

KEYWORD: Foreign Influence

DIGEST: Applicant failed to mitigate foreign influence security concerns raised by the presence in the People's Republic of China of his two sisters-in-law and his mother's brother and sister. Clearance is denied.

CASENO: 05-03271.h1

DATE: 05/16/2006

DATE: May 16, 2006

---

In re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 05-03271

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Ray T. Blank Jr., Esq., Department Counsel

**FOR APPLICANT**

### **SYNOPSIS**

Applicant failed to mitigate foreign influence security concerns raised by the presence in the People's Republic of China of his two sisters-in-law and his mother's brother and sister. Clearance is denied.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. In accordance with Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on 29 October 2005 detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing on 17 November 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 14 February 2006. On 29 March 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 10 April 2006.

I granted the unopposed motion of Department Counsel to delete the word "Canada" from ¶ 1.h of the SOR.

### **FINDINGS OF FACT**

Applicant is a 33-year-old software engineer for a defense contractor for whom he has worked since 1999. He was born and raised in the People's Republic of China (PRC). His father first came to the U.S. around 1980. Tr. 35. When he was 20 years old, Applicant, his mother, and his two siblings came to the U.S. to join the children's father. Tr. 31-32, 35. Applicant became a U.S. citizen in September 1997 and received his U.S. passport a month later. The PRC passport which Applicant used before he became a U.S. citizen expired in July 1999.

Applicant has two siblings, a brother and a sister. Both are naturalized U.S. citizens residing in the U.S. His sister lives with Applicant and his family.

Applicant traveled to the PRC five times between 1994 and 1999 in order to meet with his future wife, get married, and finally bring her to the U.S. She was born in the PRC and became a U.S. citizen in November 2002. She has three sisters, one lives in the U.S., the other two live in the PRC. Applicant's wife maintains telephonic contact with her sisters in the PRC. Tr. 43.

Applicant and his wife have two children. Their daughter is a U.S. citizen by virtue of her birth in the U.S. in 1999. When she was three months' old, she went to live with Applicant's in-laws in the PRC. She came back to the U.S. in 2003. Their son is a U.S. citizen by virtue of his birth in the U.S. in 2001. Tr. 24. When he was six months' old, Applicant took his son to the PRC to live with his wife's parents. Tr. 25. Applicant sent \$300 a month to his in-laws so they could take proper care of his son. Tr. 26. The son returned to the U.S. in 2005. Applicant sent his children to the PRC because he thought his in-laws could better care for them as Applicant was busy at work and his wife was attending school.

Applicant's parents remained citizens of the PRC. His father took the U.S. citizenship exam two or three times but did not pass. Applicant's father died in October 2004. Answer. Applicant's mother still resides with him, but is currently hospitalized in the PRC. Tr. 23. She went to visit China in January and discovered a tumor. She is recovering from surgery and will not be able to travel back to the U.S. until sometime in May 2006.

Applicant's mother- and father-in-law are citizens of the PRC. They are now permanent residents of the U.S. and live with Applicant and his family. Tr. 24; Answer.

Applicant's brother's son is a U.S. citizen by birth in the U.S. in 2003. He lived with Applicant from June-November 2003.

Applicant has two paternal aunts who are citizens and residents of the PRC. He also has three uncles and one aunt, on his mother's side of the family who were citizens and residents of the PRC. One of his uncles remains in the PRC, one is living in Holland, and the third is a permanent U.S. resident. Applicant has not had much contact with any of other his aunts or uncles. His mother telephones her brother and sister who live in the PRC. Tr. 42.

Applicant's church pastor reports Applicant is a man of faith and a trusted friend.

The PRC is an authoritarian state, has an abysmal human rights record, and is among the most active collectors of intelligence from U.S. sources.

## 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 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). 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.

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 process factors listed in ¶ 6.3 of the Directive. 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.

## CONCLUSIONS

In the SOR, DOHA alleged Applicant's parents are citizens of the PRC residing in the U.S. (¶ 1.a); his wife's parents are citizen residents of the PRC (¶ 1.b); his son, a U.S. citizen was residing in the PRC (¶ 1.c); he provides financial assistance to his wife's parents in the PRC to support his son. (¶ 1.d); his daughter, a U.S. citizen resided in China from 1999-2003 (¶ 1.e); his nephew, a citizen of the PRC, resided with him in the U.S. in 2003 (¶ 1.f); his two paternal aunts are citizen residents of the PRC (¶ 1.g); his three uncles and one aunt (maternal) are citizens and residents of the PRC (¶ 1.h); and he traveled to the PRC in 2001 and five times from 1994-99 (¶ 1.i). In his Answer, Applicant admitted each of the allegations, with explanation. A security risk may exist when an applicant's immediate family, or other persons to

whom he 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.

It is potentially disqualifying for an applicant to have immediate family members, or persons to whom he has ties of affection or obligation, who are citizens or residents of, or present in, a foreign country (DC E2.A2.1.2.1) or to share living quarters with persons if the potential for adverse foreign influence or duress exists (DC E2.A2.1.2.2). These disqualifying conditions are closely related and often entwined.

The evidence established that Applicant's mother is a permanent U.S. resident who is temporarily in the PRC recovering from an operation she had while visiting there. Applicant expects her return to the U.S. this month. She is the sole member of Applicant's immediate family who is a citizen of or present in the PRC. Applicant's in-laws are citizens of the PRC but permanent U.S. residents. There is a rebuttable presumption that an applicant has ties of affection or at least obligation to immediate members of his wife's family. ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at \*8 (App. Bd. Feb. 20, 2002). Applicant failed to rebut the presumption as to his wife's parents and sisters. Applicant's parents-in-law live with Applicant and his family. His wife telephones her sisters in the PRC. Thus, there is evidence Applicant has ties of affection or obligation to them.

The evidence also established that Applicant has three aunts who are citizen residents of the PRC and three uncles who are citizens of the PRC; one uncle resides in the PRC, one is a permanent U.S. resident, and the third lives in Holland. Applicant does not have close ties of affection or obligation to any of these aunts or uncles.

Applicant shares his living quarters with his wife, his mother, and his parents-in-law. His in-laws have two daughters (Applicant's wife's sisters) who are citizen residents of China. His mother has a sister and at least one brother who are citizen residents of the PRC. Under these circumstances, I conclude the potential for foreign influence or duress exists by virtue of Applicant's mother and in-laws living with him.

An applicant may mitigate foreign influence security concerns by establishing that his foreign associates are neither agents of a foreign power nor in a position to be exploited by a foreign power in a way that could force the applicant to choose between loyalty to the foreign contact and loyalty to the U.S. MC E2.A2.1.3.1. An applicant may also mitigate foreign influence security concerns by establishing that his contact and correspondence with the foreign citizens are casual and infrequent. MC E2.A3.1.3.

Congress has directed that the term "agent of a foreign power," when used to determine access to classified information, has the same meaning as set forth in 50 U.S.C. § 1801(b). 50 U.S.C. § 438. As defined in 50 U.S.C. § 1801(b), "agent of a foreign power" means

(1) any person other than a United States person, who-

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or

(C) engages in international terrorism or activities in preparation therefore; or

(2) any person who-

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power;

(D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or

(E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

Applying this definition, none of Applicant's foreign contacts are agents of a foreign power. [\(1\)](#)

But the inquiry in a foreign influence case is not limited to a consideration of whether the foreign contacts are agents of a foreign power. Applicant must also demonstrate that his foreign contacts are not in a position to be exploited by a foreign power in a way that could force the applicant to choose between loyalty to his foreign contacts and loyalty to the U.S. In such an inquiry it is important to consider a broad range of factors, including the depth of the relationship between the applicant and his foreign associates. The stronger the relationship the more vulnerable an applicant is to coercion or exploitation. Other factors include the identity of the foreign country and whether the foreign country is known to target U.S. citizens to obtain protected information and/or is associated with a risk of terrorism. The PRC is known to target U.S. citizens to obtain protected information.

Applicant's mother is a citizen of the PRC and is there while she recovers from surgery. Applicant's mother maintains contact with her sister and a brother who are citizens and residents of the PRC. Applicant's wife maintains telephonic contact with her sisters in the PRC. Although Applicant does not have personal contact with either his aunts, uncles, or sisters-in-law in the PRC, members of his household do. It is clear that Applicant is a member of a strong and extended family unit. While an analysis of each individual foreign associate might reveal favorable results, under the totality of the circumstances, I am unable to conclude Applicant established the applicability of any of the mitigating conditions.

I found for Applicant on ¶¶ 1.e and 1.f. Applicant's daughter is now residing in the U.S. and there is no likelihood she will return to reside in the PRC. Applicant's nephew is a native-born U.S. citizen. I also found for Applicant on ¶ 1.i. Travel to the PRC is not disqualifying in and of itself. It is merely evidence of an individual's ties to the country. Furthermore, Applicant has no intent or any apparent reason to return there.

Determining suitability for a security clearance requires a predictive judgment-it is an attempt to determine who might pose a security risk at some future time, based on certain established guidelines. As noted above, the decision to deny an individual a security clearance is not a judgment of an applicant's loyalty. Exec. Or. 10865 § 7. It is merely a determination the applicant has not met the strict guidelines set out by the President and the Secretary of Defense.

## **FORMAL FINDINGS**

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

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

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: For Applicant

### **DECISION**

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. The Appeal Board has read the term "agent of a foreign power" more broadly. It is either unaware of 50 U.S.C. § 438 or has decided not to follow this congressional mandate. *See* ISCR Case No. 02-24254 (App. Bd. Jun. 29, 2004)



(holding the definition of "agent of a foreign power" in the adjudicative guidelines is not limited by 18 U.S.C. ¶ 1801(b) because that federal statute applies only to foreign intelligence surveillance activities); *accord* ISCR Case No. 03-10954 at 4 n. 5 (App. Bd. Mar. 8, 2006).