

KEYWORD: Foreign Preference; Foreign Influence

DIGEST: Applicant is a 56-year-old naturalized U. S. Citizen, who has resided in the United States since 1975. He became a naturalized citizen in 1991. His children were born in the United States. He has worked as a computer engineer for federal contractors since 1998. His elderly parents, three siblings, father-in-law, and brother-in-law are residents and citizens of Taiwan. In 2001, he used his Taiwanese passport to visit Taiwan. The passport expired in 2003 and he has not renewed it. He mitigated the security concerns raised by foreign influence and foreign preference. Clearance is granted.

CASENO: 06-02910.h1

DATE: 04/20/2007

DATE: April 20, 2007

In re:)	
)	
)	
-----)	ISCR Case No. 06-02910
SSN: -----)	
)	
Applicant for Security Clearance)	

**DECISION OF ADMINISTRATIVE JUDGE
SHARI DAM**

APPEARANCES

FOR GOVERNMENT
Branden M. Murphy, Esq.

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant is a 56-year-old naturalized U. S. citizen, who has resided in the United States since 1975. He became a naturalized citizen in 1991. His children were born in the United States. He has worked as a computer engineer for federal contractors since 1998. His elderly parents, three siblings, father-in-law, and brother-in-law are residents and citizens of Taiwan. In 2001, he used his Taiwanese passport to visit Taiwan. The passport expired in 2003 and he has not renewed it. He mitigated the security concerns raised by foreign influence and foreign preference. Clearance is granted.

STATEMENT OF THE CASE

On January 19, 2005, Applicant submitted a security clearance application (SCA). On March 21, 2006, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On April 3, 2006, Applicant filed a response to the SOR, admitting all of the allegations, and elected to have the case decided on the written record in lieu of a hearing. On February 20, 2007, Department Counsel prepared a File of Relevant Material (FORM), containing five Items, and mailed Applicant a complete copy on February 21, 2007. The FORM also contained 12 documents for which Department Counsel requested that I take administrative notice. Applicant had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation or mitigation. Applicant received the FORM on February 28, 2007, and submitted additional information on March 12, 2007, and objected to the relevance of some documents offered for administrative notice. Department Counsel did not object to Applicant's additional submission. The case was assigned to me on March 15, 2007. After reviewing the 12 documents submitted for administrative notice, I take notice of the information contained therein.

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his response to the SOR, I make the following findings of fact:

Applicant is a 56-year-old married man. He was born in Taiwan. He came to the United States in 1975 on a student visa and never returned to Taiwan to live. He subsequently attended a prestigious university in the United States and graduated with a Ph.D. in computer sciences. He became a naturalized citizen in October 1991.¹ Since 1998, he has worked as an engineer for federal

¹Item 4 at 1.

contractors. He was granted a security clearance in 2002 by the U.S. Treasury Department.²

Applicant's wife was born in Taiwan in 1957. She became a U.S. citizen in October 1991. They have two children, both born in the United States.³ He does not have any financial interests in Taiwan.⁴ In his response he stated, "After graduation from [the university] with Ph.D. degree, I have been working, paying taxes, and later after naturalization, fulfilling civic duties entirely in America. I never held any job or position in Taiwan or any other countries. In essence, my whole-life career is in the United States. I am of unquestioned allegiance to the United States."⁵

Applicant's elderly parents are citizens and residents of Taiwan. Applicant calls his parents about once a week and visits them in Taiwan every three or four years. He sends them about \$500 a year out of a sense of familial obligation and not financial need.⁶

Applicant is one of five children, all born in Taiwan. One of his sisters is a naturalized citizen and resident of the United States. His other two sisters are retired and are citizen residents of Taiwan. His brother is a dentist and a citizen resident of Taiwan. He talks to his two sisters and brother about once a year and visits them when he sees his parents.⁷ None of his relatives have held positions in the Taiwan government.⁸

Applicant's father-in-law and brother-in-law are citizens and residents of Taiwan, who operate a small grocery store. Applicant's wife calls them twice a month and visits them when she visits Taiwan every three or four years. Her mother died in 1982. Her other brother is a naturalized U. S. citizen, who resides in the United States. She sends her family about \$100-200 every year at the Chinese New Year. She does not own property or have any financial interests in Taiwan.⁹

Over the course of the last several years, Applicant returned to Taiwan in July 2001 to celebrate his father's 80th birthday. In February 2004, he attended his grandmother's funeral. In June 2005, he visited his parents en route to Japan for a family vacation.¹⁰

In 1997, Applicant renewed his Taiwanese passport that was previously issued in June

²*Id.* at 8.

³*Id.* at 3.

⁴Item 5 at 2.

⁵Item 3 at 3.

⁶Response to Form, dated March 12, 2007, at 2.

⁷*Id.*

⁸*Id.*

⁹*Id.*

¹⁰Item 3 at 2.

1991.¹¹ He used it to enter Taiwan in July 2001 for purpose of convenience. That passport expired in June 2003 and he has no intention of renewing it. Applicant has a current U.S. passport that he renewed in May 2001. He has used it for all of his travel, except the July 2001 trip, including his other trips to Taiwan in 2004 and 2005.¹² Although he listed himself as having dual citizenship on his SCA, he is uncertain of his citizen's status with Taiwan because he did not renew his passport. However, he is willing to relinquish his expired Taiwan passport as his loyalties are with the U.S.¹³

Taiwan is a stable multiparty democracy, a U.S. ally, and a major U.S. trading partner. It has a good human rights record. Taiwan maintains a large military establishment, and its primary mission is the defense of Taiwan against the Peoples Republic of China (PRC). With the encouragement of the United States, contact between Taiwan and the PRC has grown significantly over the last decade, with increases in direct trade, travel, and postal links. The Taiwan Relations Act, 22 U.S.C. §§ 3301-3316, is the legal basis for the unofficial relationship between the United States and Taiwan and the U.S. commitment to ensuring Taiwan's defensive capability.¹⁴ Taiwan is an active collector of U.S. defense information and technology.¹⁵

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth criteria which must be evaluated when determining security clearance eligibility. Within those adjudicative guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not only the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance is not necessarily a judgment about an applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that an applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

¹¹Response to Form: Republic of China Passport.

¹²Item 5 at 2.

¹³*Id.* at 1.

¹⁴U.S. Dept. of State *Background Note: Taiwan*, October 2006.

¹⁵National Counterintelligence Center (NACIC), *Annual Report to Congress 15 (2000)*, included in the FORM as Administrative Notice Exhibit VII.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). The Directive presumes a rational connection between past proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence in refutation, extenuation, or mitigation sufficient to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive, Enclosure 3, ¶ 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 clearance." *Id.*

Based upon the allegations contained in the SOR and a consideration of the evidence as a whole, the following adjudicative guidelines are pertinent to an evaluation of the facts of this case:

Guideline B (Foreign Influence): The Concern -A security concern may exist when an individual's immediate family, including co-habitants, and other persons to whom he or she maybe bound by affection, influence, or obligations are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercions, exploitation, or pressure.

Guideline C (Foreign Preference): The Concern -When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

CONCLUSIONS

After considering all facts in evidence and legal standards, including the "whole person" concept, I conclude the following in regard to the allegations contained in the SOR:

Guideline B: Foreign Influence

The Government's evidence and Applicant's admissions established a disqualifying condition under Foreign Influence Disqualifying Condition (FI DC) 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 or, or resident or present in, a foreign country*). Applicant's parents, brother and two sisters are citizens and residents of Taiwan. According to ISCR Case No. 01-03120, DOHA LEXIS 94 at 8 (App. Bd. Feb. 20, 2002), Applicant's father-in-law and brother-in-law also fall within the disqualification as "[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."

While family ties with persons in a foreign country are not, as a matter of law, disqualifying

under Guideline B, such ties do raise a *prima facie* security concern. This concern is 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. ISCR Case No. 99-0424, 2001 (App. Bd. Feb. 8, 2001).

The Appeal "Board has warned 'against reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B,'"¹⁶ and Taiwan should not be labeled as "hostile" or as "friendly" to the United States. Taiwan is in competition with the United States in several areas, and is likely to continue to engage in espionage against the United States. Taiwan's future relationship with the United States may not be as congenial as it is today. In any event, Applicant should not be placed into a position where he may be forced to choose between loyalty to the United States and his relatives living in Taiwan.¹⁷

The Government having established a disqualification, the burden shifted to Applicant to rebut or mitigate the allegations. After considering all mitigating conditions under this guideline, in particular, Foreign Influence Mitigating Condition (FIMC) 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*), I conclude it provides some information that makes his situation less susceptible to foreign influence than if his relatives were agents of a foreign power. Applicant supplied evidence that none of his family members, including in-laws, are associated with the Taiwanese government.

In assessing the vulnerability to exploitation of Applicant's family, it is helpful to consider several factors: the nature of the foreign government, its relationship to the United States, its human rights record, and a careful balancing of the nature and strength of Applicant's relationship to his foreign associates. Taiwan is a stable democracy with close commercial and friendly ties to the United States. It has improved its human rights record significantly in the past few years. Although friendly countries may have profound disagreements with the United States or may have engaged in espionage against the United States, especially in economic, scientific, military and technical fields, it is less likely that such a foreign government would attempt to exploit a United States citizen through relatives in that foreign country. Taiwan's continuing dependence and alliance with the United States, coupled with its democratic form of government, diminishes the risk of it using coercion, persuasion, or duress to exploit its citizens to gather classified information from United States citizens. Thus, Applicant's evidence showing his elderly parents, siblings, and in-laws' absence of governmental connections provides some information that makes his situation less susceptible to foreign influence than if his relatives were residents and citizens of a foreign country such as Iran, a country known for its hostility toward the United States.

¹⁶ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)(quoting ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002)).

¹⁷The Appeal Board has not increased an applicant's burden of persuasion in cases involving contacts with family members living in Taiwan. This situation may be compared to the Appeal Board's decision to place a "very heavy burden of persuasion" on applicants to demonstrate that contacts with immediate family members living in Iran do not pose a security risk. *See* ISCR Case No. 02-13595 at 3 (App. Bd. May 10, 2005) (stating an applicant has "a very heavy burden of persuasion to overcome the security concerns" when parents and siblings live in Iran); ISCR Case No. 04-11463 at 4 (App. Bd. Aug. 4, 2006) (articulating "very heavy burden" standard when applicant's family members live in Iran).

I also considered FI MC E2.A2.1.3.2 (*Contact and correspondence with foreign citizens are casual and infrequent*). It provides some mitigation as to the allegations regarding his siblings with whom he has limited communications (about once per year), but not to his parents with whom he speaks frequently. It is not clear from the record how often he interacts with his in-laws.

Applicant does not have any financial interests in Taiwan. This fact does not mitigate the foreign influence concern based on FI DC E2.A2.1.2.1 or FI DC E2.A2.1.2.3. *See* ISCR Case No. 04-02233 at 3 (App. Bd. May 9, 2006).

I conclude no Guideline B Mitigating Conditions apply, and I expressly and specifically indicate that I have not relied “explicitly or implicitly” on any of the Mitigating Conditions listed under Guideline B of the Directive. *See* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 7, 2007). The mitigating information will be applied in the “whole person” analysis, *infra*.

Guideline C: Foreign Preference

Based on Applicant’s previous maintenance and use of a Taiwanese passport after becoming a U.S. citizen and possessing a U.S. passport, the Government established a disqualification under Foreign Preference Disqualifying Condition (FP DC) E2.A3.1.2.1 (*The exercise of dual citizenship*), and FP DC E2.A3.1.2.2 (*Possession and/or use of a foreign passport*).

The Government having established a disqualification, the burden shifted to Applicant to rebut or mitigate the allegation. After reviewing all of the mitigating conditions, I conclude that Foreign Preference Mitigating Condition (FP MC) E2.A3.1.3.4 (*Individual has expressed a willingness to renounce dual citizenship*) is applicable. Applicant’s passport expired in June 2003 and he has not renewed it. He did not indicate what he had done with the expired passport. However, he expressed his loyalty to the U.S. in his responses to the SOR and FORM, as well as during his interview.

Possession of Expired Taiwanese Passport

Applicant renewed his Taiwanese passport in 1997 and used it to enter Taiwan one time in July 2001. In June 2003, the passport expired. Its whereabouts are unknown.

The Memorandum of Assistant Secretary of Defense Arthur L. Money, dated August 16, 2000, hereinafter “ASDC3 memorandum” mandates that “consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government.”

The Appeal Board indicated in ISCR Case No. 03-10390 at 3-4 (App. Bd. Apr. 12, 2005) that the ASDC3 memorandum requirement to surrender a passport also applied to expired passports. Moreover, the passport cannot be surrendered to a Department of Defense security officer, it must be surrendered to the issuing authority. ISCR Case No. 03-06174 at 3-5 (App. Bd. Feb. 28, 2005).

There was no allegation concerning the failure to surrender the Taiwanese passport under Guideline C (foreign preference) in this case. “[T]here is no question that Applicant was entitled to receive reasonable notice of the reasons why DOHA proposed to deny or revoke [her] access to

classified information, as well as a reasonable opportunity to respond.” ISCR Case No. 03-06174 at 3 (App. Bd. Feb. 28, 2005) (citations omitted).

On December 29, 2005, the President approved the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines). The President’s approval of the Revised Guidelines was forwarded in a Memorandum from the Assistant to the President for National Security Affairs to the Director, Information Security Oversight Office that same day. This Memorandum asked the Director to, “[p]lease circulate the revised guidelines to all affected agencies for immediate implementation.” Under Guideline C (Foreign Preference) of the Revised Guidelines, paragraph 10 (a)(1) the first disqualifying condition states, “possession of a current foreign passport (emphasis added),” effectively overruling the Appeal Board’s expansive interpretation of the ASDC3 memorandum as applicable to expired passports

The Revised Guidelines were implemented within DoD by an Under Secretary of Defense Memorandum dated August 30, 2006. This Memorandum makes the Revised Guidelines applicable to all adjudications and other determinations in which a SOR is issued after September 1, 2006, and requires that all SORs issued prior to September 1, 2006, be adjudicated under the previous Guidelines. Applicant’s case must be adjudicated under the previous Guidelines because Applicant’s SOR was issued on March 21, 2006. ISCR Case No. 03-17839 at 8 (App. Bd. Nov. 24, 2006) (White, J. separate opinion) (explaining purpose for delayed implementation is to ensure applicants receive notice of particular guidelines in effect at the time the SOR is issued). However, assuming the Revised Guidelines improve and support National Security objectives, and an Applicant is not prejudiced by the change, an Applicant should be able to urge the DoD to apply the Revised Guidelines, when they are not inconsistent with the previous Guidelines, or when they clarify application of the Guidelines.

Based on said change and clarification, I conclude that the ASDC3 memorandum does not bar Applicant’s clearance because of his possession of an expired Taiwanese passport.

Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under the guideline, the adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Directive ¶ E2.2.1 describes the essence of scrutinizing all appropriate variables in a case as the “whole person concept.” In evaluating the conduct of an applicant, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual’s age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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. Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation, and behavior changes, etc., the eighth factor in this series is the most relevant.

The Appeal Board suggests that the whole person analysis address “evidence of an applicant’s personal loyalties; the nature and extent of an applicant’s family’s ties to the U.S. relative to his ties to a foreign country; his or her ties social ties within the U.S.; and many others raised by the facts of a given case.” ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007). The Appeal Board

previously recommended the whole person analysis in ISCR Case No. 03-02878 at 3 (App. Bd. June 7, 2006), which provides:

Applicant has been in the U.S for twenty years and a naturalized citizen for seven. Her husband is also a naturalized citizen, and her children are U.S. citizens by birth. Her ties to these family members are stronger than her ties to family members in Taiwan. She has significant financial interests in the U.S. , and none in Taiwan. She testified credibly that she takes her loyalty to the U.S. very seriously and would defend the interests of the U.S. Her supervisors and co-worker assess her as very loyal and trustworthy.

In the present case, there are many countervailing positive attributes to Applicant's life as a U.S. citizen that weigh in favor of granting him a security clearance. He has lived in the United States for 32 years and has been a naturalized U.S. citizen for 16 years. He has close ties to the United States. His wife, two children, sister, and brother-in-law are U.S. citizens and residents. He obtained his advanced degree at a U.S. university. He does not have a criminal background, a history of financial difficulties or a poor employment record. He was granted a security clearance from the Department of the Treasury in 2002. During the past seven years, he made three trips to Taiwan. His Taiwanese passport has expired and he will not renew it. He has no financial ties to Taiwan and the amount of money he and his wife send to their parents is minimal. He is patriotic, loves the United States and has expressed his loyalty to it.

In addition to the above facts, security worthiness determinations are predictive judgments and the best predictor of future performance is past performance. Based on a review of his history and substantial ties to the United States, I conclude Applicant's potential for exploitation by Taiwan, a democratic ally of the United States, appears low and unlikely to occur. Applicant mitigated the security concerns raised under foreign preference and foreign influence. Accordingly, Guideline B and Guideline C are decided for him.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1: Guideline B (Foreign Influence)	FOR APPLICANT
Subparagraphs 1.a through 1.d:	For Applicant
Paragraph 2: Guideline C (Foreign Preference)	For Applicant
Subparagraphs 1.a through 1.b:	For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

Shari Dam
Administrative Judge