

DATE: October 7, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-06564

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

SYNOPSIS

Applicant has worked for a defense contractor for the last ten years. In December 2003, he married a woman born in the People's Republic of China, who now resides with him in the United States. They are expecting a baby in January 2006. While he has no real contact with her family, she continues to have regular contact with her father and sister who live in the People's Republic of China. He has mitigated the government's concerns under Guideline B. Clearance is granted.

STATEMENT OF THE CASE

On April 15, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR details 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. Specifically, the SOR set forth security concerns arising under Guideline B, Foreign Influence, of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On May 3, 2005, Applicant submitted a notarized response to the allegations. He requested a hearing. This matter was assigned to me on August 1, 2005. A notice of hearing was issued on August 2, 2005, and a hearing was held on September 7, 2005. Two exhibits marked Government Exhibits 1 and 2 were admitted into evidence. Applicant submitted 13 exhibits marked as Applicant's Exhibits A through M, which were admitted into evidence. The government submitted seven documents marked hearing exhibits I through VII for administrative notice, ⁽¹⁾ and Applicant submitted one document for administrative notice, marked as Applicant's Exhibit N. These documents were accepted for purposes of administrative notice. Three witnesses testified on behalf of Applicant, who also testified on his own behalf. The hearing transcript (Tr.) was received on September 19, 2005.

FINDINGS OF FACT

Applicant admitted the allegations in subparagraphs 1.a through 1.d of the SOR.⁽²⁾ Those admissions are incorporated herein as findings of fact. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 49-year-old senior scientist for a defense contractor. He served six years in the United States Navy, and received an honorable discharge in 1980.⁽³⁾ While in the Navy, he held a security clearance.⁽⁴⁾ He completed a security clearance application (SF 86) in September 2003.⁽⁵⁾

Applicant enrolled in college following his military service.⁽⁶⁾ He received a Bachelor of Science degree in 1983 and a Master of Science degree in 1986 from a major university.⁽⁷⁾ Since 1986, he has worked for defense contractors as a scientist, in positions requiring a security clearance.⁽⁸⁾ He has received numerous performance awards.⁽⁹⁾ His last three performance evaluations have been "outstanding" or "exceeds expectations".⁽¹⁰⁾ As a hobby, he draws and paints. His mediums are Chinese brush painting and contemporary drawings.⁽¹¹⁾ He also teaches Chinese brush painting.⁽¹²⁾

Applicant married for the first time in December 2003.⁽¹³⁾ His wife is a Chinese citizen, born in the Peoples Republic of China (China).⁽¹⁴⁾ He met his wife on-line in early 2002.⁽¹⁵⁾ They began writing to each other via e-mail and instant messaging, and talking by telephone.⁽¹⁶⁾ They eventually discussed getting married and her moving to the United States.⁽¹⁷⁾ Before they could marry and prior to issuing a fiancée visa, the United States Citizenship and Immigration Services, formerly known as the United States Immigration and Naturalization Services or INS, required him to meet her in person.⁽¹⁸⁾ In October 2002, Applicant traveled to Hong Kong to meet her. They spent a week together before traveling to mainland China.⁽¹⁹⁾ He then met her father on three occasions and discussed with him his intent to marry his daughter.⁽²⁰⁾ He did not meet any other family members, but did meet two friends.⁽²¹⁾ Applicant and his then fiancée returned to Hong Kong for two more days. During this time, they became formally engaged.⁽²²⁾ He return to the United States in early November 2002 and began the process of obtaining a fiancée visa.⁽²³⁾ His fiancée immigrated to the United States in November 2003 and they were married a month later.⁽²⁴⁾ Prior to entering the United States, his wife worked in the real estate business, not for the Chinese government or the military.⁽²⁵⁾

When he entered China, an Asian couple approached him and his fiancée, asking to take his picture.⁽²⁶⁾ He thought this odd and upon his return, reported the incident to his security officer at work.⁽²⁷⁾ Nothing more occurred as a result of this incident. He has not returned to China and does not plan to do so in the future.⁽²⁸⁾ His wife has not returned to China since her arrival in the United States.⁽²⁹⁾ She has applied for permanent resident status and currently holds a valid, temporary lawful admission visa.⁽³⁰⁾ Because of bureaucratic problems, the processing of her visa has taken longer than anticipated.⁽³¹⁾

Applicant does not speak any Chinese dialects.⁽³²⁾ His wife speaks, writes and understands English, although not well.⁽³³⁾ Her parents and brothers do not speak English and her sister speaks only a little.⁽³⁴⁾ His wife was raised by her paternal grandmother, not her mother from whom she is estranged.⁽³⁵⁾ He does not talk with her family members, except to say "hi" when they call.⁽³⁶⁾ His wife talks with her father by telephone once every other month or so. She does not talk with her mother or her brothers. She does talk with her sister by telephone about once a month and occasionally by e-mail.⁽³⁷⁾ She has not developed friendships in either the American or Chinese-American communities since arriving in the United States and currently is not working.⁽³⁸⁾ She is learning English.⁽³⁹⁾

Applicant's father-in-law is a retired businessman. He is not a member of the communist party or the military, nor has he worked for the Chinese government.⁽⁴⁰⁾ His mother-in-law is a homemaker, who is not a member of the communist

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party. He does not know the source of their income. His sister-in-law sells cosmetics to European companies from China. She has never worked for the government nor has she been in the military. She receives no benefits from the government.⁽⁴³⁾ His wife's oldest brother is a businessman, selling clocks and watches in a shop. He has never worked for the Chinese government, does not receive benefits from the government, and has not been in the military.⁽⁴⁴⁾ His wife's younger brother is also a businessman, working in his wife's family business in China. The younger brother has never worked for the Chinese government, has not been in the military, and does not receive income from the Chinese government.⁽⁴⁵⁾ Applicant's wife provided him with the information about her family members.⁽⁴⁶⁾

Applicant owns no property, business interests or bank accounts in China.⁽⁴⁷⁾ His wife owns the home where her parents and sister reside in China.⁽⁴⁸⁾ He has not discussed the nature of his work with his wife or her family.⁽⁴⁹⁾ He only tells them he is a physicist.⁽⁵⁰⁾ Neither his wife nor members of her family have asked him to divulge any confidential information about his job.⁽⁵¹⁾ He credibly testified that he would not divulge confidential information if pressure was put on his wife's family and that he could do nothing to help them if the Chinese government did attempt to coerce his in-laws.⁽⁵²⁾ His wife is expecting a baby girl in January, who by birth, will be a citizen of the United States.⁽⁵³⁾

Two friends/co-workers and his boss testified on behalf of Applicant. All describe him as a man of integrity, honesty and character.⁽⁵⁴⁾ They characterize him as hardworking, competent and capable in his job.⁽⁵⁵⁾ They testified without qualification that he would safeguard the security of the United States.⁽⁵⁶⁾ One also advised that he had never discussed classified work outside of the office.⁽⁵⁷⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁵⁸⁾ The government has the burden of proving controverted facts.⁽⁵⁹⁾ The burden of proof is something less than a preponderance of the evidence.⁽⁶⁰⁾ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁶¹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁶²⁾

No one has a right to a security clearance⁽⁶³⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁶⁴⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽⁶⁵⁾ Section 7 of Executive Order 10865 specifically provides industrial security clearance 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." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant. ⁽⁶⁶⁾ 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Foreign Influence - Guideline B: 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

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline B. Based on all the evidence, Foreign Influence Disqualifying Condition (FI DC) 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*) applies in this case. Paragraph E2.A2.1.3.1. defines "immediate family members" to include a spouse, father, mother, sons, daughters, brothers, and sisters. Applicant's wife is a citizen of China. This "could create the potential for foreign influence that could result in the compromise of classified information." ⁽⁶⁷⁾ The mere possession of family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. ⁽⁶⁸⁾ 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 for him. ⁽⁶⁹⁾

Although the definition of family member in Paragraph E2.A2.1.3.1 does not include in-laws, the Appeal Board has opined that it includes a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. *See* ISCR Case No. 02-31154, at 4, fn 4 (citing ISCR Case No. 01-03120 (Feb. 20, 2002))(Sept,25,2005). Applicant's father-in-law, mother-in-law, two brothers-in-law and sister-in-law are citizens of the People's Republic of China and live there. Applicant has no contact with his mother-in-law and brothers-in-law. His only contact with his father-in-law and sister-in-law is to say "hi" when either calls to talk with his wife. However, in light of the Appeal Board's decision, his in-laws may also pose a security risk.

FI DC E2.A2.1.2.2 (*Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists*) also applies. As already stated, Applicant's wife is a citizen of China. She now resides with him in the United States. Applicant must 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 him. ⁽⁷⁰⁾

I have considered the Foreign Influence Mitigating Conditions (FI MC) and concluded that FI MC 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*) applies. Applicant's wife does not work. She did not work for the Chinese government or military prior to entering the United States. She worked in the real estate business, which does not make her an agent of a foreign power. Applicant must also show that his immediate family members or other persons to whom he may have close ties of affection or obligation are not in a position to be exploited in a way that could force Applicant to choose between

loyalty to the persons involved and the United States. He has no immediate family members living outside the United States. His closest family member is his wife, who lives with him, and soon they will have a baby daughter, whose anticipated birth will be in the United States. Because these family members are in the United States, they are not vulnerable to coercion or exploitation.

His wife is taking all the necessary steps to obtain permanent resident status in the United States. Due to a bureaucratic mix-up, and not her inactivity, her efforts have been slowed, and it is expected that the process will finalize shortly. She is learning English. She has not resided in the United States long enough to apply for citizenship. She also has made no effort to return to China. Applicant has mitigated the government's concerns under Guideline B as it relates to his wife.

Applicant has also rebutted the Appeal Board's presumption under FI DC E2.A2.1.2.1. as to his in-laws. His testimony showed that he does not have close ties of affection or sense of obligation to his in-laws. He does not talk with any members of his wife's family, except he may say "hi" to his sister-in-law or father-in-law if they call his home. He has never met his mother-in-law or brothers-in-law. He credibly testified at the hearing testimony that he has could not do anything to help his wife's family should the Chinese government decide to assert pressure on them. He reported to his security office the incident where his picture was taken almost immediately when he arrived in mainland China. He also reported to his security office his intention to travel to China, his engagement to a Chinese national, and his subsequent marriage. He would report contacts to the security office, should any occur. Applicant has also mitigated the government's concerns under Guideline B as it relates to his in-laws.

FI MC E2.A2.1.3.3. (*Contact and correspondence with foreign citizens are casual and infrequent*) also applies. As previously stated, Applicant has never met his mother-in-law, two brothers-in-law and sister-in-law. Beyond "hi" on the telephone to his father-in-law and sister-in-law, he has no contact with any of his wife's family members. He does not speak Chinese and they do not speak English. This lack of personal contact with his wife's family indicates an absence of affection. His wife has no contact with either of her brothers. Although her mother and father now live together, she only talks to her father. Because her mother did not raise her, she never developed close ties to her and remains very emotionally distant from her mother. Her lack of strong emotional ties with her brothers and mother strengthens the lack of affection between both she and Applicant and her family. He provides no financial support to her family nor have they asked for any support from him. It is clear from his hearing testimony that he does not have a feeling of obligation to his wife's family. Since he has almost no contact with his wife's family, he has mitigated the security concerns under Guideline B.

Applicant traveled to Hong Kong and mainland China only because the United States government required him to meet his prospective wife in person before granting her a fiancée visa. During his stay in Hong Kong, he spent the entire time with his wife. In China, he met her father and two of her friends. He spent no time with anyone else and did not report any unusual contacts by government representatives, although he did report the picture taking incident. His decision to travel to China was at the direction of the United States government, thus, it is not a negative to him. Applicant has mitigated the government's concerns under Guideline B, as it relates to his trip to China and Hong Kong.

Finally, I have considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I am persuaded by the evidence in this case that Applicant would not be vulnerable to pressure or duress from a foreign power or the government of the Peoples Republic of China. It is clear that he is cognizant of his duties in protecting national security, as he done so in the past. While his personal circumstances have changed, his wife resides in the United States, as will his soon to be daughter. Neither he nor his wife plan any trips to China in the near future. The possibility of pressure being exerted upon his wife and child by a foreign power or entity does not exist, thus his is not at risk. Applicant has mitigated the government's case under Guideline B. Accordingly, for the reasons stated, I find that it is clearly consistent with the national interest to grant a security clearance to Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline B: 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 of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant a security clearance for Applicant. Clearance is denied.

Mary E. Henry

Administrative Judge

1. The government also submitted for administrative notice a document marked Exhibit VIII. Applicant objected on the grounds of relevance. Document VIII was not accepted for administrative notice, as it was not relevant to this case. Tr. at 29.
2. Applicant's Answer to the SOR, dated May 3, 2005, at 1.
3. Tr. at 77-78.
4. Tr. at 78.
5. Government's Exhibit 1 (Applicant's Security Clearance Application, dated September 9, 2003) at 1.
6. Tr. at 79.
7. Tr. at 80.
8. Tr. at 80-85.
9. Applicant's Exhibit B.
10. Applicant's Exhibits C and D.
11. Applicant's Exhibit H.
12. Tr. at 94-96.
13. Tr. at 98, 107.
14. Government's Exhibit 2 (U.S. Department of Justice Application to Register as Permanent Resident or Adjust Status) at 1.
15. Tr. at 100.
16. Tr. at 100, 139-141.
17. *Id.*
18. Tr. at 101.
19. Tr. at 101-102.

20. Tr. at 102-106.

21. Tr. at 104-105, 132.

22. Tr. at 105-106.

23. Tr. at 106-107.

24. Tr. at 107.

25. Tr. at 143-144.

26. Tr. at 108, 133-135.

27. *Id.*; Tr. at 140.

28. Tr. at 112.

29. *Id.*

30. Applicant's Exhibits M and I at 4; Tr. at 114-115.

31. *Id.*

32. Tr. at 103.

33. Tr. at 100-101, 103.

34. Tr. at 103, 110.

35. Tr. at 110-111.

36. *Id.*; Tr. at 152.

37. Tr. at 110-112.

38. Tr. at 153.

39. Tr. at 140.

40. Tr. at 116-117, 147-148.

41. Tr. at 119, 148.

42. Tr. at 118, 149-150.

43. Tr. at 123-124.

44. Tr. at 119-121.

45. Tr. at 121-122.

46. Tr. at 117-118, 120, 123.

47. Tr. at 124, 130-131.

48. Tr. at 149-150.

49. Tr. at 125.

50. Tr. at 133, 139.

51. Tr. at 125.

52. Tr. at 126-130.

53. Tr. at 113.

54. Tr. 44, 61-62, 72-73

55. Tr. at 44, 59, 72.

56. Tr. at 48-49, 61, 73.

57. Tr. at 60.

58. ISCR Case No. 96-0277 (July 11, 1997) at 2.

59. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.

60. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

61. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.

62. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.

63. *Egan*, 484 U.S. at 531.

64. *Id.*

65. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

66. Executive Order No. 10865 § 7.

67. Directive, ¶ E2.A2.1.1.

68. ISCR Case No. 99-0424, 2001 DOHA LEXIS at 33-34 (App. Bd. Feb. 8, 2001)

69. *Id.*

70. *Id.*