

KEYWORD: Foreign Influence

DIGEST: Applicant is unable to successfully mitigate the foreign influence security concern due to his close family ties to the People's Republic of China, a country that is ruled by an authoritarian government controlled by the Chinese Communist Party. Clearance is denied.

CASENO: 03-12050.h1

DATE: 11/03/2005

DATE: November 3, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-12050

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

**APPEARANCES**

**FOR GOVERNMENT**

Stephanie C. Hess, Esq., Department Counsel

**FOR APPLICANT**

## **SYNOPSIS**

Applicant is unable to successfully mitigate the foreign influence security concern due to his close family ties to the People's Republic of China (PRC or China), a country that is ruled by an authoritarian government controlled by the Chinese Communist Party. Clearance is denied.

## **STATEMENT OF THE CASE**

On August 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. In his Answer, dated September 16, 2004, Applicant admitted the factual allegations and requested a hearing. Department Counsel indicated she was ready to proceed on June 6, 2005, and the case was assigned to me June 13, 2005. A notice of hearing was issued on July 13, 2005, scheduling the hearing for August 3, 2005. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript August 17, 2005. Issuing a decision was delayed due to a heavy caseload.

## **FINDINGS OF FACT**

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

Applicant is a 46-year-old married man seeking a security clearance for his employment as an architect systems engineer for a large company engaged in defense contracting. He submitted his security-clearance application (Exhibit 1) in July 2001. In completing his application, Applicant disclosed he was born in China, became a naturalized U.S.

citizen, and has family members who are citizens of and residents in China.

Applicant was born in China in 1959. He attended college at a Chinese university where he studied physics and engineering. Seeking to further his education, Applicant eventually obtained permission from Chinese authorities to come to the U.S. for graduate school. When he left China, Applicant's intent was to remain in the U.S. He arrived in the U.S. via a student visa and he enrolled in a graduate program in February 1989. He was awarded a master of science degree in December 1991, and then enrolled in a Ph.D. program in physics at the same university. In August 1996, he was awarded a Ph.D. in physics. It took him several years to earn his Ph.D. because he was working on a research project with NASA. Applicant was allowed to change his immigration status from student to resident status, and he became a U.S. citizen through the naturalization process. He took the oath of U.S. citizenship in November 1999, and he obtained a U.S. passport in June 2000.

Applicant married his first wife, a native of China, in 1989. The marriage took place in China. She came to the U.S. several months after Applicant's arrival, but they separated sometime thereafter. The marriage ended in divorce in 1992. Applicant married his second and current wife, a native of China, in 1993, and their marriage took place in China. She was allowed to immigrate to the U.S. some months after the marriage. Since her arrival in the U.S., she has earned a master's degree in computer science. She became a U.S. citizen in March 2003 (Exhibit 2). Applicant and his wife own their own home (with a mortgage) and have investments in the U.S. Neither Applicant nor his wife has any financial or business interests in China.

Applicant's parents are citizens of and residents in China. His father is 78 and his mother is 75. Both are retired and have health problems. Applicant's mother has not worked outside the home for more than 30 years. When she did, she worked for a small firm. Applicant's father is retired from his employment with a small food processing company. Applicant has regular contact with his parents by telephone. Their conversations typically involve Applicant inquiring about his parent's health and other normal family matters. He is careful not to discuss the nature or details of his employment. He provides financial assistance to his parents at the rate of about \$1,500 to \$2,000 annually. Since coming to the U.S. in 1989, Applicant has traveled to China twice in 1993 and 2000. The purpose of both trips was to visit his parents. He intends to travel to China in the future for the same purpose.

Applicant has two brothers. His elder brother and family live in Australia and have become citizens of that country. His younger brother is a citizen of and resident in China, and Applicant's parents reside with the younger brother. The younger brother is self-employed in the design business and has a few employees working for him.

By his marriage, Applicant has family members who are citizens of and residents in China. His mother-in-law is about 75 years old and is retired from her employment with a university. His brother-in-law is employed by an international firm doing business in China. His sister-in-law is a librarian at a university. Applicant describes his wife's relationship with his mother as a caring and dutiful daughter who is concerned about her mother's health and life. Likewise, she is close to her sister and brother, but that closeness has lessened somewhat due to geographical separation.

Applicant's character witnesses, in person or in writing, describe Applicant in very favorable terms. A company vice president describes Applicant as "a master in engineering, an able employee, a hard worker, and a talented researcher" (Exhibit B). The vice president, a retired Marine Corps officer, views Applicant as completely trustworthy and suitable for access to classified information. Applicant's current manager, a retired Navy officer, fully supports Applicant's application for a security clearance and has seen nothing in her working relationship with Applicant to question his fitness for a security clearance. Indeed, Applicant has earned her full trust and confidence in his ability to support the company's Defense Department customers in a classified environment.

Applicant describes himself as fully committed to the U.S., its Constitution, and its government. Since immigrating to the U.S., Applicant points out he has become a Christian. Also, he points out he is very much opposed to communism, and as a graduate student he led various demonstrations against the Chinese government in the wake of the Chinese authorities' brutal suppression of demonstrators at Tiananmen in June 1989.

As requested by Department Counsel, I took administrative or official notice of certain matters about China and the nature of its government as set forth in Exhibits 3, 4, 5, 6, 7, 8, and 9.

## **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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty. <sup>(2)</sup> Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

## **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 the 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, 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. 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, the government established its case under Guideline B, because Applicant has close and ongoing family ties to China. He has immediate family members who are citizens of and residents of China, as does his spouse. The strength of the family ties is also demonstrated by Applicant's travel to China to visit his family members as well as the financial support he provides his parents. Although these circumstances are completely legal and honorable, these circumstances raise a security concern under DC 1.<sup>(12)</sup> The remaining DC do not apply based on the facts and circumstances here.

I reviewed the mitigating conditions under Guideline B and conclude that only MC 5<sup>(13)</sup> applies. Applicant receives some credit under MC 5 because neither he nor his wife has business or financial interests in China. The remaining MC do not apply based on the facts and circumstances here. In particular, I gave consideration to MC 1,<sup>(14)</sup> but it does not apply. It appears none of the family members are agents of the Chinese government or any other foreign power.<sup>(15)</sup> But that does not end the analysis, as Applicant must show his family members (including his in-laws) in China are not in

position to be exploited.

In deciding if an applicant has met the second prong of MC 1, it is proper to consider how the 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 China is an authoritarian state in which the Chinese Communist Party is the paramount source of power (Exhibit 8 at p. 1), although that power is diluted somewhat by China's huge population, geographic vastness, and social diversity (Exhibit 7 at p. 6). We know that current China-U.S. relations are complex and at times difficult (for example, when a Chinese fighter collided with a U.S. reconnaissance aircraft in 2001), but cooperation does occur on some issues (Exhibit 3). We also know China has made efforts to acquire U.S. technology for military purposes (Exhibit 6). And we know that the PRC's record of human rights, according to a 2004 report from the U.S. State Department, remains poor and the government continues to commit numerous and serious abuses (Exhibit 8 at p. 1).

Given these facts and circumstances, which are beyond his control, Applicant's immediate family members and in-laws who remain in China are in a position where there is a potential for them to be exploited in a way that could force Applicant to choose between loyalty to the family members and the interests of the U.S. In other words, this is not a case where Applicant's connections or ties to China are minimal, *pro forma*, or insignificant, because the record evidence demonstrates he has close and ongoing family ties to China. Therefore, I conclude Applicant is unable to successfully mitigate the foreign influence security concern. Accordingly, Guideline B is decided against Applicant.

Although I decided this case against Applicant, this decision should not be construed as an indictment of his loyalty and patriotism to the U.S., as those matters are not at issue. Instead, the clearly-consistent standard--which is a demanding standard-- requires I resolve any doubt against Applicant, and his close family ties to China, an authoritarian state controlled by the Chinese Communist Party, creates such doubt. To conclude, Applicant has failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I considered the record evidence as a whole, 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: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Subparagraph e: 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 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. Executive Order 10865, § 7.
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.A2.1.3.5. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.
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), which defines the term "agent of a foreign power."