

KEYWORD: Foreign Influence

DIGEST: Applicant is a native of the People's Republic of China (PRC) who was naturalized as a U.S. citizen in January 1999. His mother, mother-in-law, sister-in-law, and two college acquaintances are citizens and residents of the PRC. In July 2005, he was determined by the Department of Veterans Affairs (DVA) to be eligible for a "noncritical sensitive" ADP position. Based on that determination, he is entitled to a favorable reciprocal determination from the Department of Defense (DoD). Eligibility for an ADP II/III position is granted.

CASE NO: 04-12728.h1

DATE: 04/28/2006

DATE: April 28, 2006

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In re:

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SSN: -----

Applicant for Trustworthiness Determination

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ADP Case No. 04-12728

**DECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Stephanie Hess, Esq., Department Counsel

## FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant is a native of the People's Republic of China (PRC) who was naturalized as a U.S. citizen in January 1999. His mother, mother-in-law, sister-in-law, and two college acquaintances are citizens and residents of the PRC. In July 2005, he was determined by the Department of Veterans Affairs (DVA) to be eligible for a "noncritical sensitive" ADP position. Based on that determination, he is entitled to a favorable reciprocal determination from the Department of Defense (DoD). Eligibility for an ADP II/III position is granted.

### STATEMENT OF THE CASE

On August 15, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary determination that Applicant was not eligible for assignment to information systems positions designated ADP II/III. <sup>(1)</sup> The SOR alleges security concerns under Guideline B (Foreign Influence). It alleges Applicant's mother (¶ 1.a.), mother-in-law and sister-in-law (¶ 1.b.), and two friends (¶ 1.c.) are citizens and residents of the PRC. It also alleges Applicant traveled to the PRC in May 1997, January 2000, June 2001, August 2002, and May 2003 (¶ 1.d.).

Applicant answered the SOR in writing on September 3, 2005, admitted the allegations in SOR ¶¶ 1.a., 1.b., and 1.d., denied the allegation in ¶ 1.c., offered explanations, and requested a hearing. The case was assigned to me on December 7, 2005, and the hearing was held as scheduled on February 28, 2006. DOHA received the transcript (Tr.) on March 7, 2006. I directed Department Counsel to submit a memorandum of law on reciprocity of trustworthiness determinations. I received two memoranda, the first on April 18, 2006, and the second on April 24, 2006. The memoranda are incorporated in the record as Hearing Exhibits (HX) X and XI. Post-hearing documentation of the sensitivity level of Applicant's position is incorporated as HX XII.

## **PROCEDURAL ISSUE**

The SOR contains two introductory paragraphs which are identical, except that the first refers to Applicant's eligibility for an ADP I/II position and the second refers to Applicant's eligibility for an ADP II/III position. The evidence adduced at the hearing established that Applicant had received a favorable determination of eligibility from the DVA for its equivalent of ADP II, and that he needed an equivalent clearance from the DoD. <sup>(2)</sup> Applicant's security officer verified that Applicant is seeking a trustworthiness determination for a "moderate risk" position. <sup>(3)</sup> Based on this evidence, I concluded that the reference to ADP I/II in first paragraph of the SOR was erroneous. Accordingly, this decision does not address Applicant's eligibility for an ADP I position.

## **FINDINGS OF FACT**

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a senior information technology consultant for a defense contractor. He came to the U.S. in 1986 on a student visa and became a U.S. citizen in January 1999. His wife entered the U.S. in 1987 and became a U.S. citizen in 1999. In July 2005, he was determined by the Department of Veterans Affairs (DVA) to be eligible for a "moderate-risk level" position, designated as "noncritical sensitive." <sup>(4)</sup> The DVA determination and the SOR in this case were based on the same security investigation, conducted by the Office of Personnel Management (OPM). <sup>(5)</sup>

Applicant is working on a project to create a health information exchange between the DVA patient record system and the DoD health care system. The project requires access to ADP systems of both the DVA and DoD. <sup>(6)</sup> He has received a DVA eligibility determination, but his participation in the project is limited because he has not yet received a DoD eligibility determination.

Applicant's mother, mother-in-law, and sister-in-law are citizens and residents of the PRC. His mother is almost 80 years old and has been retired for more than 10 years. Before retiring, she was a professor of mechanical engineering at a university in the PRC. Applicant has frequent, almost daily contact with her. <sup>(7)</sup> She receives a pension, but because it is not enough to pay her living expenses, Applicant and his brother assist her by sending about \$2,000 a year. <sup>(8)</sup>

Applicant's mother-in-law is more than 70 years old and retired. Applicant talks to her once every one or two months.<sup>(9)</sup> Applicant's sister-in-law is a homemaker and is in poor health. He talks to her about once a month.<sup>(10)</sup>

Applicant and his family traveled to the PRC in May 1997, while he was still a citizen of the PRC. He visited the PRC again in June 2001, January 2000, August 2002, May 2003, and June 2005. All trips were to visit his mother, mother-in-law, and sister-in-law.<sup>(11)</sup>

The two friends alleged in the SOR are college professors. Applicant's contact with them is infrequent, less than once every six months. Contact is event-driven and usually consists of an e-mail and attached photograph regarding a college class reunion or party. The e-mails are occasional exchanges of news rather than substantive conversations.<sup>(12)</sup>

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.<sup>(13)</sup>

The PRC and the U.S. are major trading partners.<sup>(14)</sup> After the terrorist attacks of September 11, 2001, the PRC became an important partner in U.S. counter-terrorism efforts. However, U.S.-PRC relations continue to be sometimes complicated by events in Taiwan and Hong Kong.<sup>(15)</sup> The PRC and the U.S. have worked closely on regional issues, especially those involving North Korea. Because the PRC is North Korea's sole military ally, U.S.-PRC relations complicate U.S. policy regarding the Korean Peninsula.<sup>(16)</sup> The PRC is an active collector of U.S. defense information and technology.<sup>(17)</sup>

## **POLICIES**

To be eligible for assignment to sensitive duties, an applicant must meet the security guidelines contained in the Regulation. "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." Regulation, ¶ C6.1.1.1. Appendix 8 of the Regulation sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each

guideline.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Regulation, Appendix 8. Each eligibility determination 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 Regulation. *Id.* 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 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 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. *Id.*

DoD contractor personnel are afforded the right to the procedures contained in DoD Directive 5220.6 before any final unfavorable access determination may be made. Regulation, ¶ C8.2.1. In security clearance cases, the Government initially must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. 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). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. The same rules apply to trustworthiness determinations for access to sensitive positions.

## CONCLUSIONS

"A security risk may exist when an individual's immediate family, . . . and other persons to whom he or she may be bound by affection, influence, or obligation, are (1) not citizens of the United States or (2) may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information." Regulation, Appendix 8. A disqualifying condition (DC 1) may arise when "an 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." *Id.* "[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 has not rebutted the presumption of ties of affection for or obligation to his mother-in-law and sister-in-law. His mother is a citizen and resident of the PRC. I conclude DC 1 is established.

A mitigating condition (MC 1) may apply if there is "a determination that the immediate family member(s), cohabitant, or associate(s) in question would not constitute an unacceptable security risk." Regulation, Appendix 8. When contacts and correspondence with foreign citizens are "casual and infrequent," a mitigating condition (MC 3) also may apply. *Id.*

The DVA, acting on the same security investigation as DOHA, resolved the security concerns based on foreign influence in Applicant's favor and granted him eligibility to hold a noncritical sensitive position. ADP II positions are classified as noncritical-sensitive under the Regulation, ¶¶C3.1.2.1.2.3. and AP10.2.2.1. The DVA determination raises the issue whether Applicant is entitled to a favorable DoD determination based on reciprocity. Department Counsel concedes Applicant is entitled to a favorable determination based on reciprocity. I agree with Department Counsel's concession for the reasons set out below.

The National Industrial Security Program Operating Manual (NISPOM), DoD 5220.22-M, February 28, 2006, paragraph 2-204, provides:

Any previously granted PCL [Personnel Security Clearance] that is based upon a current investigation of a scope that meets or exceeds that necessary for the clearance required shall provide the basis for issuance of a new clearance without further investigation or adjudication unless significant derogatory information that was not previously adjudicated becomes known to the granting agency.

Similarly, the Regulation, ¶ C4.1.1., provides:

Investigations conducted by DoD organizations or another Agency of the Federal Government shall not be duplicated when those investigations meet the scope and standards for the level of the clearance or access required. . . . Any previously granted security clearance or access, which is based upon a current investigation of a scope that meets or exceeds that necessary for the clearance or access required, shall provide the basis for issuance of a new clearance and/or access without further investigation or adjudication. Previously conducted investigations and previously rendered personnel security determinations shall be accepted within the Department of Defense, in accordance with the policy in sections C4.1.2. through C4.1.4. below.

Section C4.1.2. adds a requirement that there be no break in service of more than 24 months. Section C4.1.4. is entitled, "Investigations Conducted and Clearances Granted by Other Agencies of the Federal Government." Subsection C4.1.4.1. provides:

Whenever a prior investigation or personnel security determination (including clearance for access to information classified under Executive Order 12356 (reference (j))) of another Agency of the Federal Government meets the investigative scope and standards of this Regulation, such investigation or clearance may be accepted for the investigative or clearance purposes of this Regulation, provided that the employment with the Federal Agency concerned has been continuous and there has been no break longer than 24 months since completion of the prior investigation, and further provided that inquiry with the Agency discloses no reason why the clearance should not be accepted.

The NISPOM addresses only security clearances; it is silent on reliability determinations for "sensitive positions" such as ADP positions. However, the Regulation, ¶¶ C2.1.2. and C6.1.1., specifically addresses "assignment to sensitive duties" and lists ADP positions among the positions designated as "sensitive." ADP I positions are designated as "critical-sensitive." Regulation ¶¶ C3.1.2.1.1.7. and AP10.2.1.1. ADP II positions are designated as "noncritical-sensitive." Regulation, ¶¶ C3.1.2.1.2.3. and AP10.2.2.1. ADP III positions are "nonsensitive." Regulation, ¶¶ C3.1.2.2. and AP10.2.3.1.

The above-cited provisions of the Regulation establish four requirements for reciprocity:

(1) **The investigation must have been performed by a DoD organization or other federal agency.** Regulation, ¶ C4.1.1. This requirement was met in Applicant's case, because the investigation was performed by the OPM and Applicant's eligibility was adjudicated by DVA, both federal agencies.

(2) **The investigation must be "current."** Regulation, ¶¶ C4.1.1., C4.1.3.1., C4.1.4.1. Included in this requirement are provisions requiring that no derogatory information has become known since the last prior determination, and a requirement that inquiry with the agency that made the prior determination "discloses no reason why the clearance should not be accepted." DVA favorably adjudicated Applicant's eligibility on July 2005, based on the same investigation on which the SOR was based. No unfavorable information has become known since July 2005. There is no evidence in the record of a specific inquiry from DoD to DVA, asking if there is any reason why the DVA clearance should not be accepted; however, as of the date of the hearing Applicant was actively working on the DVA portion of the project in accordance with the DVA eligibility determination, thus negating any concern that a reason for not accepting the DVA determination might have arisen since July 2005. I conclude this requirement was met.

(3) **The scope of the prior investigation must meet or exceed the scope of the investigation required for the current access requested.** Regulation, ¶¶ C4.1.1. Applicant is seeking an eligibility determination for an ADP II position, designated noncritical-sensitive. A National Agency Check plus Written Inquiries (NACI) is required for ADP II and ADP III positions. Regulation, ¶¶ C2.3.3., C3.2.2., C3.2.3.1. A National Agency Check (NAC) is "a records check of designated agencies of the Federal Government that maintain record systems containing information relevant to make a personnel security determination." Regulation, ¶ C2.3.2. A NACI is a NAC plus written inquiries to law enforcement agencies, former employers and supervisors, references, and schools covering the last five years. Regulation, ¶ C2.3.3.

Applicant's eligibility determination by the DVA was not based on a NACI, but rather on a "Minimum Background Investigation" (MBI) conducted by OPM. An MBI is defined in Veteran's Administration Directive 0710(5)(v) as follows:

This investigation covers a period of five years and is used for Moderate Risk positions. It consists of a review of

National Agency Check (NAC) records [OPM Security Investigations Index (SII), DoD Defense Central Investigations Index (DCII), FBI name check, FBI fingerprint check]; a credit report covering a period of five years; written inquiries to previous employers and references listed on the application for employment; an interview with the subject, spouse, neighbors, supervisor, co-workers; and verification of educational degree.

The DVA definition of a NAC includes an FBI name check and fingerprint check, making it broader than a NAC as defined in the Regulation and more like a NACI. The DVA definition of an MBI includes an interview with the subject, which is not required in a NACI. I conclude the MBI conducted by OPM for DVA was broader than the NACI required by the Regulation. Thus, I conclude this requirement is met.

(4) **There has been no break in service for more than 24 months.** Regulation, ¶¶ C4.1.2., C4.1.4.1. This requirement has been met because Applicant's service as a government contractor has been continuous throughout and following his prior investigation and eligibility determination.

Having concluded all the requirements for reciprocity have been met, as conceded by Department Counsel, I conclude Applicant is entitled to a favorable reciprocal eligibility determination.

### **FORMAL FINDINGS**

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

Subparagraph 1.e.: For Applicant



## DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant's eligibility for assignment to sensitive duties. Eligibility for positions designated ADP II/III is granted.

LeRoy F. Foreman

Administrative Judge

1. 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 procedural rules set out in the Directive for security clearance cases are applied to ADP trustworthiness determinations. The adjudicative guidelines set out in Department of Defense Regulation 5200.2R, *Personnel Security Program* (Jan. 1987), as amended and modified, are used to make ADP trustworthiness determinations.

2. Tr. 47.

3. HX XII.

4. Applicant's Exhibit (AX) A.

5. HX X at 4.

6. AX C at 2; Tr. 48.

7. Government Exhibit (GX) 2 at 1; Tr. 51-52.

8. Tr. 62, 67.

9. Tr. 52-53.

10. GX 2 at 1.

11. *Id.*

12. Tr. 55-58.

13. U.S. Dept. of State, *Background Note, China* 1, 7-9 (Mar. 2005), incorporated in the record as Hearing Exhibit (HX) V; U.S. Dept. of State, *Country Reports on Human Rights Practices* 1-3 (Feb. 28, 2005), incorporated in the record as HX VI.

14. HX V at 13.

15. *Id.* at 19-20.

16. Congressional Research Service, *China-U.S. Relations: Current Issues and Implications for U.S. Policy* 14 (Mar. 24, 2005), incorporated in the record as HX I.

17. National Counterintelligence Center (NACIC), *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage* 1-2, 13 (2000), incorporated in the record as HX III. NACIC's report for 2005 indicates that the key collectors of information have remained the same in 2005. HX VIII at 3.