

KEYWORD: Foreign Influence

DIGEST: Applicant was born in the People's Republic of China (PRC) and came to the U.S. in 1992 to complete his education. He, his wife, and their child became U.S. citizens in September 2001. His parents, parents-in-law, and four siblings are citizens and residents of the PRC. His parents and parents-in-law are retired, and one brother owns a small barber shop. The record contains no other relevant information about his family and in-laws. The security concern based on foreign influence is not mitigated. Clearance is denied.

CASENO: 04-09649.h1

DATE: 01/23/2006

DATE: January 23, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-09649

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was born in the People's Republic of China (PRC) and came to the U.S. in 1992 to complete his education. He, his wife, and their child became U.S. citizens in September 2001. His parents, parents-in-law, and four siblings are citizens and residents of the PRC. His parents and parents-in-law are retired, and one brother owns a small barber shop. The record contains no other relevant information about his family and in-laws. The security concern based on foreign influence is not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On July 21, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. 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), based on Applicant's family ties in the PRC. Applicant answered the SOR in writing on July 27, 2005, and elected to have the case decided on the written record in lieu of a hearing. Applicant admitted his parents, siblings, and parents-in-law are citizens and residents of the PRC (SOR ¶¶ 1.a., 1.b., and 1.c.), denied his father-in-law worked for the PRC jail system (¶ 1.d.), admitted sending money to his parents (¶ 1.e.), admitted helping his brother and sister-in-law to establish a barber shop (¶ 1.f.), and admitted traveling to the PRC in 2001 to visit family and friends (¶ 1.g.). Department Counsel submitted the Government's written case on August 31, 2005. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on September 28, 2005 and responded on September 30, 2005. The case was assigned to me on November 28, 2005.

FINDINGS OF FACT

Based on the entire record, I make the following findings of fact:

Applicant is a 48-year-old engineer for a defense contractor. He has worked for his current employer since December 2002. He has never held a security clearance.

Applicant was born in the PRC. He was married in April 1992 and completed his undergraduate education in the PRC in May 1992. He attended graduate school in the U.S. from May 1992 until December 1997, when he received his Ph.D. He, his wife, and their child became U.S. citizens in September 2001.

Applicant's parents, parents-in-law, and four siblings are citizens and residents of the PRC. Applicant asserts they are not his "immediate family" and his contact with them is "casual." Since he came to the U.S., he has visited his family in the PRC once, staying for about 21 days in 2001.

Applicant sends his parents \$600 once or twice a year on special occasions, as a sign of filial piety. In the Chinese culture, the numeral "6" signifies long life and health. His parents are both 80 years old.

In 2004, Applicant's brother became unemployed. Applicant gave him and his wife \$800 to start a small barber shop. Applicant has no financial interest in the barber shop.

Applicant denies the allegation his father-in-law worked in the PRC jail system. He states his father-in-law worked in a machinery shop that was attached to a jail. There is no evidence his father-in-law was connected with the PRC penal system. His father-in-law is now 83 years old and has been retired for nearly 30 years. The machinery shop no longer exists.

The PRC is a Communist state. The Chinese Communist Party is authoritarian in structure and ideology and dominates the government. Party committees work in all important government, economic, and cultural institutions to ensure party policy guidance is followed and non-party members do not create organizations that could challenge party rule. The U.S. State Department has documented numerous instances of human rights abuses stemming from the government's intolerance of dissent and the inadequacy of legal safeguards for basic freedoms. [\(1\)](#)

The PRC and the U.S. are major trading partners.⁽²⁾ After the terrorist attacks of September 11, 2002, the PRC became an important partner in U.S. counter-terrorism efforts. The PRC and the U.S. have worked closely on regional issues, especially those involving North Korea. However, U.S.-PRC relations are sometimes complicated by events in Taiwan and Hong Kong.⁽³⁾ The PRC is one of the most active collectors of U.S. defense information and technology.⁽⁴⁾

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 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, conditions 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, 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 [spouse, father, mother, sons, daughters, brothers, sisters], 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. Although Applicant denies his father, mother, and siblings are "immediate family," they fall within the Directive's definition of immediate family. Accordingly, I conclude DC 1 is established.

A disqualifying condition (DC 2) also may arise if an applicant is "[s]haring living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." I conclude DC 2 is established because the parents of Applicant's spouse are citizens and residents of the PRC.

Finally, a disqualifying condition (DC 3) may arise if an individual has relatives "who are connected with any foreign government." Directive ¶ E2.A2.1.2.3. Although the SOR ¶ 1.d. alleges Applicant worked for the PRC jail system, Applicant denies the allegation and asserts his father-in-law worked in a machinery shop that was attached to a jailhouse and has been retired for 25-30 years. The government has presented no evidence to contradict Applicant's assertion. There is no evidence in the FORM showing Applicant's father-in-law was an employee of the PRC penal system. I conclude Applicant has refuted the allegation in the SOR ¶ 1.d.

Since the Government produced substantial evidence to establish DC 1, the burden shifted to Applicant to produce

evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. In cases where an Applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members, 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." Directive ¶ E2A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1 ("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to choose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power").

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). The distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Nevertheless, 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.

Applicant has presented evidence his parents and parents-in-law are elderly and retired. He also has presented evidence his brother owns a small barber shop. The record does not indicate whether his sister-in-law is involved with the barber shop or is otherwise employed. He has presented no evidence regarding his other siblings, and no evidence concerning the political, economic, or social ties of his family or their dependence, if any, on the PRC government for medical or financial benefits. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). I conclude Applicant has not carried his burden of establishing MC 1.

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. Applicant asserts the contacts with his immediate family are "casual." However, there is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Contact is casual when it is unintended or occurs as an incidental

byproduct of other activities, such as attending a party where a foreign citizen also has been invited. Contact may not be casual if an applicant took the initiative to make it happen. The record reflects that Applicant's \$600 gifts once or twice a year are acts of filial piety, not incidental or unintended contacts. Similarly, the gift of \$800 to his brother to establish a barber shop goes beyond an incidental or unintended contact. I conclude MC 3 is not established.

"[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). Other than asserting in conclusory terms that his in-laws are not immediate family and contacts are "casual," Applicant has presented no evidence of the frequency or nature of his contacts with his in-laws. Thus, he has not rebutted the presumption.

None of the individual family circumstances discussed above are determinative. The totality of 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). After considering the disqualifying conditions established by the record and the absence of mitigating conditions, and evaluating the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on foreign influence.

FORMAL FINDINGS

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

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

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. U.S. Dept. Of State, *Background Note, China* 1, 7-9 (Mar. 2005), available on the internet at www.state.gov.
2. *Id.* at 13.
3. *Id.* at 19-20.
4. National Counterintelligence Center, *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage* 15 (2000); Defense Security Service, *Technology Collection Trends in the U.S. Defense Industry*, 8-9 (2004).