

KEYWORD: Foreign Influence

DIGEST: Applicant's parents and brother are citizens of the People's Republic of China and reside in Hong Kong. Applicant traveled to Hong Kong in 1998. Applicant's familial ties to citizens of the People's Republic of China residing in Hong Kong raise serious security concerns because they could result in the compromise of classified information. Clearance is denied.

CASENO: 03-25675.h1

DATE: 11/15/2005

DATE: November 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25675

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

William F. Savarino, Esq.

SYNOPSIS

Applicant's parents and brother are citizens of the People's Republic of China and reside in Hong Kong. Applicant traveled to Hong Kong in 1998. Applicant's familial ties to citizens of the People's Republic of China residing in Hong Kong raise serious security concerns because they could result in the compromise of classified information. 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 December 29, 2004, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) of the Directive. On January 16, 2005, Applicant answered the SOR in writing and elected to have a hearing before an administrative judge. On July 5, 2005, the case was assigned to me. I convened a hearing on August 29, 2005, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses, introduced one exhibit (Ex.), and offered seven documents for administrative notice. The Government's documents for administrative notice were identified as Ex. I through VII. Applicant called one witness and introduced three exhibits, identified as Ex. A, B, and C. Additionally, Applicant offered four documents for administrative notice. Applicant's documents for administrative notice were identified as App. I through IV. All exhibits and documents offered for administrative notice at the hearing by the Government and by Applicant were entered in the record without objection. DOHA received the transcript (Tr.) of the proceeding September 13, 2005.

RULING ON PROCEDURE

Through counsel, Applicant waived the 15-day notice provision, as required by ¶ E3.18. of Enclosure 3 of DoD directive 5220.6. (See document dated August 16, 2005, signed by Department Counsel and Applicant's counsel.) At the hearing, Applicant's counsel requested that the record remain open for a short period of time so that he could read and, if necessary, submit comments on Government's document VII for administrative notice, which through a misunderstanding he had not received prior to the hearing. Applicant's post-hearing comments were dated September 6, 2005. Instead of commenting on Government's document VII, Applicant submitted a critique of Government's document V for administrative notice, identified as "U.S. National Security and Military/Commercial Concerns with the People's Republic of China" (The Cox Report). This document comprises Chapter 1, Volume 1 of the Report of the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China, H.R. Rpt. 105-851, declassified, in part, pursuant to H.Res. 5, as amended, 106th Congress, First Session (May 25, 1999.) Applicant's critique consisted of slightly more than one page, with five attached references. Three of the references were from private sector internet web sites; two additional references appeared to come from governmental internet websites, one from a Hong Kong governmental website and the other from a website identified with the U.S. consulate in Hong Kong. In a document dated September 7, 2005, Department Counsel provided comments on the submission and the references, arguing that since no objection was raised to Government document V for administrative notice at the hearing, Applicant had waived his right to object or to comment on the document. Department Counsel also noted that one of Applicant's references submitted for administrative notice was a newspaper article summarizing the Cox Report and that other documents submitted for administrative notice by Applicant reflected views of private citizens. (3) However, Department Counsel did not object to the admission of these documents in order to provide a complete record for the hearing. I identified Applicant's post-hearing submission as App. V for administrative notice, admitted it to the hearing record, and gave it consideration.

FINDINGS OF FACT

The SOR contains three allegations of disqualifying conduct charged under Guideline B, Foreign Influence, of the Directive. In his answer to the SOR, Applicant admitted all three allegations. Applicant's admissions are incorporated as findings of fact.

Applicant is 50 years old and employed as a software engineer by a defense contractor. (Tr. 34.) He has a bachelor's degree in electrical engineering from a university in the Philippines and a master's degree in computer science from a U.S. university. He has been married since 1983 and he and his wife are the parents of a 12-year-old son. (Ex. 1; Tr. 32-33.)

Applicant was born in the People's Republic of China (PRC). His parents were both university professors of economics.

During the Cultural Revolution in the PRC, Applicant's father was sent to a re-education camp, where he remained for approximately 12 years. Applicant and his younger siblings were not permitted by the PRC to attend school while their father was in the re-education camp. In 1974 Applicant's mother moved the family to Hong Kong. One year later, in 1975, the mother and her children moved to the Philippines, where Applicant's mother had relatives, so the children could complete their educations. In 1983, Applicant married a woman who was a citizen and resident of the Philippines. In 1986, Applicant and his wife came to the U.S. They became U.S. citizens in 1997. (Ex. 1; Tr. 31-32; 42; 66-67; 72; 78-79; 91-93.)

Applicant's father and mother are citizens and residents of the Hong Kong Special Administrative Region (SAR), PRC. They possess SAR passports. Applicant's brother is also a citizen and resident of Hong Kong SAR, PRC. He lives with his wife and two young children in Hong Kong. He works as a salesman in the pharmaceutical industry. (Ex. A, B, C; Tr. 54; 59-60.)

Applicant's father has resided in Hong Kong since 1978, and his mother has resided in Hong Kong since 1990. Both parents are 78 years old. Last year in July 2004, Applicant's father had a major stroke. Applicant's mother suffers from heart problems. (Tr. 39-42.)

Applicant has a sister who is a naturalized U.S. citizen. His mother acquired permanent resident status in the U.S. and lived with Applicant's sister for five or six years. (Tr 44-45.) Applicant's parents elected not to immigrate to the U.S. because they did not want to give up the free health care they received as citizens of Hong Kong SAR, PRC. (Tr. 45.)

In 1998 Applicant traveled to Hong Kong SAR, PRC to visit his family members there. In 2000, Applicant's parents and his brother traveled to the U.S. to visit Applicant and his family for a family reunion. On average, Applicant's brother travels to the U.S. on business about twice a year. Applicant's parents and his brother travel to the PRC mainland approximately twice a year. (Ex. 1; Tr. 62-63; 83; 95-96.)

Before his father's stroke, Applicant spoke with his parents by telephone a few times a year. Since his father's illness, however, Applicant calls his father every two weeks to provide encouragement and support. He speaks with his brother by telephone approximately once a year. Applicant's sister, who is a naturalized U.S. citizen and with whom he has a close familial relationship, has traveled twice within the past year to Hong Kong SAR, PRC to visit their parents. (Tr. 83-85.)

Applicant's former supervisor is the president of the company where Applicant is employed. He has known Applicant for two years. He testified Applicant possesses strong skills and is one of the company's key employees. (Tr. 99-111.)

I take administrative notice that the PRC is a totalitarian state with human rights policies and military goals antagonistic to the United States. Further, I take notice that Hong Kong is a political entity of the PRC and subject to the PRC in

matters of defense and foreign affairs. (China (includes Tibet, Hong Kong, and Macau) Country Reports on Human Rights Practices - 2004, U.S. Department of State, Government document for administrative notice IV; Current and Projected National Security Threats to the United States, Statement for the Record by Vice Admiral Lowell E. Jacoby, U.S. Navy, Director, Defense Intelligence Agency, before the Senate Armed Services Committee, 17 March 2005, Government document for administrative notice VII.) Additionally, I take administrative notice that the PRC pursues aggressive methods to acquire advanced U.S. military technology, including identifying ethnic Chinese in the U.S. who have access to sensitive information and enlisting their cooperation in transferring information and technology illegally. (U.S. National Security and Military/Commercial Concerns with the People's Republic of China, Government document V for administrative notice, at 20-21.) I also take administrative notice of the PRC's active and historic roles as collector of competitive information and perpetrator of industrial espionage against U.S. companies producing militarily critical technologies such as information systems, sensors and lasers, and electronics. (Government Document VI for Administrative Notice.)

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 personal 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, under Guideline B of the Directive, that Applicant's parents and brother are citizens of the PRC residing in Hong Kong (¶¶ 1.a. and 1.b.); and that Applicant traveled to Hong Kong in 1998 (¶ 1.c.).

A Guideline B security concern exists when an individual seeking clearance is bound by ties of affection, influence, or obligation to immediate family, close friends, or professional associates in a foreign country, or to persons in the United States whose first loyalties are to a foreign country. A person who places a high value on family obligations or fidelity to relationships in another country may be vulnerable to duress by the intelligence service of the foreign country or by agents from that country engaged in industrial espionage, terrorism or other criminal activity. The more faithful an individual is to family ties and obligations, the more likely the chance that the ties might be exploited to the detriment of the United States.

Applicant's case requires the recognition that the PRC, a totalitarian regime, exercises governmental control over Hong Kong and is able to use that control if it so wishes to obtain, through illegal methods, militarily critical technologies from companies doing business as government contractors in the United States. These actions threaten U.S. security interests. U.S. citizens with immediate family members who are citizens or residents of the PRC could be vulnerable to coercion, exploitation, or pressure.

Applicant admits the three allegations under Guideline B. His admissions raise security concerns under Disqualifying Condition (DC) E2.A2.1.2.1. Applicant's father, mother, and brother are citizens of the PRC and residents of Hong Kong. Additionally, Applicant acknowledged one trip to Hong Kong in 1998.

Applicant is in frequent telephone communication with his parents, who are elderly and not in good health. The parents

remain in Hong Kong in order to take advantage of free health care services provided by the PRC to residents of Hong Kong. Both parents suffer from health conditions requiring medical care, and they could be subject to duress by a government or its agents seeking classified information from Applicant in exchange for health care for his parents. Applicant's brother, with whom he communicates less frequently, is also a citizen of the PRC and a resident of Hong Kong, along with his wife and two young children. Applicant's frequent communications with his parents show his closeness to them and could make him vulnerable to coercion, exploitation, or pressure by individuals or groups seeking militarily critical technologies to be used by the PRC.

An applicant may mitigate foreign influence security concerns by demonstrating that immediate family members are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force an applicant to choose between loyalty to the foreign associates and loyalty to the U.S. mitigating Condition (MC) E2.A2.1.3.1. The evidence does not establish that Applicant's father, mother, and brother are agents of a foreign power; however, the record shows Applicant's immediate family members are citizens of a country that engages in industrial espionage or illegal data collection and is hostile to U.S. interests. Applicant offered no evidence to rebut the Government's assertion that his family members in Hong Kong could be exploited by the PRC in a way that could force him to choose between loyalty to his family and the security interests of the United States. (ISCR Case No. 03-15485, at 4-6 (App. Bd. June 2, 2005) Accordingly, MC E2.A2.1.3.1 does not apply to Applicant's case.

An applicant may also mitigate foreign influence security concerns if he shows his contacts and correspondence with foreign citizens are casual and infrequent. C E2.A2.1.3.3. Applicant's contacts with his family members who are citizens of the PRC and residents of Hong Kong are based on ties of familial affection or obligation. He has traveled to Hong Kong, PRC, to visit his parents and brother, and they have come to the U.S. for reunions with him and his sister who is a U.S. citizen. While Applicant communicates less frequently with his brother, his contacts with his parents are frequent and based on close ties of affection and obligation. He speaks with his parents by telephone every two weeks. His expressed concern for their health and well-being is filial and frequent. His relationship with his brother is also one of familial affection. Accordingly, mitigating condition E2.A2.1.3.3 does not apply to Applicant's relationships with his father, mother, and brother, all of whom are citizens of the PRC and residents of Hong Kong.

Nothing in Applicant's answers to the Guideline B allegations in the SOR suggested he was not a loyal American citizen and a credit to his adopted country. However, he was unable to put forward evidence that could mitigate the security concerns alleged in subparagraphs 1.a., 1.b., and 1.c. of the SOR and demonstrate that he would not be vulnerable to foreign influence that would result in the compromise of classified information. Accordingly, allegations in subparagraphs 1.a. through 1.c. under Guideline B of the SOR are concluded against the 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

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.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. See ISCR Case No. 02-04455 (App. Bd. July 31, 2003) for a discussion of the probative value of newspaper summaries of government reports.