1998, once in 2000 and twice in 2002. Applicant traveled on his PRC passport until he became a U.S. citizen in 2002. He surrendered his PRC passport to the PRC Embassy in Washington, DC.

In 1997, Applicant went to the PRC to meet his wife. Tr. 142-43. His wife was born in the PRC to citizen residents of the PRC. Tr. 139. She received a bachelor's degree in architectural engineering from a Chinese university in 1997. Tr. 140. After her marriage to Applicant, she emigrated from the PRC to the U.S. in 1998. Tr. 145. She received a master's degree in computer science from a U.S. university in 2000. Applicant and his wife have two children, both born in the U.S. Tr. 147. Applicant's wife became a permanent U.S. resident alien in 2003, but will apply for U.S. citizenship as soon as she is eligible. She has a PRC passport. Tr. 147. She is currently working as a software developer. Tr. 168.

One of Applicant's older brothers is a doctor who graduated from medical school in the PRC. That brother is married to a Chinese woman and they have two sons, one born in the PRC, the other in the U.S. Applicant's brother and his wife are both U.S. permanent resident aliens. Tr. 91-93. They intend to apply for U.S. citizenship as soon as they are eligible. They both possess PRC passports. Tr. 116. The wife's family still lives in the PRC. Tr. 116. Applicant's brother has returned to the PRC three times since 2000 when he became a U.S. permanent resident alien. Tr. 117.

Applicant's parents are 73 and 65. They are retired and live in the countryside. Tr. 108. Applicant's father was a construction laborer and then became an independent contractor delivering supplies to construction sites. Tr. 109. Applicant's mother has not worked outside the home. Tr. 110. Applicant's oldest brother is a citizen and resident of the PRC. Tr. 112-13. He does work similar to that done by his father. Neither Applicant's parents nor his brother ever worked for the Chinese Government.

Applicant's mother-in-law is a nurse, but is now retired. Tr. 155. His father-in-law is a physician, but is now retired. Tr. 156. In 1998, both parents-in-law visited Applicant in the U.S., his mother-in-law for six months and his father-in-law for 25 days. In 2002, Applicant's mother-in-law again visited the U.S. for six months. Tr. 159-60. Applicant's brother-in-law is also a physician. Tr. 172. Applicant's wife used to talk by telephone to her family once a week, but since Applicant's security clearance has become an issue, she has reduced the number of calls. Tr. 169.

Applicant has petitioned to sponsor the immigration of his older brother, his wife, and their children into the U.S. from China. The application is still pending. The process could take several years. Ex. Z; Tr. 211-12.

## 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.

## CONCLUSIONS

### **Guideline B-Foreign Influence**

In the SOR, DOHA alleged Applicant's wife (¶ 1.a.) and brother ¶ 1.d.) are citizens of the PRC residing in the U.S.; Applicant's parents (¶ 1.b.) and parents-in-law (¶ 1.e.) are citizens and residents of the PRC; and Applicant has traveled to the PRC at least six times since 1997 to visit relatives (¶ 1.f.). A security risk may exist when an applicant's immediate family, or other person to whom he 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. Directive ¶ E2.A2.1.1.

The Government established by substantial evidence and Applicant's admissions each of the SOR allegations alleged under the foreign influence guideline. Applicant has immediate family members-his parents and older brother-who are resident citizens of the PRC. DC E2.A2.1.2.1. His wife and another brother are citizens of the PRC, but residents of the U.S. *Id.* In addition, other persons to whom he has close ties of affection or obligation are resident citizens of the PRC-his wife's parents and siblings. <sup>(2)</sup> *Id.*

Applicant claims he is entitled to the benefit of two mitigating conditions: (1) that his immediate family members and foreign 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 him to choose between loyalty to the family member or associate and loyalty to the U.S. (MC E2.A2.1.3.1.); and (2) that his contacts with foreign citizens are casual and infrequent (MC E2.A2.1.3.3.). Applicant established to my satisfaction that his foreign family members and associates were not agents of a foreign power. However, 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. He still must demonstrate that his family members and associates are not in a position of vulnerability, even if there is no evidence that a foreign country has sought to exploit that vulnerability. *See* ISCR Case No. 00-0628 at 5 (App. Bd. Feb. 24, 2003). Any assessment of an individual's risk of vulnerability to coercion must consider the country in which the individual resides.

Although there has been increased cooperation between the U.S. and the PRC since the terrorist attacks of 11 September 2001, the PRC is still a totalitarian state with a human rights record of abuses that "have been among the most visible and constant points of contention in Sino-U.S. relations since the 1989 Tiananmen Square crackdown." Ex. 6 at 7. The PRC remains one of the most active collectors of U.S. defense information and technology. Ex. 9. 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 them in a position to be potentially exploited by the PRC in a way that could force Applicant to choose between loyalty to his family and associates and loyalty to the U.S.

Applicant's contacts with his family and associates in the PRC cannot be characterized as either infrequent or casual. He has made eight trips to the PRC in the last seven years. He helped pay for his father's surgery. He has visited his ill father and expects to return to the PRC when his father dies. He has petitioned the U.S. to permit his older brother to immigrate to the U.S. and is awaiting approval of that application. Until Applicant's security clearance became an issue,

his wife contacted her family in the PRC weekly. While I find nothing unusual or improper in an applicant visiting and staying in close contact with his family and his wife's family, or sponsoring members of the family into the U.S., it is evidence of the depth of their familial ties. Applicant failed to demonstrate that his foreign contacts do not place him in a position of vulnerability to coercion or influence.

Applicant's wife and other brother are permanent U.S. resident aliens and will apply for U.S. citizenship as soon as they are eligible. They represent a security threat only because of their foreign associates and the ability to pressure Applicant on behalf of those associates.

Applicant and his wife appear to be people of character. The evidence supports a belief that they are a welcome additions to the U.S. Applicant understands his duty to report to the authorities any threats or attempts at coercion. He insists he is willing to bear arms for the U.S., even against the PRC. Tr. 219-221. Applicant is a hard-working man who has clearly embraced the American way of life. Nevertheless, I am unable to find it is clearly consistent with the national interest to grant him a security clearance. The decision to deny Applicant a security clearance is not 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 his close familial ties to citizens and residents of the PRC, he is in a position of vulnerability to foreign influence.

### **Guideline C-Foreign Preference**

In the SOR, DOHA alleged Applicant possessed a current PRC passport. ¶ 2.a. When an applicant acts in such a way as to indicate a preference for a foreign country over the U.S., then he may be prone to provide information or make decisions that are harmful to the interests of the U.S. Directive ¶ E2.A3.1.1.

The Government established that Applicant possessed a PRC passport after he became a U.S. citizen. The possession or use of a foreign passport is a disqualifying condition. DC E2.A3.1.2.2. However, Applicant amply demonstrated that he possessed the passport only as an incidence of his birth in the PRC. He did not use his PRC passport after he became a U.S. citizen, the passport has expired, it was canceled by the PRC government, and was surrendered to the PRC Embassy. MC E2.A3.1.3.1. After carefully reviewing all the evidence, and considering the Government's concession on the foreign passport issue, I conclude Applicant has mitigated the foreign preference security concern.

### **FORMAL FINDINGS**

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

#### Paragraph 1. Guideline B: 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

#### Paragraph 2. Guideline C: FOR APPLICANT

Subparagraph 2.a.: For 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. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.

2. There is a rebuttable presumption that an applicant has ties of affection for, or obligation to, the immediate family members of the applicant's spouse. ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at \*8 (App. Bd. Feb. 20, 2002).