

DATE: June 15, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-12889

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Jeff A, Nagel, Esquire, Department Counsel

FOR APPLICANT

Thomas M. Abbott, Esquire

McKenna, Long & Aldrich

SYNOPSIS

The Applicant's mother is an American citizen and lives in the People's Republic of China (PRC). His wife has family who live in Hong Kong, but are primarily not citizens of the PRC or the Hong Kong Special Administrative Region (HKSAR). These relatives are not agents of those governments, or in a position to be exploited by them. The Applicant has considerable links to the United States, is knowledgeable about his security responsibilities, and shows that he can fulfill them. Sufficient mitigation is shown. Clearance is granted.

STATEMENT OF THE CASE

On August 23, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on September 9, 2005, and requested a hearing. The case was received by the undersigned on September 28, 2005, and a Notice of Hearing was issued on October 26, 2005.

A hearing was held on November 18, 2005, at which the Government presented five documentary exhibits. Testimony was taken from the Applicant, who also submitted 14 exhibits. The transcript was received on December 1, 2005.

FINDINGS OF FACT

The Applicant is 60, married and has a Doctorate in Chemical Physics. He is employed by a defense contractor as a

Program Manager, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant may have foreign connections which potentially make him vulnerable to coercion, exploitation or pressure.

The Applicant was born in mainland China in 1945. The Applicant and his family moved to Hong Kong in 1949, after the Chinese Civil War. He emigrated from Hong Kong in 1964 in order to continue his studies in the United States. The Applicant became a naturalized American citizen in November 1976. His wife was also born in mainland China, and she became a naturalized American citizen in September 1984. They were married in 1992. It is the second marriage for each of them. (Government Exhibit 1, Transcript at 18-19.) The Applicant has two American born children from his first wife. (Transcript at 20-22.) His current wife has three American born children from her first marriage. (Transcript at 22-23.) The Applicant and his wife have about \$1,750,000 in assets in the United States. (Transcript at 39-40, Applicant's Exhibits G through K.)

The Applicant's father is deceased. His mother lived in the United States for many years, and became an American citizen in July 1989. (Government Exhibit 1 at 11.) The Applicant's mother now lives in the PRC. She decided to move back there to be close to her remaining siblings, and also because of the availability of transportation and a lower cost of living. The Applicant talks to his mother once or twice a month, and tries to visit her once a year. She supports herself financially. (Transcript at 24-26.)

The Applicant has two sisters. One is an American citizen and lives in the United States. The other is a British National Overseas citizen. She lives in Malaysia with her Malaysian husband. The Applicant's mother is closer to the sister who lives in Malaysia, because that sibling is geographically closer to his mother. (Transcript at 27-32.) None of his direct family works for a foreign government or is an agent of a foreign government.

The majority of the Applicant's wife's family lives in Hong Kong. However, all but two of them are not citizens of the PRC or the HKSAR. Her parents are citizens of Singapore. She has two brothers living in Hong Kong. One is a citizen of Singapore and the other is a citizen of the HKSAR. The Applicant's wife also has three sisters. One lives in Singapore and is a citizen of that country. One of the sisters who lives in Hong Kong is a citizen of Canada, the other is a citizen of the HKSAR. The Applicant did not meet any of his in-laws until he married his current wife in 1992. None of the Applicant's wife's family works for any foreign government or is an agent of a foreign government. (Transcript at 32-37.)

The Applicant made sixteen these trips to Taiwan, the PRC and/or Hong Kong between 1996 and 2004. Some of the trips were in connection to business travel the Applicant made to Japan for his employer. He would take advantage of such trips to fly to Hong Kong with his wife. The other trips were made primarily to visit his wife's family, as the Applicant has no immediate family in Hong Kong or PRC other than his mother. (Transcript at 34-35.) The Applicant does not stay long in Hong Kong or PRC. He stated that is because he is by nature an American and gets bored if he stays longer in Asia. (Transcript at 41.)

With regards to his foreign travel, the Applicant stated that his Facility Security Officer had knowledge of all of his trips. (Transcript at 44.) In addition, the Applicant's supervisor stated, "I am aware that [the Applicant] was . . . born [in] China and that he still has relatives who live in China. [The Applicant] has never made any effort to hide this fact or his trips to China and Hong Kong." (Applicant's Exhibit A at 2.) Two co-workers, a close friend who was a member of the Senior Executive Service, and a Program Manager in the Defense Department, all affirm that the Applicant has been open about his trips to Asia. (Applicant's Exhibits B, C, D and N.)

The Applicant has received a considerable amount of security training from his employer over the years. (Transcript at 16-17, Applicant's Exhibit E.) The Applicant was asked what he would do if he was approached by a foreign intelligence service. He stated, "Well there is no choice for me to do, but to report it back to [his employer's] security

office. My thinking is if my relative is in trouble, maybe held hostage, just providing them information doesn't help. The best thing to do - - my Mom is a U.S. citizen - - and the best thing to do is go back and let the Government handle that." (Transcript at 42-43.)

Mitigation.

The Applicant has been part of the defense industry for about 30 years, has held a clearance for about 23 years, and is very proud of the work he does. (Transcript at 17-18, 38-39.) He has lived in the United States over 40 years, about two-thirds of his life. He has fully assimilated into American society. (Transcript at 41.)

His manager submitted a statement on the Applicant's behalf. He has known the Applicant since 1990 and states that the Applicant "is a man of unquestioned integrity." The manager strongly recommends the Applicant for a position of trust. (Applicant's Exhibit A.) A co-worker who has known the Applicant since 1976, when they went to graduate school together, states, "[I]n the almost 30 years I have known him, I have never had any reason to doubt his allegiance to the United States. I am not aware of anything [the Applicant] has ever said or done which would cause me to doubt his loyalty to the United States." (Applicant's Exhibit B.) (*See* Appellant's Exhibits C, D and N.)

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case will be set forth under CONCLUSIONS, below.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately

concerned where available information indicates that an Applicant for clearance may have foreign connections that could lead to poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance. In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has foreign connections which could cause a security concern (Guideline B).

The Applicant, on the other hand, has successfully mitigated the Government's case. The Applicant's mother is an American citizen who lives in the PRC. His wife's family lives primarily in Hong Kong, but most of them are citizens of other countries. Their presence requires application of Disqualifying Condition 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 have considered his foreign trips in connection with his contacts in the PRC and Hong Kong. In addition, I have also considered the information about the PRC's interest in, and attempts to obtain, technology as set forth in Government Exhibit 3 and Applicant's Exhibit L. Finally, the information about the PRC and the HKSAR set forth in Government Exhibits 4 and 5 has also been considered.

What the available evidence shows is that the PRC is an active collector of intelligence, and that it has suffered technology losses itself. (Applicant's Exhibit L at 15.) In addition, there is no evidence to show that the PRC government, though Communist in nature, has attempted to intimidate *foreign* nationals who reside within its borders. To conclude, based on the evidence available to me, that the PRC or HKSAR would resort to such intimidation techniques which could bring about international diplomatic sanctions would be rank speculation. Under the particular facts of this case, particularly the citizenship of his mother and wife's relatives, I find that there is no reasonable potential for coercion.

None of his family or his wife's family in the PRC or Hong Kong is an agent of those governments or, in my opinion, in a position to be exploited by those governments. The possibility that the Applicant can be coerced by his mother, or his wife's family is virtually nil. Under the particular facts of this case, the following Mitigating Condition applies: 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).*)

"[A] Judge is not limited to Adjudicative Guidelines mitigating conditions when deciding whether an applicant has demonstrated extenuation or mitigation."⁽¹⁾ In this case, the Applicant is also eligible for clearance under relevant General Factor h. Assuming, for sake of argument, that the position of the Applicant's foreign family members (including his in-laws) is significant and precludes application of Mitigating Condition E2.A2.1.3.1., the totality of this Applicant's conduct and circumstances, as set forth at length above, including the virtually non-existent potential for

exploitation, still warrants a favorable finding under the whole person standard.

The record shows that the Applicant has been an American citizen for many years, his substantial financial assets are in the United States, as are almost all of his immediate family (especially his wife and children), and he has favorable character references. The evidence further demonstrates that the Applicant is a patriotic American citizen. He testified about the importance of his family in the United States, and his pride in being an American citizen and a member of the defense industry. He is knowledgeable about security and understands his responsibility, having held a security clearance for over 20 years without incident. Using the whole person standard, the Applicant has mitigated the security significance of his foreign connections and is eligible for a security clearance.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraphs 1.a. through 1.d.: For the 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 the Applicant.

Wilford H. Ross

Administrative Judge

1. ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006).