

DATE: August 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-26677

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's mother-in-law and father-in-law are citizens of the People's Republic of China (PRC). His mother-in-law is a permanent U.S. resident and has resided with Applicant for 13 years. She receives no income or benefits from the PRC. His father-in-law, a retired accountant, lives in a small government-owned house in the PRC and receives government medical care. Applicant visited the PRC once to help his father-in-law move into his house, and he sends him about \$1,000.00 per year. His contact with his father-in-law since 1998 has been limited to financial assistance and occasional exchange of pleasantries by telephone. The security concern based on foreign influence is mitigated. Clearance is granted.

STATEMENT OF THE CASE

On February 4, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. 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 SOR alleges security concerns under Guideline B (Foreign Influence). It alleges Applicant's father-in-law is a citizen and resident of the PRC (§ 1.a.), Applicant's mother-in-law is a citizen of the PRC temporarily residing with him (§ 1.b.), Applicant sends his father-in-law \$500.00 to \$1,000.00 per year (§ 1.c.), and Applicant traveled to the PRC in 1998 (§ 1.d.).

Applicant answered the SOR in writing on February 24, 2005. He admitted all the allegations in the SOR and requested a hearing. The case was assigned to me on June 15, 2005. On June 23, 2005, DOHA issued a notice of hearing setting the case for July 12, 2005. The case was heard as scheduled. DOHA received the transcript (Tr.) on July 27, 2005.

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 39-year-old project manager for a defense contractor. He was born in the People's Republic of China (PRC), came to the U.S. in 1985, obtained a college degree in 1990, and received a master's degree in computer science in 1993. He has worked for his present employer since November 1993. He enjoys a reputation among his colleagues and supervisors as a talented, dedicated, trustworthy employee. He became a U.S. citizen in August 2002. In September 2002, he Americanized his name by legally changing his first name to "Peter."

Applicant's spouse was born in the PRC and became a U.S. citizen in November 1991. They were married in February 1992. They have two children, both native-born U.S. citizens.

Applicant's father and mother were born in the PRC. His father became a U.S. citizen in August 1999. His mother is a citizen of the PRC and a permanent U.S. resident since 1997.

Applicant's father-in-law is a citizen and resident of the PRC. His father-in-law is 75 years old and a retired accountant who worked for a government-owned grocery store. He came to the U.S. in 1997 and returned to the PRC after about six months. He receives no pension. His only sources of income are his savings and about \$1,000.00 per year he receives from Applicant. He lives in the PRC because he is in poor health and the cost of health care is less in the PRC than in the U.S. He lives in a small government-owned, rent-controlled house. If he were ejected from his government-owned house, Applicant would increase the amount of money he sends his father-in-law by about \$50.00 per month to enable him to rent a privately-owned residence. According to Applicant, the PRC "doesn't know even [sic] he exists." (Tr. 63.)

Applicant and his family traveled to the PRC for about one month in 1998, to assist his father-in-law in finding a place to live. During this visit, Applicant's mother-in-law stayed with her husband, and Applicant stayed in a hotel with his wife and children.

Applicant's mother-in-law is a citizen of the PRC. She is 73 years old and was never employed. Contrary to the allegation in the SOR ¶ 1.b., she has lived permanently with Applicant and his wife in the U.S. for more than 13 years. She has not become a U.S. citizen because she cannot speak English.

Applicant's wife and mother-in-law contact his father-in-law by telephone once every two weeks. Applicant exchanges pleasantries with his father-in-law, but his wife and mother-in-law conduct most of the conversation.

The PRC is an authoritarian state with a poor human rights record. The Communist Party is the paramount source of power, and party members hold almost all top government positions.⁽¹⁾ The PRC has a significant intelligence collection capability targeted against the U.S. Persons with access to advanced propriety technology are subject to surveillance, and their hotel rooms and personal computers are subject to search without their consent or knowledge.⁽²⁾ Industrial espionage is a serious concern in the U.S.⁽³⁾

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

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 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 (spouse, father, mother, son, daughter, brother, or sister), or other persons to whom he or she 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.

The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). Family ties with persons in a foreign country are not, as a matter of law, automatically disqualifying. However, such ties do 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. Directive, ¶ E3.1.15; ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 (Feb. 8 2001) at 33-34.

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.

None of Applicant's immediate family members are residents of the PRC. His mother is a PRC citizen, but her citizenship status is not alleged in the SOR. The security concern set out in the SOR is focused on his mother-in-law and father-in-law. "[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). Applicant's mother-in-law has been a member of his household for more than 13 years. His father-in-law visited for about six months more than seven years ago and then returned to the PRC. The record indicates Applicant has no

particular ties of affection for his father-in-law, but he appears to have ties of obligation to his father-in-law, evidenced by his financial assistance. I conclude DC 1 is established.

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country, 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. Because Applicant has ties of affection and obligation to his spouse's parents, the underlying considerations of MC 1 are relevant, even though in-laws are not "immediate family members."

Applicant's father-in-law has never been employed by or connected with the PRC government. He has never been part of the high-technology environment in which Applicant works. He clearly is not an agent of a foreign power. He receives no government pension, but he depends on the government for medical care and housing.

Applicant has considered the possibility of his father-in-law losing his housing and is able and willing to pay for substitute housing if necessary. Applicant has considered the possibility of bringing his father-in-law to the U.S. but cannot afford to pay for his father-in-law's medical expenses.

Applicant's mother-in-law is not an agent of a foreign power. She receives nothing from the PRC government. She lives permanently with Applicant in the U.S. and is not subject to the authority of the PRC government.

A mitigating condition (MC 3) applies when "[c]ontact and correspondence with foreign citizens are casual and infrequent." Directive E2.A2.1.3.2. The record reflects Applicant's contacts with his father-in-law are limited to occasional pleasantries as an adjunct to his wife's conversations. Although he calls "sometimes," his wife and mother-in-law are the primary points of contact. I conclude MC 3 is established for Applicant's contacts with his father-in-law.

Considering Applicant's family ties as a whole, I conclude the security concern is mitigated. His mother-in-law presents virtually no risk of foreign influence. It is theoretically possible the PRC would physically abuse his father-in-law or deprive him of his meager government benefits in an effort to influence Applicant, but the risk of Applicant being influenced appears to be very low. It is even less likely Applicant's father-in-law could indirectly influence Applicant through his spouse or mother-in-law. Under the circumstances of this case, to disqualify Applicant from receiving a security clearance based on his attenuated relationship with his father-in-law would be tantamount to adopting the rule of automatic disqualification based on foreign family ties that has been rejected by the Appeal Board. After weighing the disqualifying and mitigating conditions in the Directive, I conclude the security concern based on foreign influence is mitigated.

FORMAL FINDINGS

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

Paragraph 1. Guideline B (Foreign Influence): FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

1. See U.S. Dept. of State, *China (includes Tibet, Hong Kong, and Macau), Country Reports on Human Rights Practices* 1 (Feb. 28, 2005) (attached to the record as Appellate Exhibit VIII).
2. See U.S. Dept. of State, *Consular Information Sheet 2* (Apr. 5, 2005) (attached to the record as Appellate Exhibit I).
3. See generally Office of the National Counterintelligence Executive, *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage-2003* (February 2004) (attached to the record as Appellate Exhibit VII).