

DATE: October 24, 2006

In Re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 05-17812

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Goldstein, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The foreign citizenship of applicant's husband and two siblings do not constitute an unacceptable risk. Determination of Trustworthiness is granted.

STATEMENT OF THE CASE

On April 9, 1993, the Composite Health Care System Program Office (CHCSPO), the Defense Office of Hearings and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I), entered into a Memorandum of Agreement which gave DOHA the responsibility to provide trustworthiness determinations for contractor personnel employed in Information Systems Positions as defined in DoD Regulation 5200.2R, *Personnel Security Program*, dated January 1987.

On February 8, 2006, DOHA issued a Statement of Reasons (SOR) to applicant which detailed reasons why DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to make or continue a determination of trustworthiness, suitability, and eligibility for applicant to hold a sensitive Information Systems Position (ADP-I/II/III). [\(1\)](#)

Applicant responded to the SOR on February 24, 2006 and requested a hearing. The case was assigned to the undersigned on May 31, 2006. A Notice of Hearing was issued on August 22, 2006, and the hearing was held on September 20, 2006. The transcript was received on September 29, 2006.

RULINGS ON PROCEDURE

At the hearing, the first paragraph of the SOR was amended by deleting the following: "paragraph 3-614, DoD Regulation 5200.2-R and paragraph 2.4.," (TR at 5-6).

FINDINGS OF FACT

Applicant is a 44 year old health care analyst. She has worked for her current employer since 2001.

Applicant was born in the People's Republic of China (PRC). She and her husband were married in the PRC in 1989.

Applicant's husband moved to the United States in 1992 to attend an American university. She joined him in the United States a year later. She enrolled at the same university where her husband was studying, and she eventually earned an MBA degree (Exhibit F).

Applicant became a United States citizen in 2003. Her husband is a legal permanent resident of the United States (Exhibit M), but a citizen of the PRC. Applicant testified that her husband does not want to become a United States citizen and give up his PRC passport at this time because he wants to be able to return to the PRC on short notice if one of his elderly parents, both of whom are residents and citizens of the PRC, becomes ill. He made this decision after seeing the problems applicant experienced as a United States citizen when trying to travel to the PRC on short notice to see her ailing mother. She further testified that this is the only reason he has not applied for United States citizenship, and when his parents pass on, he intends to become a United States citizen. The husband never worked for the PRC government or military.

Applicant has two children, both of whom are United States citizens. The oldest was born in the PRC and became a United States citizen when applicant did. The youngest was born in the United States.

Applicant's mother was a citizen and resident of the PRC. She recently passed away. Applicant has two siblings, and both are citizens and residents of the PRC. She communicates with each of them an average of once every two to three months. Neither of them has worked for the PRC government or military. Neither of them has visited applicant in the United States.

As noted above, applicant's mother-in-law and father-in-law are citizens and residents of the PRC. She speaks to them on holidays, maybe two to three times a year. Her husband speaks with his parents about once a month. They have visited applicant and her husband in the United States twice, the last time in 2001. Neither in-law worked for the PRC government or military.

Applicant's husband has a brother who is a citizen and resident of the PRC. He has no connection to the PRC government or military. The husband speaks with his brother a few times a year.

Applicant traveled to the PRC at least five times since moving to the United States. Her last two trips were in 2005. In March 2005, she traveled there for her mother's funeral. Later that year she traveled back to deal with family issues arising from her mother's death. She has no current plans to visit the PRC.

Applicant has lived in the United States continuously since 1993. She and her husband have substantial equity in a home they have owned since 2002, and each has a 401K plan worth about \$70,000.00. They have no assets in the PRC.⁽²⁾ She and her husband have made the United States their permanent home, and they intend to live out their lives here.

CONCLUSIONS

The evidence establishes that applicant's husband is a citizen of the PRC, and her brother and sister are citizens and residents of the PRC. These facts require application of Disqualifying Condition E2.A2.1.2.1 (*an immediate family member . . . is a citizen of, or resident or present in, a foreign country*).

The DOHA Appeal Board has precluded application of Mitigating Condition E2.A2.1.3.1 (*a determination that the immediate family member(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*) in cases such as this one. Therefore, although I believe it is applicable, I decline to apply it.

The DOHA Appeal Board has held, however, that a "Judge is not limited to Adjudicative Guidelines mitigating conditions when deciding whether an applicant has demonstrated extenuation or mitigation," but may consider "the

totality of an applicant's conduct and circumstances" under "the Directive's general factors." ISCR Case No.03-17620 at 4 (App. Bd. April 17, 2006).

Applicant came to this country 13 years ago. Since moving to the United States, her conduct has been consistent with her stated intention of making the United States her permanent home. She obtained an advanced degree from a United States university; became a United States citizen; had her minor daughter become a United States citizen; had a child in the United States, and did not seek PRC citizenship for him; purchased a home; and started and continues to maintain a 401k plan. On the other hand, she has no assets in the PRC, and even gave up any right she may have had to any of her mother's property in the PRC after her mother's death. In addition, although her contacts with her siblings in the PRC cannot be considered "casual and infrequent," they are not particularly close since the death of applicant's mother. Finally, she has satisfactorily explained why her husband is reluctant to give up his PRC citizenship at the present time, and testified credibly that when his parents pass on, he will seek United States citizenship. Even though the foreign country at issue is a human rights abuser which actively engages in military and economic espionage, considering the totality of applicant's conduct and circumstances under the Directive's general factors,⁽³⁾ I conclude that applicant has met her burden and demonstrated sufficient mitigating and extenuating evidence to overcome the foreign citizenship of her husband and the foreign citizenships and residences of her immediate family members and in-laws.

FORMAL FINDINGS

GUIDELINE B: 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 make or continue a determination of trustworthiness, suitability and eligibility for applicant to hold a sensitive Information Systems Position.

Joseph Testan

Administrative Judge

1. Applicant raised the issue of whether she should be required to have a trustworthiness hearing and determination. Although it could be argued that DoD Regulations designate ADP III positions as non-sensitive, which do not require a determination of trustworthiness (Exhibits D and E), a November 19, 2004 memorandum from the Deputy Under Secretary of Defense (Counterintelligence and Security) states that DOHA will make trustworthiness determinations for "ADP I, II and III positions." This memorandum requires DOHA to adjudicate ADP III cases.
2. Following her mother's death, applicant gave her share of the inheritance to her siblings in the PRC (TR at 38-39).
3. Directive, Sections E2.2.1.1. through E2.2.1.9.