

DATE: October 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10955

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

James B. Norman, Esq., Department Counsel

FOR APPLICANT

Philip Cave, Esq.

SYNOPSIS

Applicant, who is 43 years old, was born in the People's Republic of China, as was her daughter. She and her daughter are naturalized citizens and residents of the United States. Her mother, stepfather, father and sister are citizens of and reside in the People's Republic of China. She has mitigated the government's foreign influence concerns. Clearance is granted.

STATEMENT OF THE CASE

On October 28, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR details 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. Specifically, the SOR set forth security concerns arising under Guideline B, Foreign Influence, of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On December 16, 2004, Applicant submitted a notarized response to the allegations. She requested a hearing. This matter was assigned to me on July 28, 2005. A first notice of hearing was issued on August 8, 2005, scheduling the hearing for August 24, 2005. Applicant's counsel timely filed a Motion for Continuance, which was granted by Order dated August 18, 2005. A second notice of hearing was issued on September 2, 2005, and a hearing was held on September 20, 2005. Government Exhibit 1 was admitted into evidence. Applicant's Exhibits A through E were admitted into evidence. Government Exhibits I through VIII were admitted for administrative notice, as was Applicant's Exhibit F. Two witnesses testified for Applicant, who also testified on her own behalf. The hearing transcript (Tr.) was received on October 5, 2005.

FINDINGS OF FACT

Applicant admitted, with explanation, the allegations in subparagraphs 1.b and 1.c of the SOR.⁽¹⁾ Those admissions are incorporated here as findings of fact. She denied the allegation in subparagraph 1.a.⁽²⁾ After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 43-year-old database administrator/developer for a defense contractor.⁽³⁾ She has worked for this contractor for almost three years.⁽⁴⁾ Applicant completed a security clearance application (SF 86) in January 2003.⁽⁵⁾

Applicant was born in the Peoples Republic of China (PRC) in 1962. Her daughter was born in the PRC in 1988.⁽⁶⁾ She and her daughter immigrated to the United States (U.S.) in 1990.⁽⁷⁾ She joined her then husband, who had previously immigrated to the U.S.⁽⁸⁾ From 1992 until 1995, her daughter lived in the PRC with her in-laws, while she and her then husband attended school in the U.S.⁽⁹⁾ Her daughter returned to the U.S. in 1995, and continues to live here.⁽¹⁰⁾ Her daughter is a 17-year-old U.S. citizen and holds a U.S. passport.⁽¹¹⁾ She and her husband divorced in 1996.⁽¹²⁾ He died in May 2005.⁽¹³⁾

In 1997, Applicant and her daughter returned to the PRC for three months to visit with her family.⁽¹⁴⁾ During this time, she had no contacts with anyone who worked for the government or the military.⁽¹⁵⁾ She also did not meet with, talk to, or discuss business with anyone.⁽¹⁶⁾ She has not returned to the PRC.⁽¹⁷⁾ Her daughter traveled to the PRC in 1998, where she spent a month studying Chinese.⁽¹⁸⁾

Applicant's mother, stepfather, father, and sister are citizens of the PRC and reside there.⁽¹⁹⁾ She has almost no contact with her birth father, who is a retired professor of civil engineering and architecture.⁽²⁰⁾ Her sister lives in the PRC. She is an assistant professor at a private college.⁽²¹⁾ She and her sister speak by telephone every couple of months.⁽²²⁾ They do not communicate by e-mail as her sister has not had e-mail access for a year.⁽²³⁾ Applicant's mother is a retired medical doctor, currently living in the PRC.⁽²⁴⁾ Her stepfather, whom her mother married when Applicant was an adult, is a retired musician, currently living with her mother in the PRC.⁽²⁵⁾ Her mother and stepfather recently returned to the PRC after a six-month visit with her.⁽²⁶⁾ They have decided to move to the U.S. and have started the process to immigrate here.⁽²⁷⁾

Applicant has no financial or business interests in the PRC.⁽²⁸⁾ She does not own property there.⁽²⁹⁾ She has a good financial record, has not been arrested for or charged with any criminal offenses, and has not had any alcohol or drug-related problems.⁽³⁰⁾

Two friends testified on behalf of Applicant. They described her as an honest and reliable person.⁽³³⁾ They testified without qualification that she would safeguard the security of the United States.⁽³⁴⁾ One also advised that she had very strong dislike for the PRC's government and military and very strong positive feelings for the U.S.⁽³⁵⁾ In addition, nine individuals provided written statements opining that she is honest and can be trusted with national secrets.⁽³⁶⁾

The PRC is an authoritarian, communist party-led state.⁽³⁷⁾ Human rights violations continue to be problematic.⁽³⁸⁾ Concerns regarding the PRC's weapons development, theft of classified technology information between 1979 and 1999, and industrial espionage activities remain.⁽³⁹⁾ On the other hand, the PRC supports the U.S.'s anti-terrorism position and activities.⁽⁴⁰⁾ The U.S. and the PRC have developed joint trade agreements, resulting in the sale of goods to each other, and work together on environmental issues.⁽⁴¹⁾ The PCR enjoys a most favored nation status in trading with the U.S. The PRC has opened its doors to outside investment.⁽⁴²⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative

process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁴³⁾ The government has the burden of proving controverted facts.⁽⁴⁴⁾ The burden of proof is something less than a preponderance of the evidence.⁽⁴⁵⁾ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against her.⁽⁴⁶⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁴⁷⁾

No one has a right to a security clearance⁽⁴⁸⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁴⁹⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽⁵⁰⁾ Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.⁽⁵¹⁾ 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Foreign Influence - Guideline B: A security risk 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 United States 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 to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Guideline B concerns countries hostile to the U.S., although these concerns are not limited to hostile countries. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person organization, or country has interests inimical to those of the

United States."⁽⁵²⁾ Relations between nations can shift, sometimes dramatically and unexpectedly. 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.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline B. Foreign Influence Disqualifying Condition (FI DC) E2.A3.1.2.1. (*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*) applies in this case. Paragraph E2.A2.1.3.1. defines "immediate family members" to include a spouse, father, mother, sons, daughters, brothers, and sisters. Applicant's mother, stepfather, father and sister are citizens and residents of the PRC. Based on the statements in her security clearance application, Applicant's daughter was a citizen of the PRC at the time the SOR was issued. The mere possession of family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. (53) However, the possession of such ties may pose a security risk and raises a *prima facie* security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for her. (54)

The government has not established its case under FI DC 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*). While Applicant's daughter may have been a citizen of the PRC at the time the SOR was issued, her daughter has become a naturalized citizen and resides with Applicant in the U.S. Although her daughter was born in the PRC, she came to the U.S. as a very young child. The daughter returned to the PCR in 1992. She came back to the U.S. to live in 1995. Since then, the daughter has visited the PRC twice, in 1997 and 1998. She has not been to the PRC for more than seven years. The bulk of her daughter's time in the last ten years has been in the U.S. The potential for adverse foreign influence or duress is minimal.

I considered the Foreign Influence Mitigating Conditions (FI MC) and concluded that FI MC 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*) applies. Notwithstanding the facially disjunctive language of FI MC 1, Applicant must establish through evidence that her family members, cohabitants or associates are not agents of a foreign power, and are not in a position to be exploited by a foreign power in a way that could force Applicant to chose between the person(s) involved and the U.S. (55)

The government produced substantial evidence to establish the potentially disqualifying conditions. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. (56) Her mother, who is a citizen of the PRC and a retired medical doctor, and her stepfather, also a citizen of the PRC and a retired musician, do not work for the government or the military. Her father lives in the PRC and is a retired professor, who has no connection with the government or the military. Her one sister lives in the PRC and works at a private college, also with no connection to the government or military. Her family in the PRC are not agents of a foreign power.

Applicant's closest family member is her teenage daughter, who is a U.S. citizen and lives with her. She has no governmental connections and is not an agent of a foreign power. Because this family member is in the U.S., she is not vulnerable to coercion or exploitation by a foreign power.

Applicant's remaining family members live in the PRC. Her parents and stepfather are retired and in no way connected with the government or military. She has little contact with her birth father, thus, neither would be vulnerable to coercion or exploitation. While not conclusive as to their vulnerability, her mother and stepfather recently visited the U.S. for six months with the approval of the PRC and have decided to immigrate to the U.S. They returned to the PRC and began the process for obtaining legal permission to leave the PRC. They do not anticipate problems, only that the process will take six months. Given their previous lengthy visit to the U.S. and their lack of fear to ask for permission to

emigrate from the PRC, her mother and stepfather are not likely to be subject to or vulnerable to coercion or exploitation by a foreign power. Her sister works in a private college. Her chosen career and her non-government work make her an unlikely target for coercion or exploitation by a foreign power.

Finally, none of the individual family circumstances discussed above are determinative. Rather, these circumstances must be considered together under the "whole person concept", which includes consideration of Applicant's evidence of her family's absence of governmental connections; financial dependence, or lack thereof, on the government; or business connections susceptible to industrial espionage. To ignore such evidence would establish a virtual per se rule against clearing applicants with foreign family ties. Likewise, while the nature of the PRC's government, its human rights record, and its relationship with the U.S. are clearly not determinative, they are relevant factors to be considered.

I am persuaded by the totality of the evidence in this case that Applicant would not be vulnerable to pressure or duress from a foreign power or the government of the PRC. It is clear that she is cognizant of her duties in protecting national security. Her daughter is a U.S. citizen and resides with her in the U.S. Her mother and stepfather traveled to the U.S. with the permission of the government of the PRC. Her contacts with her father are almost nonexistent. She and her sister speak every few months. The possibility of pressure being exerted upon her daughter by a foreign power or entity is minimal. The likelihood of pressure being placed on her remaining family in the PRC is de minimus. Applicant has mitigated the government's case under Guideline B. Accordingly, for the reasons stated, I find that it is clearly consistent with the national interest to grant a security clearance to Applicant.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B (Foreign Influence): FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is granted.

Mary E. Henry

Administrative Judge

1. Applicant's Answer to SOR, dated December 16, 2004 at 1-2.
2. *Id.* at 1.
3. Government Exhibit 1 (Security Clearance Application, dated January 2, 2003) at 3.
4. *Id.*; Tr. at 43.
5. Government Exhibit 1, *supra* note 3, at 1.
6. *Id.* at 6.
7. Tr. at 35-36, 45; Applicant's Exhibit A (Applicant's U.S. passport, answers to interrogatories and documents renouncing her Chinese citizenship) at 8.

8. *Id.* at 35.

9. *Id.* at 45-46.

10. *Id.* at 46.

11. *Id.*; Applicant's Exhibits B (daughter's U.S. passport) and F (pamphlet of United States Citizenship and Immigration Services, formerly known as the United States Immigration and Naturalization Services or INS).

12. *Id.* at 36; Government Exhibit 1, *supra* note 3, at 5.

13. Tr. at 54.

14. Government Exhibit 1, *supra* note 3, at 7; Tr. at 37-38.

15. Tr. at 38.

16. *Id.*

17. Government Exhibit 1, *supra* note 3, at 7.

18. Tr. at 47.

19. Government Exhibit 1, *supra* note 3, at 5-6.

20. Tr. at 29, 41, 51-52.

21. *Id.* at 42, 52-53.

22. *Id.*

23. *Id.* at 53.

24. *Id.* at 39, 48.

25. *Id.* at 39, 50, 51.

26. *Id.* at 39-40.

27. Applicant's Exhibit D (letter from Applicant's mother, dated September 7, 2005); Tr. at 40-41, 53-54.

28. Tr. at 47.

29. Government Exhibit 1, *supra* note 3, at 6; Tr. at 48.

30. [\(31\)](#)

31. Government Exhibit 1, *supra* note 2, at 11-13. [\(32\)](#)

32. Government Exhibit 1, *supra* note 2, at 11-13. -

33. Tr. at 27, 32.

34. Tr. at 28, 32-33.

35. Tr. at 32.

36. Applicant's Exhibit E (Eleven signed statements from friends and co-workers including statements from her two hearing witnesses).
37. Government Exhibit VII (U.S. Department of State, China: Country Reports on Human Rights Practices 2004) at 1, and Government Exhibit V (U.S. Department of State Background Note: China) at 1, 9.
38. *Id.*
39. Government Exhibit II (Prepared Statement, Director of the Central Intelligence Agency, March 17, 2005) at 6-7; Government Exhibit III (Current and Projected National Security Threats to the United States, Statement for the Record by the Director, Defense Intelligence Agency, February 16, 2005) at 9, 11-13, 15-17.
40. Government Exhibit V, *supra* note 34, at 19.
41. *Id.* at 11-12, 13-14.
42. *Id.* at 13-14.
43. ISCR Case No. 96-0277 (July 11, 1997) at 2.
44. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
45. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
46. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
47. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
48. *Egan*, 484 U.S. at 531.
49. *Id.*
50. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
51. Executive Order No. 10865 § 7.
52. ISCR Case No. 02-1157(App. Bd. May 19, 2004) at 5.
53. ISCR Case No. 99-0424, 2001 DOHA LEXIS 59, at 33-34 (App. Bd. Feb. 8, 2001).
54. *Id.*; ISCR Case No. 98-0507 (App. Bd. Decision and Reversal Order, May 17, 1999) at 8.
55. ISCR Case No. 02-31154 (App. Bd. Sept. 22, 2005) at 5-6; *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power").
56. *Supra* note 43.