

DATE: October 14, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-05880

**ECISION OF ADMINISTRATIVE JUDGE**

**MARTIN H. MOGUL**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant, born in the People's Republic of China (PRC), came to the United States in 1989 and became a United States citizen in 2001. Her husband and daughter are also United States citizens. Her mother and her husband's parents are citizens and residents of PRC, but are in the process of obtaining permission to move to the United States. She has other relatives, who are citizens and residents of PRC, but her contacts with them are infrequent. 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 her loyalty to the United States. Applicant's strong attachment to the United States and minimal ties to PRC makes it unlikely that she would respond favorably to any efforts to act against United States interests. Mitigation 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 January 16, 2004, 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 referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, or denied. The SOR was based on foreign influence (Guideline B) concerns and foreign preference (Guideline C) issues.

Applicant filed a notarized response dated February 6, 2004, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On May 20, 2004, the case was assigned to this Administrative Judge to conduct a hearing. Pursuant to formal notice dated June 4, 2004, a hearing was held on June 25, 2004.

At the hearing, Department Counsel offered four documentary exhibits (Government Exhibits 1- 4) and no witnesses were called. Applicant offered 11 documentary exhibits (Exhibits A-K) and offered her own testimony and that of two

other witness. The transcript (TR) was received on July 15, 2004.

### **FINDINGS OF FACT**

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline B (Foreign Influence) and Guideline C (Foreign Preference) of the Directive. The SOR contains nine allegations, 1.a., through 1.i., under Guideline B, and two allegations, 2.a. and 2.b. under Guideline C. Applicant admitted all of the SOR allegations except 2.b. The admitted 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 witnesses, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 41 years old. She is employed as a Systems Engineer by a United States defense contractor that wants her to have a security clearance. She received a Masters degree in a university in PRC. She also earned a Masters degree in Electrical Engineering and a Ph. D. in Communication Science from a United States university.

#### **Paragraph 1 (Guideline B - Foreign Influence)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because she 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. She came to the United States in 1989 to pursue an advanced education. She became a naturalized United States citizen in 2001. She is married and she and her husband have a daughter who is three and a half years old. Her daughter was born in and adopted from PRC and is a United States citizen. Her husband, who was born in PRC, also became a naturalized United States citizen.

Applicant's mother and sister are citizens and residents of PRC. Applicant's father is deceased. Applicant's mother is retired and is in the process of applying to become a resident of the United States. Neither her mother nor sister has ever belonged to, participated in, or been active with any government agency of PRC. She speaks to her mother approximately two times a month and her sister far less frequently. In the past she has sent her mother between \$200 and \$250 a month, but she no longer does it regularly, since her mother often did not cash the checks that she sent her. Applicant's brother, who is also a naturalized United States citizen, has applied for a green card for their mother to move to this country (Tr at 50-51).

Applicant's parents-in-law are PRC citizens and residents. Both of them were college professors and are now retired. Neither of them ever worked for or had any affiliation with the PRC Government. Applicant and her husband have applied for green cards for his parents to come to this country and spend the rest of their lives here. They have sent his parents approximately \$1,000 a year (Tr at 51-54).

Applicant has a brother-in-law, her sister's husband, who is a citizen and resident of PRC, retired from the PRC Navy in 2000. He is currently employed with a government agency of PRC in a bureaucratic, non military, non Communist position. The only time that she has had any contact with him is when she has visited PRC and that has been limited (Response to SOR) (Tr at 54-57).

Applicant has some other relatives, who are citizens of and reside in PRC. The only contact that she has had with any of them is at her father's funeral. She had no information that any of these family members belong to any government agency of PRC (Response to SOR) (Tr at 57-59).

Before Applicant came to the United States, she worked for ten months as a lecturer at a university in PRC, where she had obtained a Master's degree. This was not a position that involved working for the PRC Government. After she resigned from her position in July 1989, she has had no further contact with the university (Tr at 59-60).

Applicant has traveled to PRC on seven occasions, from 1997 to the last time in 2002. The last three trips were related

to her adoption of her daughter. The trip before that was to attend the

funeral of her father. Her other three trips were related to visiting her family. Applicant has not traveled to PRC since she took her daughter to this country, and she has no plans to travel to PRC in the future (Response to SOR) (Tr at 61-62).

Applicant does not anticipate receiving any inheritance or other financial interest from PRC. She has estimated the financial holdings in this country of her husband and her to be worth several hundred thousand dollars (Response to SOR) (Tr at 49, 50).

### **Paragraph 2 (Guideline C - Foreign Preference)**

The Government alleges in this paragraph that the Applicant is ineligible for clearance because she 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 January 2003, Applicant possessed a PRC passport, which was not scheduled to expire until August 2004.

Applicant testified that after she was sworn in as a United States citizen, she believed that she had renounced her PRC citizenship, and she never used her PRC passport after becoming a United States citizen. When she was made aware of the negative implications of retaining her PRC passport by a Defense Security Service (DSS) agent who interviewed her, Applicant destroyed the passport in front of the DSS agent in January 2003 (Tr at 43-47).

Applicant had two individuals testify for her, who have both known her as supervisors. They indicated that they believed she was extremely trustworthy and reliable (Tr at 29-41).

### **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 mother, in-laws and other relatives 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 her burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for her. This Applicant has done.

The existence of immediate family members, who are citizens and residents of 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. Also because of her brother-in-law, DC E2.A2.1.2.3., relatives who are connected with any foreign government, applies.

Based on the nature of the overall record and the totality of the evidence, including: the lack of PRC government involvement of Applicant's mother and in-laws, currently and in the past, the fact that her mother and in-laws are in the process of obtaining approval to live in the United States, Applicant's devotion to her daughter, her history since coming to the United States, her extremely minimal contacts with her relatives other than her mother, and her strong feelings concerning this country, I have determined that her relatives in PRC do not constitute an unacceptable security risk.

In reviewing the Mitigating Conditions (MC), 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. Also, MC E2.A2.1.3.3. is applicable because her contact with these foreign citizens is casual and infrequent.

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, she 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 her 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 she retained her 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 her passport once she became a United States citizen, she never exercised foreign citizenship and DC E2.A3.1.2.1. does not apply. Since Applicant revoked her PRC passport, neither the Money Memorandum nor DC E2.A3.1.2.2 applies in this case either .

### 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

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

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

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: 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