

KEYWORD: Foreign Influence

DIGEST: Applicant is a 40-year-old engineer immigrant from the Peoples Republic of China (PRC). She married and obtained U.S. citizenship after she immigrated. She works for a defense contractor in the information technology field. Applicant's family members are citizens of the PRC and live there, except for her father who is a permanent U.S. resident living with Applicant. Applicant and her husband own a \$200,000 apartment in the PRC used by her mother and her brother with his family. Applicant has not mitigated the foreign influence security concern. Clearance is denied.

CASENO: 03-12303.h1

DATE: 01/06/2005

DATE: January 6, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12303

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Linda S. Stukey, Esq.

SYNOPSIS

Applicant is a 40-year-old engineer immigrant from the Peoples Republic of China (PRC). She married and obtained U.S. citizenship after she immigrated. She works for a defense contractor in the information technology field. Applicant's family members are citizens of the PRC and live there, except for her father who is a permanent U.S. resident living with Applicant. Applicant and her husband own a \$200,000 apartment in the PRC used by her mother and her brother with his family. Applicant has not mitigated the foreign influence security concern. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On April 5, 2004, DOHA issued a Statement of Reasons ⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing on April 19, 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on May 12, 2004. On September 1, 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on September 10, 2004.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 40 years old, married with three children, and has a master's degree in chemical engineering from a university in the Peoples Republic of China (PRC). While in the U.S., she obtained a manufacturing engineering degree. Applicant was born and raised in the PRC, and came to the U.S. for additional education. She has lived in the U.S. for 10.5 years. She became a naturalized U.S. citizen on April 4, 2001. Applicant had her PRC passport cancelled by the PRC government at her request on December 14, 2003. Applicant works as a computer systems administrator for a defense contractor. She is considered an excellent employee by her direct supervisor. (Tr. 36, 39 to 114; Exhibits 1, 3, 4, and H)

Applicant's parents and two brothers are citizens of the PRC and live in the PRC. Applicant purchased an apartment in the PRC for her mother in November 2002, and held title to it until the month prior to this hearing. She transferred title because of the security clearance issue that is now the subject of this hearing. At that time Applicant traveled to the PRC and while there she transferred the title of the apartment to her husband effective June 16, 2004. The apartment is currently valued at about \$200,000 in U.S. dollars. Applicant paid \$90,000 for it. The down payment came from the \$20,000 her mother earned in the U.S. from 1997-2001 and took back to China with her in April 2001, and another \$15,000 Applicant gave to her mother. Applicant's mother and brother with his family live there while Applicant's father has permanent residency status in the U.S. In 1997 Applicant's parents came to the U.S. to help her take care of her first-born child, a son. Applicant's father returned to the PRC in December 2001 to visit his wife after he obtained his permanent residency in the U.S. He returned in November 2002, within the year limit for foreign travel so he could maintain his permanent residency status. He later went to the PRC in July 2003 until July 2004. He lives now with Applicant and her family. He intends to apply for U.S. citizenship in 2006. He is 78 years old. Applicant's mother, who is 72 years old, is in poor health and continues to live in the PRC, having returned there in April 2001. She returned to the PRC to obtain medical treatments she could not obtain in the U.S. In the PRC she receives free medical treatment. Applicant's parents are retired and receive a retirement income of about \$100 monthly. Applicant's mother worked in the watch factory where Applicant's brother now works, and Applicant's father was a carpenter. (Tr. 17, 41 to 91, 100, 101, 129; Exhibits 2, B, C)

Until April 30, 2004, Applicant had a bank account in the PRC. She opened that account on November 24, 2002. On December 20, 2002, Applicant had a balance of \$23,910 in that account. After the SOR issued on April 5, 2004, Applicant closed the account by withdrawing the balance of \$3,877.26. The account was used to pay the mortgage on the apartment in the PRC. The apartment was paid in full and the account closed in the early part of 2004. Applicant sends money to her family members in the PRC on occasion. (Tr. 27, 48 to 60, 82, 98 to 100, 129; Exhibit A)

Applicant's brothers live and work in the PRC. One brother is a factory worker in a watch factory since 1974. The other brother works for an insurance company as a salesman and has done so since 1996. They want to immigrate to the U.S. after Applicant's father obtains U.S. citizenship and can sponsor them. (Tr. 55 to 59, 91 to 97; Exhibits D and E)

Applicant returned to the PRC on two occasions during the past decade, in November 2002 and June 2004. The most recent trip was to close the bank account and transfer title to the apartment to her husband. Applicant lived in the apartment during the most recent trip. If Applicant's mother continues to live in the PRC and in the apartment, then Applicant will visit her often. (Tr. 56 to 61, 67 to 74; Exhibit 1)

The PRC is an active collector of proprietary technology and economic information in the U.S. by engaging in industrial espionage. The PRC is a one political party authoritarian state with the Communist Party as the only party. The PRC has a poor human rights record. (Tr. 62 to 64; Exhibits 5, 6, and 7)

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 restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

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. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (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). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

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

GUIDELINE B: Foreign Influence

The Concern: 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. Directive, ¶ E2.A2.1.1.

Conditions that could raise a security concern and may be disqualifying include:

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. Directive, ¶ E2.A2.1.2.1.

Sharing living quarters with a person if the potential for adverse foreign influence or duress exists. Directive, ¶ E2.A2.1.2.2.

A substantial financial interest in a country that could make the individual vulnerable to foreign influence. Directive, ¶ E2.A2.1.2.8.

Conditions that could mitigate security concerns include:

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. Directive, ¶ E2.A2.1.3.1.

CONCLUSIONS

In the SOR, the Government alleged Applicant had family members in the PRC and she has close ties of affection and obligation to them, and those allegations are supported by the evidence. The allegations about substantial financial interests in the PRC also were supported by the evidence, because of the \$200,000 apartment owned first by Applicant and now by her husband as a result of a paper transfer. That title transfer was not an arms-length market transaction, so Applicant effectually and legally continues to have an equitable interest at least in the apartment. Applicant had a bank account in the PRC, though it is now closed because she paid off the loan on the apartment. Also, Applicant's father, who is a citizen of the PRC, but has permanent residency in the U.S., lives with Applicant in the U.S. Her father has spent almost two years out of the past three years in the PRC visiting his wife. Disqualifying Conditions (DC) 1, DC 2, and DC 8 apply on these facts.

While Applicant established her family members are not agents of the PRC government, they are in a position to be exploited by that Government and Applicant has not met her burden of proof to show Mitigating Condition (MC) 1 applies. They receive a pension from the PRC through some mechanism. Applicant's mother receives free medical treatments in the PRC for her health problems that she could not obtain in the U.S. Applicant's family's substantial property interest in the PRC apartment is a security concern. Applicant's brothers want to immigrate to the U.S. in the next few years. All these facts make Applicant's family vulnerable to exploitation that could force Applicant to choose between loyalty to her family and loyalty to the U.S. There are no other MC that apply to this case. Therefore, I conclude this guideline against Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

DECISION

In light of all of 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.

Philip S. Howe

Administrative Judge

1. Pursuant to Exec. Or. 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).

