DATE: July 31, 2006

In re:

SSN: -----------

Applicant for Security Clearance

ISCR Case No. 06-00975

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

Peregrine Russell-Hunter, Esq., Department Counsel

FOR APPLICANT[(1)]

Elizabeth L. Newman, Esq.

SYNOPSIS

Applicant and his spouse were born in the People's Republic of China (PRC). Applicant became a U.S. citizen in April 2002, and his spouse became a U.S. citizen in January 2004. His parents, sister, mother-in-law, and father-in-law are citizens and residents of the PRC. The security concern based on foreign influence is not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On March 22, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. 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 SOR alleges security concerns under Guideline B (Foreign Influence). It alleges Applicant's parents, a sibling, his mother-in-law, and father-in-law are citizens and residents of the PRC (SOR ¶¶ 1.a, 1.b), he provides financial support to his parents and in-laws (SOR ¶ 1.c), and he traveled to the PRC in August 2002 (SOR ¶ 1.d).

Applicant answered the SOR in writing on April 10, 2006, admitted the allegations, offered explanations, and requested a hearing. The case was assigned to me on May 1, 2006. On May 8, 2006, DOHA issued a notice of hearing setting the case for May 23, 2006. On May 12, 2006, DOHA issued an amended notice of hearing rescheduling the case for May 19, 2006, at Applicant's request. Applicant waived the 15-day notice requirement. (Tr. 12.) The case was heard as rescheduled. DOHA received the transcript (Tr.) on May 30, 2006.

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 42-year-old certified public accountant employed by a defense contractor. He has worked for his present employer since September 1999. He has held interim clearances in the past but has not received a final clearance.(2)

Applicant and his spouse both were born in the PRC. Applicant went to college in the PRC, worked in the PRC for British and U.S. oil companies, worked in the PRC for a Japanese electronics company, and came to the U.S. in 1991 to obtain a master's degree. (Tr. 31.) He became a naturalized U.S. citizen in April 2002. (Government Exhibit (GX) 1 at 2.)

Applicant's spouse came to the U.S. in 1984 to finish college. (Tr. 77.) She returned to the PRC in 1987 to work for a U.S. accounting firm with an office in the PRC. (Tr. 78.) She and Applicant were married in 1988. (Tr. 31-32.) She accompanied Applicant to the U.S. in 1991. (Tr. 80.) She became a naturalized U.S. citizen on January 9, 2004. (Tr. 81.) She did not become a citizen at the same time as Applicant because her work schedule as a tax accountant was very heavy, and she wanted additional time to study for the citizenship test. (Tr. 64, 81.) They have two children. The older child was born in the PRC in July 1990 and is now a U.S. citizen; the younger was born in the U.S. in December 1993 and is a native-born U.S. citizen.

Applicant's parents are citizens and residents of the PRC. They are both in their late 70s and have been retired for more than 20 years. Before they retired, his mother was a clerk in a bookstore and his father was a clerk in the tax bureau. (Tr. 29.) Applicant's parents do not have e-mail, but he calls them every week. They talk mostly about grandchildren and do not discuss political or military subjects. (Tr. 41-42.)

Applicant's sister is a citizen and resident of the PRC. Both she and her husband work for Japanese electronics companies doing business in the PRC. (Tr. 30.) Applicant has very infrequent contacts with her, limited to occasions when she is at their parent's home when he calls.

Applicant's father-in-law and mother-in-law are in their 70s and have been retired for more than 10 years. His father-in-law was a factory worker and his mother-in-law was an elementary school teacher. (Tr. 55.) Applicant does not talk to his in-laws, but his spouse talks to them about once a week. (Tr. 60.) Applicant's spouse testified she would notify U.S. authorities and use the media to pressure the PRC if they attempted to exercise influence on Applicant through family members. (Tr. 84.)

Applicant' family and in-laws are financially independent. He sends small amounts of money, about $150 a month, to each set of parents as a token of appreciation. (Tr. 58.) Applicant has visited his parents and in-laws every year since 2002, usually for about three weeks.(3) (Tr. 61-62.) None of Applicant's immediate family members or in-laws have any connection to the government. (Answer to SOR at 1.)

Applicant testified he had not thought about the possibility of his parents being threatened or coerced by PRC authorities until he became involved in the security clearance process. He has decided his spouse and children are his first priority, and he would not cooperate with any efforts to influence him through his parents. (Tr. 52.)

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 nonparty 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. (U.S. Dept. of State, *Background Note, China* 1-2, 5-17 (Mar. 2005), incorporated in the record as Hearing Exhibit (HX) I; U.S. Dept. of State, *Country Reports on Human Rights Practices* 1-2 (Mar. 8, 2006), incorporated as HX II.)

The PRC and the U.S. are major trading partners. (HX I at 16-17.) After the terrorist attacks of September 11, 2001, the PRC became an important partner in U.S. counter-terrorism efforts. The PRC and the U.S. have worked closely on regional issues, especially those involving North Korea. (HX I at 16.) The PRC is well known as an active collector of

U.S. defense information and technology. (National Counterintelligence Center, *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage* 15 (2000) available at www.nacic.gov.)

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 has 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), as amended and modified. 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 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision 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 Directive ¶¶ 6.3.1. through 6.3.6.

In evaluating an applicant's conduct, 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 applicant'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. Directive ¶¶ E2.2.1.1. through E2.2.1.9.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, 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.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

The concern under Guideline B is that a security risk may exist when an applicant's immediate family, or other persons to whom he or she 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. A disqualifying condition (DC 1) may arise when "[a]n 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." Directive ¶ E2.A2.1.2.1. A disqualifying condition (DC 2) also may arise when an applicant is "[s]haring living quarters with a person or persons, regardless of

their citizenship status, if the potential for adverse foreign influence or duress exists." Directive ¶ E2.A2.1.2.2. Where the cohabitant is also an immediate family member under DC 1, both disqualifying conditions may apply. Based on the evidence of record, DC 1 and DC 2 are established in this case.

"[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 rebutted the presumption of affection in this case, but he has not rebutted the presumption of ties of obligation.

Family ties with persons in a foreign country are not, as a matter of law, automatically disqualifying. However, such ties raise a prima facie security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 (App. Bd. Feb. 8, 2001). Since the government produced substantial evidence to establish DC 1 and DC 2, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

In cases where an applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members, 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." Directive ¶ E2.A2.1.3.1. The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003).

Notwithstanding the facially disjunctive language of MC 1("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to chose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004).

Applicant's parents, sister, and in-laws are not agents of a foreign power under either the statutory definition in 50 U.S.C. 1801(b) or the broader definition apparently adopted by the Appeal Board. *See* ISCR Case No. 02-24254, 2004 WL 2152747 at *4-5 (App. Bd. Jun. 29, 2004) (employee of foreign government need not be employed at a high level or in a position involving intelligence, military, or other national security duties to be an agent of a foreign power for purposes of MC 1).(4)

Thus, the first prong of MC 1 is established.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). The distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. ar. 29, 2002). Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S.

Applicant's parents and in-laws are subject to the PRC's repressive government. His sister's livelihood and personal freedom are subject to the PRC's control. His sister works in a high technology industry susceptible to privately-sponsored industrial espionage as well as government-sponsored economic espionage. I found Applicant's testimony credible and sincere when he stated he would resist any direct or indirect attempts at foreign influence. Nevertheless, after considering the totality of his family ties to the PRC as well as each individual family tie, I conclude he has not carried his burden of showing he is not vulnerable to exploitation. Accordingly, I conclude MC 1 is not established.

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Although Applicant's contacts with his sister are infrequent, he has not rebutted the presumption that they are not casual. I conclude MC 3 is not established.

I have no doubt Applicant is a loyal American. Nevertheless, after weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude he has not mitigated the security concern based on foreign influence.

FORMAL FINDINGS

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

Paragraph 1. Guideline B (Foreign Influence): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

DECISION

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

LeRoy F. Foreman

Administrative Judge

1. The Statement of Reasons transposed Applicant's first and last names. On May 9, 2006, I granted Department Counsel's motion to amend the SOR to correctly reflect Applicant's name. The caption of this decision reflects Applicant's name as corrected on the amended SOR.

2. Applicant testified he believed he had received a final clearance (Tr. 69). I directed Department Counsel to provide a post-hearing submission to clarify whether Applicant had a final clearance. Department Counsel complied on May 23, 2006. A copy of the submission was provided to Applicant's counsel, who did not comment. Department Counsel's submission is incorporated in the record as Hearing Exhibit (HX) IV.

3. The SOR ¶ 1.d initially alleged travel to the PRC in August 2002. Based on Applicant's testimony, Department Counsel moved to amend the SOR to allege travel to the PRC in August 2002, and the summers of 2003, 2004, and 2005. I granted the motion with no objection from Applicant (Tr. 88).

4. The Appeal Board has declined to reexamine its broad definition of "agent of a foreign power," but it has not addressed the applicability of 50 U.S.C. § 438(6), which expressly applies the definitions in 50 U.S.C. § 1801(b) to security clearance determinations, nor has it addressed the significance of Executive Order 12968, § 1.1(f), which

adopts the definition in 50 U.S.C. § 1801(b) for security clearance adjudications. *See* ISCR Case No. 03-10954 at 7-8 (App. Bd. Mar. 8, 2006).