

KEYWORD: Foreign Influence

DIGEST: Applicant has four brothers, two sisters, a father-in-law, and a mother-in-law who are citizens of and who reside in the People's Republic of China (PRC). He failed to mitigate the foreign influence security concerns based on his family ties to the PRC. Clearance is denied.

CASE NO: 04-05745.h1

DATE: 05/11/2006

DATE: May 11, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-05745

DECISION OF ADMINISTRATIVE JUDGE

CHRISTOPHER GRAHAM

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant has four brothers, two sisters, a father-in-law, and a mother-in-law who are citizens of and who reside in the People's Republic of China (PRC). He failed to mitigate the foreign influence security concerns based on his family ties to the PRC. Clearance is denied.

STATEMENT OF THE CASE

On February 17, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR alleged facts under Guideline B (foreign influence), detailing 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 Applicant's security clearance.

In a written statement, dated March 12, 2005, Applicant responded to the allegations in the SOR, and requested a decision without a hearing. Department Counsel submitted a file of relevant material (FORM) in support of the Government's preliminary decision, a copy of which was received by Applicant on June 22, 2005. Applicant was afforded the opportunity to file objections and submit material in refutation, extenuation, or mitigation by July 22, 2005. Applicant did not respond to the FORM. The case was assigned to me on August 1, 2005.

FINDINGS OF FACT

Applicant admitted the allegations in the SOR that his four brothers, two sisters, his father-in-law, and mother-in-law are citizens and residents of the People's Republic of China (PRC); admitted he traveled to the PRC in 1996, 1999, and 2001; and that he applied for membership in the Chinese Communist Party (CCP) in 1985, prior to his coming to the

United States. Applicant did not respond to the FORM. After a thorough review of the record as a whole, I make the following additional findings of fact:

The PRC Constitution sets forth the supremacy of the Communist Party over all other government, military, and civilian entities. ⁽¹⁾ Applicant is a married, 59-year-old employee of a federal contractor. ⁽²⁾ He is a native of the People's Republic of China (PRC), was married in the PRC in 1972, came to the U. S. in 1985, and became a naturalized citizen in 2000. ⁽³⁾ He is employed as a senior principal contractor. ⁽⁴⁾

In addition to his travels to the PRC in 1996, 1999, and 2001, Applicant speaks by telephone with his siblings about twice each year. ⁽⁵⁾ There is no evidence whether Applicant's family members are employed, if so by whom, whether some are retired, and if so whether they are receiving pensions from the PRC.

The PRC has an abysmal human rights record, which includes arbitrary killings; detention or incarceration without notice in mental facilities; torture; arbitrary arrest, detention or exile; no right to a public, fair trial, and no rights of privacy for family, home or correspondence. ⁽⁶⁾ China engages in espionage against the United States, especially against Fortune 500 companies for technology and defense-related information. ⁽⁷⁾ The PRC has had success in obtaining classified defense information. ⁽⁸⁾

POLICIES

"[No] one has a 'right' to a security clearance." ⁽⁹⁾ 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." ⁽¹⁰⁾ 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 coercion, and willingness and ability to abide by regulations governing use, handling, and protection of classified information." ⁽¹¹⁾

Eligibility for a security clearance may be adjudicated using 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 factors listed in ¶ 6.3 of the Directive: nature and seriousness of the conduct and surrounding circumstances; frequency and recency of the conduct; age of the Applicant; motivation of the applicant, and the extent to which the conduct was negligent, wilful, voluntary, or undertaken with knowledge of the consequences involved; absence or presence of rehabilitation; and probability that the circumstances or conduct will

continue or recur in the future.

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.⁽¹²⁾ 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.⁽¹³⁾

Once the Government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.⁽¹⁴⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽¹⁵⁾ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the Government.⁽¹⁶⁾ Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism.

Having considered the evidence as a whole, I find the following guideline most pertinent to an evaluation of the facts of this case: Guideline B (foreign influence) Directive, ¶ E2.A2.1.1. *A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.*

CONCLUSIONS

Applicant admitted that he has numerous immediate family members living in the PRC. He provided no evidence where they live, where they work, or whether they are members of the Communist party. Common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to the potential to be manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service. Here, based on the record as a whole, the government established its case under Guideline B. Applicant has close family ties to the PRC, as his sisters, brothers, and his in-laws are citizens of and residents in the PRC. The strength of the ties is also demonstrated by Applicant traveling to the PRC for family visits and regular telephone contact with family members. These circumstances raise a security concern under DC 1, E2.A2.1.2.1. *An 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.*

I reviewed the mitigating conditions under Guideline B and conclude none apply. MC 1, E2.A2.1.3.1. *A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) 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 person(s) involved and the United States, does not apply.* There is no evidence to base a decision either way. The term "foreign power" includes political parties and entities controlled by the government.⁽¹⁷⁾ Applicant has the burden to present evidence to mitigate the security concern. As Applicant failed to respond to the FORM and provide answers to these questions, we do not know if his family members either work or worked for a government entity or rely on a government pension and thus could easily be exploited by the PRC government.

In deciding if an applicant has met the second prong of MC 1, it is proper to consider how the foreign country at issue is governed. The focus is its rulers and the nature of the government they impose. The PRC is has interests generally adverse to the U.S. and is ruled by a communist government with a poor record of human rights. With this history there is potential for a scenario in which Applicant's siblings could be subjected to some or all of these arbitrary denial of basic human rights in an effort to put pressure on him to divulge classified information. The PRC is actively pursuing industrial and military intelligence in this country. Given these circumstances, the presence of Applicant's siblings in the PRC places them at risk of being brought under control or used as a hostage by a PRC intelligence or security service. Unfortunately, his siblings and his in-laws are in a position where there is a potential for them to be exploited in a way that could force him to choose between loyalty to his family members and the interests of the U.S. Accordingly, Applicant failed to successfully mitigate the security concern. Guideline B is decided against him.

To conclude, Applicant has failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. But this decision should not be construed as an indictment of Applicant's loyalty and patriotism to the U.S., as those matters are not at issue. Instead, the clearly consistent standard requires I resolve any doubt against Applicant. His close family ties to the PRC create doubt about his security suitability. In reaching my decision, I have considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by E3.1.25 of Enclosure 3 of the Directive, are:

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

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 or continue Applicant's security clearance. Clearance is denied.

Christopher Graham

Administrative Judge

1. Government Exhibit 9 (*Report of the Select Committee on U.S. National Security and Military/Commercial Concerns with The People's Republic of China* dated June 1999) at 9.
2. Item 4 (Standard Form 85P (SF 85P) *Public Trust Position Application* signed October 4, 2001) at 1, 3.
3. *Id.* at 1, 3; Tr. at 19-22.
4. Item 4, *supra*, at 2.
5. Item 5 (Applicant's Sworn Statement dated April 9, 2003) at 2.

6. Government Exhibit 8 (U. S. State Department, *Country Reports on Human Rights Practices: China, 2005*,) at 1, 4-9, 11-12.
7. Government Exhibit 6 (*Annual Report to Congress on Foreign Economic Collection and Industrial Espionage for 2000*, at 1-18.
8. Government Exhibit 11 (*Report of the Select Committee on U. S. National Security and Military/Commercial Concerns with the People's Republic of China, ay 25, 1999*) at 19-21.
9. See *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1998).
10. *Id.* at 527.
11. Exec. Or. 12968, *Access to Classified Information*, § 3.1(b) (Aug. 4, 1995).
12. *Egan, supra*, at 531.
13. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).
14. See ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
15. *Id.*, at 3.
16. See *Egan*; Directive ¶ E2.2.2.
17. See 50 USC §1801 (a) (5) and (6).