

DATE: October 26, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17113

ECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Michael S. Fauci, Esq.

SYNOPSIS

Applicant's sister is a U.S. citizen residing in Macau, a Special Administrative Region of the People's Republic of China. His father is a citizen resident of Hong Kong. Applicant's in-laws are citizen residents of Taiwan. Applicant failed to document on his security clearance application his travels outside the U.S. He failed to mitigate foreign influence and personal conduct security concerns. 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. DOHA issued ⁽¹⁾ a Statement of Reasons ⁽²⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 5 March 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 15 July 2004. On 8 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 17 September 2004.

FINDINGS OF FACT

Applicant is a 42-year-old advisory systems engineer for a defense contractor. Applicant obtained a security clearance in 1986 when he worked in the applied physics laboratory of a university. After starting work with his present employer in 2000, he obtained an interim clearance that was suspended when the SOR was issued.

Applicant was born in Macau, which was then a colony of Portugal and is now a Special Administrative Region of the People's Republic of China (PRC). In 1978, Applicant's mother divorced his father and moved to the U.S. with Applicant. Applicant was 16 years old at the time. He completed high school and college in the U.S. and became a naturalized U.S. citizen in 1985. Ex. 1 at 1.

Applicant is married to a naturalized U.S. citizen who was born in Taiwan. Her parents are citizen residents of Taiwan. Applicant has visited his in-laws once since his marriage in 1986. His wife stays in touch with her parents. Applicant's mother, father, and stepfather were born in what is now the PRC. His father is a retired watchman who is a citizen resident of Hong Kong. Ex. A. Applicant saw his father on one of his trips to Macau. Applicant's mother and stepfather are naturalized U.S. citizens.

Applicant has one sister, one half-sister, and one brother. Ex. 3 at 4. The half-sister was born in the U.S. His brother and sister were born in Macau. The brother is a citizen of Macau, but lives in the U.S. The sister was born in Hong Kong, is a naturalized citizen of the U.S., but has been a resident of Macau for 30 years. Ex. B.

Applicant has traveled to Macau to visit his sister once a year, the last time in early in 2004. During these visits, he went to Shanghai, in the PRC, for a week, and visited another city in the PRC for dinner. He used a Macau residency card, apparently provided to him when he was a resident of Macau, to cross the border into the PRC. Applicant also has a Macau driver's license. Macau is a 13 square mile enclave on the south China coast approximately 40 miles west of Hong Kong. It reverted from Portuguese to PRC control on 20 December 1999. Macau enjoys considerable autonomy except in defense and foreign affairs. Macau's citizens should enjoy this autonomy until 2049 and the economic system and way of life are to remain unchanged until then. Citizens have basic freedoms and the government respects basic human rights of its citizens.

Applicant signed his security clearance applications (SCAs) on 6 September 2000 and 6 November 2003, certifying the information contained therein was "true, complete, and correct to the best of [his] knowledge and belief," and acknowledging that a "knowing and willful false statement" could be punished under 18 U.S.C. § 1001. Question 16 asked if Applicant "had traveled outside the United States on other than on official U.S. Government orders in the past 7 years." He was not to repeat travel covered in other questions. Applicant answered "no" to this question on both SCAs.

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

Guideline B--Foreign Influence

In the SOR, DOHA alleged Applicant's father is a citizen of Hong Kong residing in Macau (¶ 1.a); his sister is a U.S. citizen residing in Macau (¶ 1.b); his in-laws are citizen residents of Taiwan (¶ 1.c); he traveled to Macau three or four times between January 1998 and December 1999 and resided with his sister (¶ 1.d); he traveled to the PRC (¶ 1.e), and he traveled to Hong Kong to visit his father who resides in Macau (¶ 1.f). 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 that Applicant has immediate family members--his father and sister--and persons to whom he is bound by obligation--his in-laws--who are citizens, residents, or present in a foreign country.⁽³⁾ DC E2.A2.1.2.1. While the

mere possession of family ties with persons in a foreign country is not, as a matter of law, automatically disqualifying . . . [it] does raise a prima facie security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant.

ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 (Feb. 8 2001) at 33-34. It is a mitigating condition if the immediate family members are not agents of a foreign power and are not in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to her family members and loyalty to the U.S. MC E2.A2.1.3.1. Under Guideline B, it is important to consider the totality of an applicant's family ties in a foreign country, not just each family tie considered in isolation. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003).

The Appeal Board has cautioned against "overly simplistic distinctions between 'friendly' nations and 'hostile' nations" when deciding foreign influence cases. ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Relations between nations often change, even friendly nations may have "profound disagreements" with the U.S. over some issues affecting their national security, and not all cases of espionage against the U.S. involve nations hostile to the U.S. *Id.* "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).

Applicant is clearly close to his sister who, although a U.S. citizen, has resided and worked in Macau for the past 30 years. They are close, as demonstrated by his annual trips to visit her. Although his personal contact with his in-laws is not great, Applicant failed to overcome the presumption that a person has ties of affection or at least obligation to the immediate family members of his spouse. ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). Of particular concern in this case, is the frequency of Applicant's trips to Macau and his ability to travel freely from Macau to the PRC by using his acau residency card in lieu of his U.S. passport.

Security clearance decisions are not an exact science. Instead, they are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Egan*, 484 U.S. at 528-529. Applicant failed to establish any of the mitigating conditions apply to his case. After carefully considering the totality of Applicant's ties to foreign countries, I am unable to find for him.

Guideline E--Personal Conduct

In the SOR, DOHA alleged Applicant falsified material facts on his SCA by failing to list non-government travel outside the U.S. (¶ 2.a). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly

safeguard classified information. Directive ¶ E2.A5.1.1.

The Government established by substantial evidence that Applicant failed to disclose in his SCA his travel to Macau and the PRC. Proof Applicant omitted this information from his SCA shifted the burden to Applicant to explain the omissions sufficiently to negate a finding of knowing and deliberate falsification. *See* ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004). Applicant claims he misread the question on both SCAs and thought he was required to list official government travel outside the U.S. rather than any travel not authorized by the U.S. Government. Applicant failed to convince me that his failure to list his travel on two SCAs, filed three years apart, was because he misread the question. 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

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: 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. The SOR is undated.

2. 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).

3. However, the evidence supports a finding that Applicant's father resides in Hong Kong, not Macau.