

DATE: April 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-08988

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

FOR APPLICANT

Jerome Matus, Personal Representative

SYNOPSIS

Applicant and her spouse were both born in the People's Republic of China (PRC) and became naturalized citizens. Applicant's elderly parents and older sister are citizens and residents of the PRC. Her brother is a naturalized U.S. citizen who works in the PRC for a European furniture company. The security concern based on foreign influence is not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On September 21, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. This action was taken under Executive Order 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 (Directive). The SOR alleges security concerns under Guidelines C (Foreign Preference) and B (Foreign Influence).

Applicant answered the SOR in writing on October 15, 2004. She denied the allegation in the SOR ¶1.a., alleging dual citizenship, and admitted ¶1.b., alleging possession of a Chinese passport. She admitted all the allegations in the SOR ¶¶2.a.-2.f., under Guideline B. She requested a hearing.

The case was assigned to an administrative judge on December 1, 2004. It was reassigned to another administrative judge on December 30, 2004 based on the geographic location of the hearing, and reassigned to me on February 16, 2005, to consolidate the hearing docket. On February 22, 2005, DOHA issued a notice of hearing setting the case for March 15, 2005. The case was heard as scheduled. DOHA received the transcript (Tr.) on March 24, 2005.

PROCEDURAL ISSUE

Before the hearing, Applicant presented Department Counsel with her PRC passport, with the word "Canceled" stamped on it in English. One of the corners of the passport had been cut off. At the beginning of the hearing, Department Counsel conceded Applicant had mitigated the security concern under Guideline C, and he stated he would not present any evidence or argument regarding the allegations under Guideline C (Tr. 15). I treated Department Counsel's action as a withdrawal of ¶¶ 1., 1.a., and 1.b. of the SOR in accordance with the Directive ¶ E3.1.6. Accordingly, this decision is limited to the allegations in ¶¶ 2.a.-2.f. of the SOR, under Guideline B.

FINDINGS OF FACT

Applicant's admissions in her answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 49-year-old database manager for a defense contractor. She has never held a security clearance. She was born in the People's Republic of China (PRC), came to the U.S. in August 1989, and became a U.S. citizen in March 2001. She received her undergraduate degree in the PRC, and she holds a master's degree in computer science from a U.S. university. Before she became a U.S. citizen, she obtained a PRC passport, which expired on November 22, 2004.

Applicant's spouse was born in the PRC and became a naturalized U.S. citizen in August 2002. One of their children is a naturalized U.S. citizen and the other is a native-born U.S. citizen.

Applicant's mother and father are citizens and residents of the PRC. Her mother lived in the U.S. with Applicant from 1993 until 1996 and once had U.S. permanent resident alien status. Her father is a retired industrial engineer. Her parents are about 76 years old and in poor health. They each have government medical insurance and receive a pension from the PRC.

Because Applicant's father was a landowner, neither he nor any members of his family were allowed to join the Communist Party or serve in the Army. During the cultural revolution, her parents were forced to perform physical labor, insulted, and physically abused.

Applicant has two sisters. Her older sister is a citizen and resident of the PRC. She is a factory worker. Although she lives apart from their parents, she cares for them. Applicant's younger sister is a citizen and resident of Spain.

Applicant's brother was born in the PRC, became a naturalized U.S. citizen, and now resides in the PRC. He is a manager for a European furniture manufacturer doing business in the PRC. He moved to the PRC after he lost his job in the U.S., and he intends to return to the U.S. as soon as he can find employment here. His wife and two daughters are U.S. citizens.

Applicant has telephonic contact with her parents in the PRC every two or three months. Because her parents are old and in poor health, she worries about them. She visited her family in the PRC twice, once on May 18, 1996, and once on September 3, 2000. She planned another trip in June 2002, and she used her U.S. passport to obtain a PRC visa, but she cancelled the trip because of her job requirements. Applicant does not discuss her work with her parents, because they know nothing about computers and do not understand what she does.

Applicant talks to her brother and sister only about once a year. She does not call them directly, but if they are present when she calls her parents, she also talks with them.

The PRC is ruled by an authoritarian, repressive government dominated by the Communist Party. In all important government, economic, and cultural institutions in the PRC, party committees ensure party and state policy is followed and nonparty members do not create autonomous organizations that could challenge party authority. The PRC has a well-documented record of human rights abuses. ⁽¹⁾

Foreigners detained by the PRC may be held incommunicado until questioning is completed. Foreigners detained for trial often wait more than a year for the trial to begin, and are rarely granted bail. Punishments in the PRC are draconian in comparison to the U.S. ⁽²⁾

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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, 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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

A security risk may exist when an applicant's immediate family members 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. A disqualifying condition (DC 1) may arise when "[a]n immediate family member . . . is a citizen of, or resident or present in, a foreign country." Directive ¶ E2.A2.1.2.1. Applicant's mother, father, and sister are citizens of the PRC. They, along with her brother, all reside in the PRC. Based on these facts, I conclude DC 1 is established.

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country, a mitigating condition (MC 1) may apply if "the immediate family members (spouse, father, mother, sons, daughters, brothers, sisters) . . . 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." Directive ¶ E2A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1 ("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to chose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power"). Since the Government produced substantial evidence to establish DC 1, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

Even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. We know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S.

The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). Applicant's mother and father are old, retired, and in poor health. However, the fact that they are elderly and retired, standing alone, does not mitigate concerns under Guideline B. ISCR Case No. 03-05645 at 6 (App. Bd. Sep. 15, 2004). Her parents depend on the PRC government for medical care and their pensions. Her older sister's job and government benefits are vulnerable to repressive or coercive measures. Applicant's brother, although a U.S. citizen, is vulnerable to being expelled from the PRC and losing his job, as well as vulnerable to the PRC's draconian legal system. Although Applicant's family members are not agents of a foreign power, Applicant has not shown her family members are not in a position to be exploited, or that she is not vulnerable to indirect coercion through her family members. I conclude the second prong of MC 1 is not established.

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." The record reflects Applicant has very little contact with her brother and older sister. Thus, I conclude MC 3 applies to them. Applicant's contacts with her parents are not frequent, but she obviously is concerned about their health and well-being. I conclude her contacts with her parents are not casual, and MC 3 is not established with respect to Applicant's parents. After weighing the disqualifying and mitigating conditions and applying the adjudicative guidelines in the Regulation, I conclude the security concern based on foreign influence is not mitigated.

FORMAL FINDINGS

The following are my findings as to each allegation in the SOR, as amended by the withdrawal of the allegations under Guideline C:

Paragraph 2. Guideline B (Foreign Influence): AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Subparagraph 2.f.: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. See U.S. Dept. of State, *Background Note: China* 7-9 (Oct. 2004) (incorporated in the record as Appellate Exhibit I), available on the internet at www.state.gov. See also ISCR Case No. 02-26976 at 4 (App. Bd. Oct. 22, 2004); ISCR Case No. 99-0452, 2000 WL 739501 at 3 (App. Bd. Mar. 21, 2000) (authority to take official notice of official documents posted by federal departments or agencies on their web sites).
2. See U.S. Dept. Of State, *Consular Information Sheet: China* 14 (Nov. 29, 2004) (incorporated in the record as Appellate Exhibit II).