

DATE: May 6, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-04583

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has successfully mitigated the foreign influence security concern, as the record evidence demonstrates that his connections to China are rather minimal or *pro forma* or both when compared with his significant family, professional, and financial connections to the U.S. Clearance is granted.

### **STATEMENT OF THE CASE**

On April 27, 2004, 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. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline B for foreign influence. Applicant replied to the SOR on May 29, 2004, and requested a hearing. Department Counsel indicated he was ready to proceed on August 25, 2004, and the case was assigned to me September 7, 2004. A notice of hearing was issued on September 16, 2004, scheduling the hearing for October 6, 2004. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript October 19, 2004. Issuing a decision was delayed due to a heavy caseload.

### **FINDINGS OF FACT**

In his Answer to the SOR, Applicant admitted the factual allegations, with explanations. His admissions are incorporated into my findings, and after a thorough review of the record, I make the following findings of fact:

Applicant testified during the hearing and his testimony was credible and believable. He is a 27-year-old married man seeking a security clearance for his job as a senior software engineer with a large company engaged in defense contracting. Applicant's job centers on web application work development. He has worked for this company since August 2001. A co-worker and a supervisor submitted written character references on Applicant's behalf describing him as a hardworking, honest, dependable, and trustworthy employee, and both support Applicant's application for a security clearance.

Applicant was born in China in 1977. In 1991, the then 14-year-old Applicant came to the U.S. with his mother to join his father who was already in the U.S. working as a university researcher. Applicant enrolled in a public high school and graduated in 1994. He then attended a state university where he studied engineering. Applicant completed his studies and was awarded a bachelor's degree in engineering in April 2000. During the same year, Applicant obtained U.S. citizenship via the naturalization procedure. He has a U.S. passport and no other.

While in college, Applicant met and married his wife, who is also a native of China. She entered the U.S. in 1994 on a student visa and was also a college student. They married in December 1998. Applicant's wife is a well-educated professional woman with degrees in finance, economics, international relations, and a master's degree in accountancy. All were awarded, except the finance degree, by U.S. universities. She is currently employed as a senior analyst for a company. Before coming to the U.S., and years before she met Applicant, she was employed during 1993 - 1994 as an accountant with the Construction Bank of China. She is now a lawful permanent resident alien of the U.S. She submitted her application for naturalization in September 2003 and she is awaiting decision on the application by U.S. immigration officials.

Applicant and his wife have substantial financial interests in the U.S. They own a home currently valued at about \$600,000.00. Their combined gross income is about \$115,000.00 annually. Applicant estimates the couple's net worth at about \$250,000.00. In contrast, neither Applicant nor his wife has any financial interests in China or any other foreign country.

Applicant's mother and father are both residents of the U.S. The father is a U.S. citizen and the mother is a lawful permanent resident alien of the U.S. The father became a U.S. citizen in 2000, and the mother has resided in the U.S. since 1991. The father no longer works as a university researcher, and he and his wife work together in the restaurant business. According to Applicant, his father and mother have no plans to return to China as their parents are deceased. Applicant's father and mother have substantial financial interests in the U.S. based on real-estate investments and retirement accounts.

Based on his marriage, Applicant has relatives who are citizens of and residents in China. Applicant has little, if any, contact with these relatives (parents-in-law and two sisters-in-law) and has only met them once during a trip to China in 2004. Applicant's father-in-law is an English professor at a local college and has been so employed for more than 20 years. Applicant's mother-in-law is a pharmacist who retired three years ago. One sister-in-law is 30 years old, and she is a married housewife. The other sister-in-law is a 26-year-old high school teacher.

In addition to these relatives, Applicant has a sister-in-law in the U.S. She is a lawful permanent resident alien of the U.S. who came here in 1996 to study computer science. She earned a degree in 2000 and worked for a private firm before marrying a U.S. Coast Guard officer in 2002. They have one child and are expecting another in June 2005. Applicant believes this sister-in-law will apply to become a U.S. citizen when she is eligible to do so.

Applicant and his wife had plans to travel to China in 2003 to visit his wife's family, but the trip did not occur until 2004. Before going on the trip, Applicant obtained a security briefing from his employer. Applicant used his U.S. passport for the trip, while his wife used a Chinese passport. Neither Applicant nor his wife experienced any problems or difficulties with Chinese officials or authorities during this trip. Likewise, neither Applicant nor his wife was required to register with the local police or other authorities in China. As Applicant has never met any of his wife's family before this trip, he described it as being "kind of dragged to China. Otherwise, I would never go." (2)

Concerning the closeness of his relationships with his in-laws in China, Applicant described it as not very close given he has only met them once, that he hardly knows them, and relies on his wife to provide information about them. Likewise, his wife has a distant relationship with her parents and two sisters in China, perhaps calling them four to five times per year on holidays to say hello and inquire about their well being.

According to Applicant, his wife has never been contacted by her former employee in China. Likewise, Applicant denies that he or his wife have ever received any unsolicited e-mail or faxes from persons in China.

As requested by Department Counsel, I took administrative or official notice of certain matters about China and the

nature of its government as described in Exhibit 8. I have considered these matters in making my clearance decision.

## **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.

## **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.<sup>(3)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(4)</sup> The government has the burden of proving controverted facts.<sup>(5)</sup> The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.<sup>(6)</sup> The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.<sup>(7)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(8)</sup> 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.<sup>(9)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(10)</sup>

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."<sup>(11)</sup> 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**

Under Guideline B for foreign influence, 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. Common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service.

Here, based on the record evidence as a whole, the government established its case under Guideline B. Applicant has family ties to China through his in-laws. In addition, the trip to China during 2004 with his wife to visit these family members is also evidence of the family ties. Taken together, these circumstances raise a security concern under DC 1.<sup>(12)</sup> In addition, I considered DC 2,<sup>(13)</sup> but it does not apply. Although Applicant shares living quarters with a foreign citizen (his wife), she has lived in the U.S. since 1994, she is a lawful permanent resident alien, she has worked for U.S. employers for years, and she has applied to become a U.S. citizen. Given these circumstances, the potential for adverse foreign influence or duress is remote if not nonexistent. The remaining DC do not apply based on the facts and circumstances here.

I have reviewed the MC under Guideline B and conclude that both MC 3<sup>(14)</sup> and MC 5<sup>(15)</sup> apply. MC 3 applies to Applicant's contact with his parents-in-law and two sisters-in-law who are citizen residents of China. The record shows that, although his wife is close to them, Applicant is not. He has met them once, has no contact with them to speak of, and basically relies on his wife to inform him of his in-laws' lives. Given these circumstances, Applicant's contact with these four persons is fairly characterized as casual and infrequent. And MC 5 applies because neither Applicant nor his

wife has any financial interests in China. They earn their incomes by working for U.S. employers, and they own a home and investments in the U.S.

The analysis does not necessarily end with the formal mitigating conditions, as other matters under the whole-person concept may mitigate the security concern. First, although the record shows Applicant has family ties to citizen residents of China, these family ties are hardly close. Concerning Applicant, he has met his in-laws in China once during the 2004 trip, and it appears he went on the trip as the reluctant son-in-law. Second, concerning Applicant's wife, she, of course, is closer to her family members in China. But her relationships with them are distant due to the length of time she has lived in the U.S. (since 1994) and geographic separation. And her life, both personally and professionally, is firmly rooted in the U.S. Third, Applicant's ties or connections to the U.S. are strong. He has lived in the U.S. since the age of 14. Since his arrival here, Applicant can fairly be described as a model immigrant. He completed high school in 1994, was awarded a college degree in 2000, and had since been gainfully employed as a software engineer. Moreover, his professional career and financial interests are clearly in the U.S. and that situation is unlikely to change.

The record evidence demonstrates Applicant has all the indicators of a self-reliant, industrious, mature, responsible, and trustworthy individual. At this point in Applicant's life, his connections to China are rather minimal or *pro forma* or both when compared with his significant family, professional, and financial connections to the U.S. After weighing the record evidence as a whole, I conclude Applicant has successfully mitigated the foreign influence security concern raised by his family ties to China. Accordingly, Guideline B is decided for Applicant.

To conclude, Applicant has met his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I have considered 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: For the Applicant

Subparagraphs a - f: For the 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. Clearance is granted.

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. Transcript at p. 70.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

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

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

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

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

12. 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."

13. E2.A2.1.2.2. "Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists."

14. E2.A2.1.3.3. "Contact and correspondence with foreign citizens are casual and infrequent."

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