

KEYWORD: Foreign Influence; Personal Conduct

DIGEST: Applicant mitigated security concerns raised by an incorrect answer on his security clearance application, but failed to mitigate concerns raised by the presence in the People's Republic of China of his parents, brother, parents-in-law, and a sister-in-law. Clearance is denied.

CASE NO: 05-03979.h1

DATE: 05/24/2006

DATE: May 24, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-03979

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant mitigated security concerns raised by an incorrect answer on his security clearance application, but failed to mitigate concerns raised by the presence in the People's Republic of China of his parents, brother, parents-in-law, and a sister-in-law. 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 20 October 2005 detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 28 October 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 17 February 2006. On 5 April 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 19 April 2006.

FINDINGS OF FACT

Applicant is a 42-year-old program manager for a defense contractor. He is married and has one child. His superiors and coworkers find him to be a dedicated and trustworthy employee.

Applicant was born in the People's Republic of China (PRC) in 1963. His father was a university professor and his mother worked as an engineer in a paper-making institute. For his first seven years, Applicant was raised by his

grandmother. During the so-called Cultural Revolution, his family was persecuted by the communists. Applicant accompanied his parents, who were sent to remote farm land to do labor-intensive work. His parents are citizen residents of the PRC, as is his 39-year-old brother, who works as an accountant. Applicant's parents are retired and receive a very small pension. Applicant provides them financial support of between \$1,000-\$2,000 a year. He speaks with them via telephone approximately once a month.

Applicant married a native-born citizen of the PRC in April 1989. Her parents and one of her two sisters are citizen residents of the PRC. Her other sister has immigrated to the U.S. Her father was a civil engineer and her mother was a school teacher. They were also persecuted during the Cultural Revolution. Both are now retired. They visited Applicant and his wife in the U.S. in 2005. Applicant and his wife do not provide financial support to her parents.

Applicant and his wife decided to try to emigrate to the U.S. because of the educational and financial opportunities and the religious and political freedoms available here. Applicant's wife entered the U.S. first, in June 1989, during the revolt of students in Tiananmen Square. Applicant followed in January 1990.

Having received his bachelor's degree in computer science from a Chinese university, Applicant completed his master's and PhD in electrical engineering in the U.S. He and his wife are both naturalized U.S. citizens. Their daughter is a U.S. citizen by birth.

Applicant traveled to Australia in November 1998, Canada in June 1999, Austria in February 2001, and the PRC in 1994, 2001, and 2004. The trips to Australia, Canada, and Austria were to attend professional meetings while he was pursuing his advanced degrees. The trips to the PRC were to visit his family and his wife's family, and were normally two to three weeks in duration. Applicant did not have any incidents of security concern during his travels to the PRC. Since he became a U.S. citizen and obtained his U.S. passport in 2001, Applicant has traveled exclusively on that passport.

On 8 October 2003, Applicant completed a security clearance application (SCA) by certifying that his statements therein were true, complete, and correct to the best of his knowledge and belief, and by acknowledging that a knowing and willful false statement could be punished by fine and/or imprisonment. Ex. 1 at 8. Question 16 asked if, in the previous seven years, Applicant had traveled outside the U.S. on other than official U.S. Government orders. Ex. 1 at 5. Applicant answered "no." He misread the question to ask if he had traveled outside the U.S. on government orders.

Applicant is fully cognizant of his duties and responsibilities to protect classified information and to report any security incidents to security officials.

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. It is known to attempt to exploit U.S. citizens through their relatives in the PRC.

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

Guideline B-Foreign Influence

In the SOR, DOHA alleged Applicant's parents (¶ 1.a), brother (¶ 1.b), and parents-in-law (¶ 1.c) are citizen residents of the PRC; and Applicant traveled to the PRC in June 2001 and July 2004 (¶ 1.d). In his Answer, Applicant admitted each of the allegations in ¶ 1. 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. Applicant has immediate family members-his parents and brother who are citizens and residents of the PRC. The Appeal Board has determined there is a rebuttable presumption that an applicant has close ties of affection, or at least obligation, to members of his wife's family. ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Feb. 20, 2002). Applicant did not rebut that presumption. I conclude DC E2.A2.1.2.1 applies to Applicant's parents, his brother, and his in-laws in the PRC.

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 be exploited by a foreign power in a way that could for the applicant to choose between loyalty to the foreign contact and loyalty to the U.S. MC E2.A2.1.3.1. 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 is an agent 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.

After careful consideration of all the evidence, including the adjudicative process factors from Directive ¶ 2.2.1, I conclude Applicant failed to mitigate foreign influence security concerns. The presence in the PRC of the rest of his family and all but one member of his wife's family raises the risk to an unacceptable level. 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.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant falsified his SCA by deliberately failing to disclose that he had traveled to Australia (¶ 2.a(1), Canada (¶ 2.a(2), Austria (¶ 2.a(3), and the PRC (¶ 2.a(4). In his Answer, Applicant admitted traveling to those countries, but denied deliberately falsifying his SCA. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The deliberate omission, concealment, or falsification of relevant and material facts from a SCA is a potentially disqualifying condition. DC E2.A5.1.2.2. An applicant's foreign travel is relevant and material to a determination of the applicant's security worthiness. Applicant failed to list in his SCA his foreign travel to Australia, Canada, Austria, and the PRC. Nevertheless, after listening carefully to Applicant's testimony and observing his demeanor, I am convinced his inaccurate answers were due to his misreading the question rather than any intent to mislead security investigators. Therefore, I find for Applicant on ¶ 2.

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

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: 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).