

DATE: June 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-27134

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 53 year-old naturalized United States citizen, born in the People's Republic of China (PRC). Applicant's father and brother reside in Hong Kong, and are PRC citizens, because Hong Kong is under the control of the PRC. The evidence establishes that Applicant has extremely limited and infrequent contacts with these family members, neither of whom is involved with the PRC government. He is not vulnerable to foreign influence because of his strong attachment to the United States and his family here, and because his family in PRC is not in a position to be exploited in a way that could force Applicant to choose between loyalty to these family members and his loyalty to the United States. Mitigation has been shown. Clearance is granted.

STATEMENT OF THE CASE

On February 14, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on March 2, 2005. Applicant requested a clearance decision based on a hearing record.

On May 11, 2005, the case was assigned to this Administrative Judge to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on June 1, 2005, and the hearing was held on June 8, 2005.

At the hearing, Department Counsel offered eight documentary exhibits (Exhibits 1 - 8) and no witnesses were called. Applicant offered no documentary exhibit and offered his own testimony. The transcript (TR) was received on June 20, 2005.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline B of the Directive because Applicant has immediate family members who are not United States citizens and may be subject to duress. The SOR contains three allegations, 1.a., through 1.c., under Guideline B. Applicant admitted all of the SOR allegations. Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the documents and the live testimony, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 53 years old, employed as an Instrumentation Engineer by a defense contractor, and he seeks a security clearance for that position. He received a Bachelor of Science degree in electrical engineering from a United States university in 1978.

Applicant was born in the PRC in 1951. In 1957 Applicant's father moved, without his family, to Hong Kong to escape the Communist rule of the PRC. In 1969, Applicant, along with three other high school classmates, escaped the PRC, by riding their bicycles for approximately 40 miles and then swimming seven hours, until they arrived in Hong Kong. Applicant stayed in Hong Kong until 1973, when he moved to Canada to further his education. He moved to the United States in 1975, and became a naturalized United States citizen in 1984.

Applicant's wife is a Chinese born, United States citizen, who also escaped the PRC by swimming to Hong Kong. Applicant and his wife have one 26 year old daughter, who is a natural born United States citizen. Additionally, Applicant has two brothers and three sisters, who have become United States residents and citizens (Tr at 19).

Applicant's father and brother are residents of Hong Kong. They are citizens of the PRC, as a result of Hong Kong reverting to the control of the PRC. His father is 92 years old and has been retired for many years. He worked as an independent businessman since he moved to Hong Kong. Applicant's brother is employed in Hong Kong as an executive for an American company. Neither his father nor brother ever worked for or was associated with the Governments of Hong Kong or the PRC, and neither was ever a member of the Communist party (Tr at 26-28, 31.)

Applicant contacts his father and brother by telephone approximately two times a year (Tr at 30-31).

Applicant traveled to Hong Kong on three occasions between 2000 and 2001, to visit his ill step-mother, then to attend her funeral, and finally to visit his father (Tr at 29-30, 34).

Applicant testified that he has no assets in Hong Kong or the PRC, and he estimates that his net worth in the United States is \$800,000 (Tr at 30, 33-34).

When he was questioned as to what he would do if the Chinese Government threatened his father or brother if he did not cooperate with the government, he testified, "I would call security. Call FBI immediately. I would notify the Security." (Tr at 31).

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, etc.

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets

that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONSBased on the evidence of record, the Government has established an initial reason to deny Applicant a security clearance because of Guideline B (Foreign Influence). Applicant's father and brother are citizens of the PRC, which could create the potential for foreign influence that could result in the compromise of classified information because it makes Applicant potentially vulnerable to coercion, exploitation, or pressure. The possession of such ties raises a security concern sufficient to require Applicant to present evidence in rebuttal, extenuation, or mitigation sufficient to meet his burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for him. This Applicant has done.

The evidence of existence of immediate family members, who are citizens of the PRC comes within Disqualifying Condition (DC) E2.A2.1.2.1, immediate family members, or persons to whom the individual has close ties of affection or obligation, who are citizens of, or resident in, a foreign country. The fact that the foreign country in question is the PRC, a country under Communist rule, is also of serious concern; but that fact is not automatically controlling.

The primary factors that I have considered in mitigation include: the lack of any government involvement of Applicant's father and brother in the PRC, and Applicant's limited and infrequent contact with them, and the fact that Applicant's wife, child, two brothers, and three sisters live in the United States and are United States citizens. I have also considered Applicant's valiant effort to come to the United States, his long history since coming here, and his strong feelings concerning this country. Based on the nature of the overall record and the totality of the evidence, I have determined that his family in the PRC do not constitute an unacceptable security risk, and Mitigating Condition (MC) E2.A2.1.3.1, a determination that the immediate family members in question 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 persons involved and the United States, applies. MC E2.A2.1.3.3. also applies because Applicant's contacts with his family in the PRC is casual and infrequent.

After considering all of the evidence of record on these issues, I conclude that the mitigating evidence substantially outweighs the evidence supporting the SOR, and even in the unlikely event pressure was exerted upon Applicant to compromise classified information, he would resist it and would report the incident to the proper authorities.

Accordingly, Applicant has mitigated the security concerns, thereby demonstrating that it is clearly consistent with national security to grant him a security clearance.

FORMAL FINDINGS

Paragraph 1. Guideline B: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: 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 or continue a security clearance for Applicant.

Martin H. Mogul

Administrative Judge