

KEYWORD: Foreign Influence

DIGEST: Applicant is unable to successfully mitigate the foreign influence security concern raised by his close and continuing family ties to China. Clearance is denied.

CASENO: 03-10149.h1

DATE: 09/24/2004

DATE: September 24, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10149

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant is unable to successfully mitigate the foreign influence security concern raised by his close and continuing family ties to China. Clearance is denied.

STATEMENT OF THE CASE

On October 6, 2003, 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.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline B for foreign influence. In particular, the SOR alleges Applicant has several family members who are citizens of and residents in the People's Republic of China (a/k/a PRC or China) and that he traveled there at least five times between 1993 and 1998. In his answer to the SOR, dated October 27, 2003, Applicant admitted, without explanation, the allegations in subparagraphs 1.a, 1.b, 1.d, 1.e, and 1.g; he denied, without explanation, the allegations in subparagraphs 1.c and 1.f; he also requested a clearance decision based on a written record in lieu of a hearing.

On January 23, 2004, Department Counsel prepared and submitted her written case. The File of Relevant Material (FORM) was mailed to Applicant on or about January 27, 2004, and it was received by Applicant on February 3, 2004. Applicant's response to the FORM was due by March 4, 2004, and, to date, no response has been received. The case was assigned to me March 29, 2004.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the record, I make the following essential findings of fact:

Applicant is a 44-year-old married man and a naturalized U.S. citizen. He was born in China in 1960, and he obtained U.S. citizenship in August 2000. He has lived continuously in the U.S. since 1987. Since February 2002, Applicant has worked as a senior software engineer for a federal contractor.

Applicant arrived in the U.S. in 1987 for a fellowship to study music at a major U.S. university. Previously, he performed as the principal flutist for a symphony orchestra. He earned a master's degree in music performance in 1989, and accepted another fellowship for advanced music study at another U.S. university. After arriving there, he decided to study computer science and earned a bachelor's degree in 1995. Since January 1995, he has been continuously employed as a software engineer.

Applicant met his wife, who is also a native-born Chinese citizen, in the U.S. The couple married in 1991, and she obtained U.S. citizenship in August 2000. Applicant and his wife have adopted a daughter, who is also a native-born Chinese citizen. The couple is in the process of obtaining U.S. citizenship for their daughter. Since the daughter is living in the U.S. and has legal status here, her birth in China is of little, if any, security significance, and I find for Applicant on subparagraph 1.c.

Both Applicant and his wife have immediate family members who are citizens of and residents in China. Applicant's mother, father, brother, and sister are citizens of and residents in China. Applicant's mother-in-law and brother-in-law are also citizen residents of China. Applicant has another brother-in-law who is a Chinese citizen residing in Hong Kong. Applicant's parents are retired medical doctors. His brother works as a teacher, and his sister works as a nurse.

Since arriving in the U.S. in 1987, Applicant has traveled to China five times. The trips took place during 1993, 1998, 1999, 2000, and 2002. He made the trips to visit family members, and he paid his own travel expenses. He experienced no problems with Chinese authorities or officials during these trips. He used his Chinese passport to travel until obtaining his U.S. passport in 2000. Thereafter, he used his U.S. passport and he no longer possesses the Chinese passport.

Applicant does not provide financial assistance or support to anyone in China. Likewise, he has no financial interests in China.

Applicant has not worked for the Chinese government. He has not served in the Chinese military. He has not been contacted by the Chinese government since living in the U.S. None of Applicant's family members have been detained or held in prison in China.

Applicant and his wife own their home in the U.S., and they plan to remain in the U.S. permanently. Applicant believes there is no reason he could be blackmailed, and he pledges he will not do anything to jeopardize holding a security clearance.

China, also known as the People's Republic of China, is hostile to the U.S., and has interests inimical to those of the U.S. China is ruled by a totalitarian government that depends on the suppression of its people. The government has a poor record of human rights that features, among other things, repression of political and religious dissenters. China is known to engage in espionage against the U.S., economic and otherwise. ⁽²⁾

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

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."⁽¹¹⁾ 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,⁽¹²⁾ 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. Contacts with citizens of other countries, or financial interests in other countries, are also relevant if they make an individual potentially vulnerable to coercion, exploitation, or pressure. In addition, 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 as a whole, the government has established its case under Guideline B. Applicant has close and continuing family ties to China. The closeness of the ties is evidenced by not merely the relationship, but also by Applicant's five trips to China for family visits. These circumstances raise a security concern under DC 1.⁽¹³⁾

I have reviewed the mitigating conditions under Guideline B and conclude none apply. The only MC deserving serious consideration is MC 1,⁽¹⁴⁾ but it too does not apply. It does appear that none of the family members are agents of the Chinese government or any other foreign power.⁽¹⁵⁾ But that does not end the analysis, as Applicant must show his family members are not in position to be exploited by the Chinese government.

In foreign influence cases, it is proper to consider the how foreign country at issue is governed. The focus is not the country or its people, but its rulers and the nature of the government they impose. This approach recognizes it is nonsensical to treat North Korea as if it were Norway. Here, we know that China is hostile to the U.S. and is ruled by a totalitarian government with a poor record of human rights. We have limited information about Applicant's family members in China. Given these circumstances, Applicant has not established that his family members are not in a

position to be exploited by the Chinese government in a way that would force him to choose between loyalty to his family and the interests of the U.S. Accordingly, Guideline B is decided against Applicant.

To conclude, this decision should not be construed as an indictment of Applicant's loyalty and patriotism to the U.S., as those matters are not at issue. Nor is this decision based on Applicant's race or national origin. Instead, the clearly-consistent standard requires I resolve any doubt in favor of protecting national security, and the record evidence of Applicant's close and continuing family ties to a foreign country ruled by a totalitarian government creates doubt. In reaching my decision, I have considered the evidence as a whole, the whole-person concept, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline B: Against the Applicant

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: Against the Applicant

Subparagraph 1.g: Against the 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 or continue a security clearance for Applicant. Clearance is denied.

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. Although I was not asked to take administrative notice, these are facts known to this agency through its cumulative expertise in deciding security clearance cases involving foreign influence or preference. *See* ISCR Case No. 99-0452 (March 21, 2000) at p. 4.
 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. Directive, Enclosure 2, Attachment 2, at pp. 21-22.
13. 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.
14. E2.A2.1.3.1. A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) 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.
15. *See* 50 U.S.C. § 1801(b).