

DATE: November 4, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-16083

## **ECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Francisco J. Mendez Jr., Esq., Department Counsel

#### **FOR APPLICANT**

Philip D. Cave, Esq.

### **SYNOPSIS**

Applicant is a naturalized U.S. citizen who emigrated from the People's Republic of China (PRC). Applicant failed to mitigate foreign influence security concerns raised by the presence in the PRC of his mother, sister, mother-in-law, and brothers-in-law. 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 7 May 2004, DOHA issued a Statement of Reasons [\(S\)](#) (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 4 June 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 29 July 2004. On 21 September 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. DOHA received the hearing transcript (Tr.) on 30 September 2004.

### **FINDINGS OF FACT**

Applicant is a 41-year-old senior software engineer for a defense contractor. He has the full backing of his employer and supervisors who find him to be a reliable, trustworthy, and honest employee.

Applicant was born and raised in the People's Republic of China (PRC). After graduation from college, he was denied entry into a graduate program because he refused to promise that he would not leave the PRC and go to the U.S. He came to the U.S. on a student visa in 1988. After completing his graduate education, Applicant was hired by an American company and eventually granted U.S. permanent residency in 1993. That same year, Applicant returned to the PRC to marry. His wife was born and raised in the PRC. She is also a software engineer. Applicant and his wife became naturalized U.S. citizens in 2000.

Applicant and his wife have two children, both born in the U.S. Applicant and his wife own their own home outright. They have an excellent credit rating. Applicant does not have any assets in foreign countries. Applicant and his wife send \$2,000 a year to each of their mothers. Applicant participates in the U.S. election process and was called to serve jury duty. Applicant is willing to bear arms for the U.S., even against the PRC.

Applicant's mother and two sisters are citizen residents of the PRC. His mother is 71 years old, a retired shopkeeper, and has visited the U.S. on two occasions--once in 1997 and again in 2000. Both of these visits were on six month visas that were extended for an additional six months. Applicant has been trying to bring his mother to the U.S. She was accepted for immigration on 30 January 2004 and her case is being processed. She will live with Applicant when she arrives.

Applicant's wife's mother and two siblings are citizen residents of the PRC. Applicant's mother-in-law is a retired high school teacher. Applicant's father-in-law died in early 2004.

Applicant and his wife traveled to the PRC in 1995 to visit his father who was fatally ill with lung cancer and died that same year. Applicant and his wife traveled to the PRC in 2002 and again in 2003 to visit Applicant's father-in-law who was struggling with lung cancer. In early 2004, they returned to the PRC for his funeral.

## 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.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. 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. 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).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

## CONCLUSIONS

In the SOR, DOHA alleged Applicant's mother and two siblings are citizen residents of the PRC (¶ 1.a), his wife's parents and two siblings are citizen residents of the PRC (¶ 1.b), he traveled to the PRC on three occasions (¶ 1.c), and he and his wife provide \$2,000 a year to each of their families in the PRC (¶ 1.d). A security risk may exist when an applicant's immediate family, or other persons to whom he 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. Directive ¶ E2.A2.1.1.

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Applicant has immediate family members--his mother and two sisters--who are citizen residents of a foreign country. DC E2.A2.1.2.1. There is a rebuttable presumption that a person has ties of affection for, or at least obligation to, his wife's immediate family members. ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at \* 8 (App. Bd. Feb. 20, 2002). Applicant's mother-in-law and two brothers-in-law are citizen residents of the PRC. DC E2.A2.1.2.1.

It is a mitigating condition if the immediate family members or foreign associates 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 applicant to choose between loyalty to the foreign associates and loyalty to the U.S. MC E2.A2.1.3.1. Applicant's mother, two sisters, mother-in-law and brothers-in-law are not agents of a foreign power, but they are in a position to be exploited by a foreign power.

The evidence supports Applicant's contention that he and his wife are loyal U.S. citizens. Nevertheless, members of his immediate family and his wife's immediate family are in a position to be exploited by a foreign power. The PRC is an authoritarian state, has an abysmal human rights record, and is among the most active collectors of intelligence from U.S. sources. . Ex. 7 at 1; Ex. 6 at 13. Thus, although Applicant has not been involved in any misconduct such as to render him an inappropriate candidate for a security clearance, the condition of having vulnerable foreign associates does. Under the circumstances, I find 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: 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.

**James A. Young**

**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).