

DATE: December 13, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-14036

ECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Lynette Andresen, Esq. and Pamela C. Benson, Esq., Department Counsel

FOR APPLICANT

Russell J. Gaspar, Esq.

Robert Schwalls, Personal Representative

SYNOPSIS

Applicant is 45 years old, married with a son born in the U.S. His wife applied for U.S. citizenship, but has not yet received it. His and her parents are citizens of and reside in the Peoples Republic of China. Applicant's brother is a citizen and resident of Canada. Applicant provided small sums of money to his parents and calls them periodically. Applicant has not mitigated the foreign influence security concern because of the potential for exploitation. 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 March 29, 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 24, 2004. On June 23, 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 June 30, 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 45 years old, married with one child who was born in the U.S. in 1997, and employed with a computer

information company. His wife is a resident alien in the U.S. having immigrated from the Peoples Republic of China (PRC) in 1991. She applied for her U.S. citizenship in March 2002. The processing time for her application has been since then, and she recently resubmitted her fingerprint sheet at the government's request. She expects to be granted U.S. citizenship in 2004. Applicant obtained U.S. citizenship in 2000. Applicant and his wife own their own home, two cars, and have retirement investment accounts and their son's education fund in the U.S. They have no assets or property in the PRC. Since 1991 they have returned to the PRC only once in 2000 to visit their families. (Tr.16, 17, 22, 26 to 31, 66, 67, 83; Exhibit C; Answer)

Applicant graduated with a bachelor's degree in engineering mechanics in 1982 from a PRC university in Beijing, China. During his time in college he visited his family only once a year because Beijing is over 1,000 miles from his home in Shanghai. After graduation he taught at a Chinese university in Shanghai where he met his future wife. In 1988 Applicant came to the United States to study at an American university. In 1991 he graduated with a master's degree in aeronautical engineering and enrolled in a Ph.D. program in aeronautical engineering. He got his green card and permanent residency at that time. Applicant realized employment might be scarce in the aeronautical field, so he looked for job in computer science or computer engineering in 1995 and 1996. Since 1996 he has worked for a defense contractor, and worked on several DoD computer systems, including a recruiting information tracking system and the Joint Personnel Adjudication System (JPAS). He is ranked in the top 10% of his company based on his annual evaluations. (Tr. 19 to 24, 82, 83, 87; Answer)

Applicant had a PRC passport until he became a U.S. citizen. He returned the expired PRC passport (December 28, 2003) to the PRC Embassy in Washington, D.C., on June 14, 2004. Applicant had not signed the passport originally, never used it, let it expire and put it in his safety deposit box. He understood when he took the citizenship oath he was renouncing his PRC citizenship. When Applicant and his wife traveled to the PRC in 2000 he used his U.S. passport exclusively. Chinese citizenship is lost when a Chinese citizen becomes a naturalized citizen of another country, according to the information Applicant submitted in response to Government interrogatories. Applicant would report any contacts from any foreign agents or governments immediately, and has taken his employers security training courses so he knows how important security is. (Tr. 25, 47 to 51, 54, 55, 79; Exhibits 2 and E)

Applicant's brother immigrated to Canada in 1999 or 2000. He obtained Canadian citizenship on April 22, 2004. He is an electrical engineer working for a multinational corporation. His brother is 42 years old and unmarried. (Tr. 43 to 46, 96; Exhibits 2 and D)

On Applicant's only trip to the PRC since 1988 was in 2000. He had dinner with former teaching colleagues at the university one night during his visit. He has not had any other contact with them since his return four years ago. (Tr. 52, 53)

Applicant's father is a retired electrical engineer who worked for private company at the time of his retirement. His mother is a retired teacher. His father is 76 and his mother is 69. During the Chinese Cultural Revolution in the 1960s his parents were sent into the countryside with millions of other educated Chinese people. Applicant and his brother lived with friends and neighbors for that year. Applicant's parents lead a low-key retired life in Shanghai, living off their two pensions and their savings. The savings come from a not-for-profit company that invests and manages those companies. Applicant calls his parents periodically, not on any regular schedule. Applicant sent his parents small amounts of money at Christmas or other times during the years since 1991, but usually only about \$100. There is no regular gift he makes to them because they have their own income and savings. Neither parent ever worked for the PRC government. (Tr. 32 to 42; 73 to 75, 89)

Applicant's spouse's parents are also retired in the PRC, and have their pensions. Her father was a clerk in a private company, and her mother was a teacher. She calls them irregularly during the year. They visited Applicant once since Applicant came to the U.S., as did his parents. Applicant's brother-in-law lives in Shanghai, but he has no contact with him and his wife speaks infrequently with her brother in the PRC. (Tr. 41, 71, 72)

The PRC is an active collector of foreign economic information and technology. The PRC also has a history of human rights violations involving its own citizens. Applicant was able to obtain a permanent residency in the U.S. in 1991 as a result of a federal law enacted to provide assistance to PRC nationals who came to the U.S. before the Tiananmen

Square public protest in 1989 in the PRC. Applicant's parents were caught in the Cultural Revolution reeducation program because they were intellectuals. (Tr. 22, 34 to 36; Exhibits 4 to 6)

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.

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

The Government established by substantial evidence that Applicant has his parents and his wife's parents in the PRC. His wife has a brother in the PRC also. Applicant's brother is a citizen of Canada. Disqualifying Condition (DC) 1 applies because these people are his immediate family members and they are in a foreign country.

Applicant's parents and his wife's family are not agents of the PRC. However, they are in a position to be exploited, even though they live a quiet life. The advanced age of Applicant's parents and his parents-in-law is not a reason to think they could not be exploited by the PRC. Applicant's parents have already been victims of PRC policies in the Cultural Revolution. Mitigating Condition (MC) 1 is not applicable here because of the exploitation potential. Because they are immediate family members, contact with them is not casual though in this case it is relatively infrequent, but the monthly contact is frequent enough so that MC 3 is not applicable here. Applicant's brother lives in Canada and is a Canadian citizen, and is not an agent of the Canadian government nor in a position to be exploited by that government that has had friendly relations with the United States since 1814. Weighing all the evidence, 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: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: For 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).