

DATE: November 30, 2004

In Re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 03-17161

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant and his spouse are both naturalized U.S. citizens. Applicant's father, sister, mother-in-law, and father-in-law are citizens and residents of the People's Republic of China (PRC). Applicant talks to his father once a month and his spouse talks to her parents twice a month. Applicant has little contact with his siblings. Applicant and his spouse have twice made two-week visits to their families in the PRC, staying with each family a significant part of the time. Security concerns based on foreign influence have not been mitigated. Eligibility for an ADP I/II position is denied.

STATEMENT OF THE CASE

On May 14, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its determination that Applicant was not eligible for an information systems position designated ADP I/II.

(1) The SOR alleges four security concerns under Guideline B (Foreign Influence) of the Directive: Applicant's father, sister, mother-in-law, and father-in-law are citizens and residents of the People's Republic of China (PRC) (SOR ¶ 1.a.); Applicant maintains monthly telephonic contact with his father in the PRC (SOR ¶ 1.b.); Applicant's spouse maintains twice monthly telephonic contact with her parents in the PRC (SOR ¶ 1.c.); and Applicant traveled to the PRC in January 1998 to visit his relatives (SOR ¶ 1.d.). Applicant answered the SOR in writing on May 26, 2004. He admitted the allegations, offered explanations, and requested a hearing. The case was assigned to me on August 20, 2004. On September 1, 2004, DOHA issued a notice of hearing setting the case for October 6, 2004. Applicant appeared as scheduled. At his request, I kept the record open for 15 days to allow him to produce documentation to support his testimony. I received his documentation on October 13, 2004 (Applicant's Exhibits A through E). DOHA received the transcript (Tr.) on October 26, 2004.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a senior software developer for a defense contractor. He has never held a security clearance. His co-workers regard him as generous, loyal, dedicated, and a person of high integrity.

Applicant was born on October 28, 1958, in Wuhan, PRC. He received bachelor's and master's degrees in biology in the PRC. He came to the U.S. as a visiting scholar in December 1989 to work in molecular biology at a university medical center. He came because he wanted better research facilities and the opportunity for freedom. He became a permanent U.S. resident in 1993, obtained a master's degree in computer science, and became a naturalized U.S. citizen on November 24, 1999. He has renounced his PRC citizenship.

Applicant's PRC passport expired in December 1999, a month after he became a U.S. citizen. He surrendered the expired passport to the Chinese Consulate.

Applicant married a native-born PRC citizen in July 1986. His spouse came to the U.S. in 1991, and she became a U.S. citizen in April 2003. They have no children.

Applicant's mother is deceased. His father is a citizen and resident of the PRC. His father worked as an accountant for an organization that manages hydroelectric power and controls contamination of the Yangtze River in the PRC. His father retired in 1993, receives a pension, and is financially independent.

Applicant's sister is a PRC citizen and resident. She works as a librarian for the same organization as Applicant's father. Her spouse also works for the same organization. Applicant's brother is an associate professor of physics at a university in the PRC. Applicant does not maintain close contact with his siblings.

Applicant's father-in-law was the editor of a small entertainment magazine until he retired in 1993. His mother-in-law is a retired elementary school teacher. His brother-in-law is a university professor in the PRC.

None of Applicant's family or in-laws are members of the Communist Party. Applicant's families have never been subjected to harsh treatment or abused by the PRC government. If they were threatened, Applicant would report it and would trust the U.S. government to protect his family. Applicant does not know if his spouse's family has ever been threatened or abused by PRC authorities.

Applicant and his spouse do not send any money to their families, and do not own any property in the PRC. Applicant owns a home in the U.S. worth at least \$600,000.00 and has more than \$100,000.00 in his retirement account. He contributes the maximum allowable each year to his retirement account.

Applicant talks to his father about once a month. His spouse contacts her family about twice a month. Neither Applicant's family nor his spouse's family have visited them in the U.S.

Applicant and his spouse traveled to the PRC for two weeks in January-February 1998, to visit his father and his spouse's parents. They visited Applicant's father and his spouse's parents again during a two-week period in October 2003. During each visit, they stayed with Applicant's father for part of the time and his spouse's family part of the time.

The PRC is ruled by an authoritarian, repressive government dominated by the Communist Party. In all important government, economic, and cultural institutions in the PRC, party committees ensure that party and state policy is followed and non-party members do not create autonomous organizations that could challenge party authority.⁽²⁾ The PRC's record of human rights abuses is a matter of continuing concern of the U.S. government⁽³⁾. In the year 2000, China was the most active practitioner of industrial espionage in the world.⁽⁴⁾

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 Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

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. A disqualifying condition (DC 1) may arise when "[a]n 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. Applicant's admission that his father and sister are citizens and residents of the PRC establishes DC 1. [\(5\)](#)

Applicant's wife's ties to the PRC and the possible effect they may have on Applicant's conduct are relevant considerations under Guideline B (Foreign Influence). ISCR Case No. 01-02452 at 8 (App. Bd. Nov. 21, 2002). "[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). Furthermore, a disqualifying condition (DC 2) may arise if an applicant is "[s]haring living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." Although Applicant's spouse is a naturalized U.S. citizen, a security concern could arise based on the likelihood of coercion or duress against her family members. The fact that Applicant spent part of each two-week visit to the PRC with his spouse's parents strongly suggests that he has ties of affection or obligation to them. Thus, I conclude that DC 2 is

established with respect to Applicant's spouse.

Since the Government produced substantial evidence to establish DC 1 and DC 2, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. In cases where an Applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members (spouse, father, mother, sons, daughters, brothers, sisters) . . . 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 ¶ E2A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to chose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power").

Guideline B is not limited to countries that are hostile to the United States. "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." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). The distinctions between friendly and unfriendly governments must be made with caution, because relations between nations can shift, sometimes dramatically and unexpectedly.

Furthermore, even friendly nations can have profound disagreements with the United States over matters that they view as important to their vital interests or national security. Finally, we know that even friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). 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.

Applicant's father and mother-in-law are retired and dependent on pensions. The fact that they are elderly and retired, standing alone, does not mitigate concerns under Guideline B. ISCR Case No. 03-05645 at 6 (App. Bd. Sep. 15, 2004).

Applicant's sister and her spouse work for the same organization as their father did, and are dependent on it for their livelihood. The exact nature of the organization is not clear from the record, but it is well known that in all important government, economic, and cultural institutions in the PRC, party committees ensure that party and state policy is followed.⁽⁶⁾ All of Applicant's family members and in-laws are vulnerable to this Communist Party monitoring and human rights abuses.

It is important to consider the totality of an applicant's family ties to a foreign country as well as each individual family tie. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). All the immediate family members of both Applicant and his spouse are citizens and residents of PRC. Direct or indirect coercion of any family member would affect Appellant. Although there is no direct evidence that Applicant has personal ties of affection with his in-laws, his spouse clearly has a close relationship with her parents, making Applicant vulnerable to coercion through his spouse.

Applicant's dual background in a biology and computer science make his work very attractive to industrial spies. While Applicant enjoys a reputation as a person of high integrity and unquestioned loyalty to the U.S., he simply has too many family ties to a country that does not hesitate to use espionage and coercion to further its goals.

While Applicant's father, sister, and in-laws may have no hostile feelings toward the U.S., they are nevertheless subject to the control and authority of the authoritarian government of the PRC and vulnerable to direct and indirect coercion. Applicant believes that the U.S. government will protect his family if he reports any attempted coercion. Unfortunately,

(7)

U.S. diplomatic and economic pressures have not spared PRC citizens and residents from abuse and coercion. The likelihood that Applicant's family or in-laws will be subjected to duress or coercion cannot be determined with precision, but cannot be disproved with any degree of certainty on this record. Doubtful cases must be decided in favor of national security. I conclude that MC 1 is not established.

Security concerns can be mitigated by showing that contact with foreign citizens is casual and infrequent (MC 3). Directive ¶ E2.A6.1.3.3. Applicant's contacts with his in-laws are infrequent, but the evidence indicates that they are not casual. In each of his two visits, he spent significant time with his spouse's parents. In his last visit, he spent one week with his father and one week with his spouse's parents. I conclude that MC 3 is not established.

FORMAL FINDINGS

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

Paragraph 1. Guideline B (Foreign Influence): 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 the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for an ADP I/II position. Eligibility is denied.

LeRoy F. Foreman

Administrative Judge

1. This action was taken under Executive Order 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). The rules for security clearance cases are applied to ADP trustworthiness determinations.
2. See U.S. Dept. of State, *Background Note: China* 7-9 (Oct. 2004), available on the internet at www.state.gov. See also ISCR Case No. 02-26976 at 4 (App. Bd. Oct. 22, 2004); ISCR Case No. 99-0452, 2000 WL 739501 at 3 (App. Bd. Mar. 21, 2000) (authority to take official notice of official documents posted by federal departments or agencies on their web sites).
3. Congressional Research Service, *China-U.S. Relations: Current Issues for the 108th Congress* 11-13 (May 20, 2004) (admitted as Government Exhibit 4).
4. National Counterintelligence Center (NACIC), *Annual Report to Congress 15* (2000) (admitted as Government Exhibit 5), available on the internet at www.nacic.gov. The NACIC Annual Reports for 2001, 2002, and 2003 did not identify the most active practitioners of industrial espionage by name.
5. Applicant's brother and brother-in-law are not mentioned in the SOR, even though they also are citizens and residents of the PRC. Thus, I have not considered Applicant's relationships with his brother and brother-in-law as separate security concerns.
6. See U.S. Dept. Of State, *Background Note: China*, *supra* n. 2.

7. *Id.* at 9.