



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 12-05359 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

03/22/2013

Decision

LYNCH, Noreen A., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on February 23, 2011. On September 12, 2012, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines B and C. DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant received the SOR, and requested a hearing before an administrative judge. The case was assigned to me on December 4, 2012. A notice of hearing was issued on January 2, 2013, scheduling the hearing for February 12, 2013. Government

Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted two exhibits (AX) A and B. I received the transcript (Tr.) on February 22, 2013.

Procedural Issue

The Government requested that I take administrative notice of certain facts with respect to Taiwan. Applicant objected to the source documents based on their relevance. The Government's submission was labeled Hearing Exhibit I and entered into the record over Applicant's objection.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations in the SOR ¶¶ 1.a, 1.c, 1.d, 1.f, 2.a, 2.b, and 2.c under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) with explanations. He denied the remaining two SOR allegations. He provided additional information to support his case. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Foreign Influence

Applicant is 63 years old, and is a U.S. citizen by birth. He obtained his Master's degree, but he has not yet completed his studies in a PhD program. He has worked as a senior software engineer for a number of years. Applicant has worked for his current employer since July 2010. (GX 1) Applicant initially obtained a security clearance in 1979. (Tr. 55)

Applicant met his future wife online. He met her in person in August 2002, and married her on December 18, 2002 in the United States while she was on a semester break from teaching at a university in Taiwan. His wife, who was born in Taiwan, is a citizen of Taiwan. She is a professor of English at a private university in Taiwan. During her teaching career, she has received monetary grants from the Taiwanese Ministry of Education. Applicant's wife returned to Taiwan shortly after their marriage to resume her teaching duties at a private university. She learned that she was pregnant a few months later and when she attempted to return to the United States, she was not allowed to do so due to an incorrect visa. (Tr. 40) The plan to have their child born in the United States was thwarted, and a son was born in September 2003 in Taiwan. Applicant left the United States to be present for the birth of his child. He lived in Taiwan with his wife and child from September 2003 until June 2004. He arranged with his company to work in Taiwan on unclassified items while in Taiwan. (Tr. 40) During Applicant's time in Taiwan, he applied for and received a residency card. He stated his reason was one of convenience for travel. (Tr. 52) The card expired in January 2004. (Tr. 52) Applicant did not renew it.

Applicant's wife is not a U.S. citizen. She has not applied for citizenship although she has an alien registration. (GX 1) She has a successful teaching career at the

university in Taiwan. She is now Chair of the English Department. Applicant's wife has taught English to members of the Taiwanese Air Force and to police. (Tr. 64) Applicant met other faculty members at the university in 2003. (GX 1) Applicant also acknowledges that he met several of the Taiwanese Air Force personnel. His wife invited them for dinner at their house. (GX 3)

In 2004, Applicant, his wife and son returned to the United States when their son was nine months old. Applicant's son is a dual Taiwanese and U.S. citizen. He holds two passports. Applicant's wife received a two-year maternity leave from the Taiwanese university. (Tr. 41) Applicant and his wife and son remained in the United States until approximately 2006. In 2006, Applicant's wife and her son returned to Taiwan for one semester to maintain her teaching position. However, she returned to the United States to care for her mother-in-law who was ill. Applicant's wife remained in the United States for almost two years (2007-2009) on care leave. (GX 4)

From 2009 until the present, Applicant's wife has lived and worked in Taiwan at the same university. Applicant's son lives with her in a rented apartment on the university campus. Applicant's wife's preference is that their son be bilingual, and that he should be in elementary school in Taiwan to learn Chinese reading and writing. Applicant's wife continues to pursue her teaching career in Taiwan. (Tr. 44) She and her son returned to the United States for semester breaks. When they return to the United States, they reside with Applicant. Applicant visits his wife and son in Taiwan approximately four or five times a year. (Tr. 75) Applicant's son recently left the United States to return to Taiwan for the school semester. Applicant speaks to his son daily via Skype.

When Applicant answered the 2012 SOR, he noted that his son resided with him as of August 2012, and attends elementary school in the United States. Applicant further noted that his son had no intention to reside in Taiwan in the future. This is inconsistent with the facts as he presented them at the hearing. Applicant hopes that his son will attend high school and college in the United States, but that is not fully established at this time.

Applicant's mother-in-law is a citizen and resident of Taiwan. (Tr. 39) She is 74 years old. She visited the United States in 2004 to see Applicant's son. Applicant has not had any contact with her for three years. Since 2009, Applicant's wife has also cared for her mother who is now crippled due to an accident. Applicant's father-in-law is deceased.

Applicant's brother-in-law and sister-in-law are citizens and residents of Taiwan. When he was in Taiwan, Applicant had contact with them. His brother-in-law inspects hotels. His sister-in-law is a teacher. For the past few years, he has not had contact with them. Applicant does not provide any support for them.

Applicant's wife inherited property from her father in Taiwan. According to Applicant, his wife has property valued at approximately \$1 million. (Tr. 79) She also

has a bank account in Taiwan. Applicant, when questioned again about the property, stated that he really did not know if this was true as he only had his wife's word. (Tr. 126) Applicant's son has a home in his name that was given to him by his grandmother. Applicant noted that he believes there is a family dispute about some of the property. There is also the possibility that his wife owns farmland. (Tr. 128) Applicant claims that he has no right to any of this property. Applicant's wife owns half of the property interest in Applicant's home in the United States. (Tr. 47)

The SOR did not allege that Applicant's wife owns property in Taiwan. At the hearing after much discussion about an amendment to the SOR, I allowed Counsel over the objection of Applicant, to amend the SOR 1.e to state "Applicant's wife owns property and has a bank account in Taiwan." (Tr. 130)

In November 2012, Applicant filed for divorce. (AX A) He claims that he and his wife's lives have diverged during the past years. His wife noted in an affidavit that she has not made any decision concerning a divorce. (AX B) Applicant elaborated that they are still married, and that she stays with Applicant when she comes to the United States. He then noted that he was not sure what would occur. She has not agreed to a divorce yet and he is somewhat ambivalent. Applicant does not wish to live in Taiwan due to the poor climate. (Tr. 71) He is not asking for custody of his son because he believes that issue should be resolved amicably between the parties. However, he wants his son to receive a high school education in the United States.

Applicant stated that he does not have a high level clearance and that Taiwan would not be interested in the work that he performs. Applicant's wife knows about Applicant's security clearance issues and that he is attending a hearing. Applicant noted that he informs his security officer when he travels to Taiwan. He believes that there is no evidence of a heightened risk just because his son attends school in Taiwan and his wife teaches English in Taiwan. Moreover, he stated that Taiwan is a friendly country that has maintained economic and military cooperation with the United States.

Foreign Preference

As noted above, Applicant travelled to Taiwan and lived there for one year when his son was born in September 2003. He stated that due to the fact that his wife did not have the proper visa, she was not allowed to enter the United States when she was pregnant, and he was "forced" to go to Taiwan to be with her for the birth. He admitted that he had applied for and had a residency card for Taiwan, as he was married to a Taiwanese citizen. He used the card for travel convenience. The card expired in 2004. The medical benefits that he received while living in Taiwan were based on his wife's medical insurance through her employment. He has no desire to reside in Taiwan. He was credible when he explained that he has no preference for Taiwan.

Administrative Notice

Taiwan is a multi-party democracy. The United States does not support Taiwan independence, in keeping with the “one China” policy; however, “maintaining strong, unofficial relations with Taiwan is also a major U.S. goal, in line with the U.S. desire to further peace and stability in Asia. The United States supports Taiwan’s membership in appropriate international organizations where statehood is not a requirement for membership and encourages its meaningful participation in appropriate international organizations, such as the World Trade Organization, Asia-Pacific Economic Cooperation (APEC) forum, and the Asian Development Bank. Maintaining diplomatic relations with the People’s Republic of China (PRC) has been recognized to be in the long-term interest of the United States by six consecutive administrations.

There are significant economic ties between Taiwan and the PRC, which are attributable to their physical proximity and history. Because of its location, Taiwan has a particular interest in information from the United States that could aid it in its own defense. Taiwan’s primary defense goal is to deter invasion from the PRC. The PRC maintains intelligence operations in Taiwan through a bureau utilizing PRC nationals with Taiwanese connections. Unlike the PRC, however, the constitutional basis of the Taiwanese government suggests that resorting to coercive measures against its citizens to collect economic intelligence is unlikely.

Taiwan’s commercial ties with the United States have expanded since 1979. Export-Import Bank financing, Overseas Private Investment Corporation guarantees, normal trade relations (NTR) status, and ready access to U.S. markets have enhanced the Taiwan economy. “In recent years, AIT commercial dealing with Taiwan have focused on expanding market access for American goods and services.” AIT has been engaged in a series of trade discussions that have focused on protection of intellectual property rights and market access for U.S. goods and services.

The record references various cases involving the illegal export or attempted import of U.S. restricted, dual-use technology to and/or through Taiwan. One report to Congress concerns foreign economic collection and industrial espionage. That report notes that Taiwan was then known to be an active collector of U.S. economic intelligence. The report ranked Taiwan after China, Japan, Israel, France, and Korea as an active collector of such information. Although some record information about Taiwan’s intelligence activities targeting U.S. classified or sensitive information is more than 10 years old, several exhibits address more recent espionage by Taiwan’s National Intelligence Bureau (NSB). There is some evidence that Taiwan has specifically targeted U.S. citizens in the last five to seven years to obtain protected and classified information.

The United States is committed to assisting Taiwan with maintenance of Taiwan’s defensive capabilities. “The United States has continued the sale of appropriate defensive military equipment to Taiwan in accordance with the Taiwan Relations Act, which provides for such sales and which declares that peace and stability

in the area are in U.S. interests. Sales of defensive military equipment are also consistent with the 1982 U.S.-P.R.C. Joint Communiqué.”

Taiwan is a modern democracy with vibrant public participation during which demonstrations may become confrontational. The U.S. Department of State urges caution within the vicinity of any public demonstrations. Overall crime is noted as low.

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 have 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance 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 that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the

criteria listed therein and an applicant's security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (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. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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 AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The security concern under this guideline is set out in AG ¶ 6:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Three disqualifying conditions under this guideline are potentially applicable. A disqualifying condition may be raised by "contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion." AG ¶ 7(a). Also, AG ¶ 7(b) states that "connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information." Finally, AG ¶ 7(e) states that "a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to a heightened risk of foreign influence or exploitation."

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).

Furthermore, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.” ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. 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. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

While there is no evidence that intelligence operatives from Taiwan seek or have sought classified or economic information from or through Applicant or his family, nevertheless, it is not possible to rule out such a possibility in the future. Applicant’s relationship with his wife and son living in Taiwan creates a potential conflict of interest because this relationship is sufficiently close to raise a security concern about his desire to assist his family living in Taiwan and has raised the issue of potential foreign pressure or attempted exploitation.

Applicant’s wife is a Taiwanese citizen who spends her time between the United States and Taiwan. She has a permanent resident status but has not become a U.S. citizen. Applicant’s son is a dual citizen of Taiwan and the United States. Applicant has traveled between the United States and Taiwan since he married in 2002. His wife teaches at a private university in Taiwan and their son is currently schooled in Taiwan. She returns to the United States when she is on semester break. Applicant’s son also returns to the United States on school break. However, he is attending elementary school in Taiwan and lives officially with his mother. Applicant cares about the welfare of his wife and son currently living in Taiwan.

Applicant’s mother-in-law is a citizen and resident of Taiwan. Applicant’s wife communicates with her mother on a regular basis. Applicant has not had contact with his mother-in-law for three years. “[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 maintains some relationship with these family members, albeit a distant one. He saw them when he lived in Taiwan in 2003-2004. His mother-in-law visited Applicant and his wife and son in the United States in 2004 or 2005.

After considering the totality of Applicant's family ties to Taiwan as well as each individual tie, I conclude that Applicant's family ties are sufficient to raise an issue of a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion. Based on all these circumstances, I conclude that AG ¶ 7(a), and 7(b) are applicable.

The property and bank account that Applicant's wife owns in Taiwan falls under AG 7 ¶ (e). Applicant is still married to his wife and could be affected by this property. I conclude that AG ¶ 7(e) is applicable.

Security concerns under this guideline can be mitigated by showing that "the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S." AG ¶ 8(a).

Security concerns under this guideline can also be mitigated by showing "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest." AG ¶ 8(b).

Under AG 8(c), "contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation."

None of the above mitigating conditions apply in this case. Applicant's wife and only son live in Taiwan. His wife and son are Taiwanese citizens. Granted, his wife and son periodically return to the United States, and his son is a dual citizen of the United States and Taiwan, but this is Applicant's immediate family. His wife has worked for many years at a university. She has taught English to Taiwanese military personnel. Applicant has met them. Applicant travels to Taiwan frequently. His loyalty to his wife (they are still married) and son are a positive trait; however, for security clearance purposes, those same connections to his immediate family in Taiwan negate the possibility of mitigation, and Applicant has failed to fully meet his burden of showing there is "little likelihood that his relationship with his wife and son who are Taiwanese citizens could create a risk for foreign influence or exploitation."

Foreign Preference

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. AG ¶ 9.

A disqualifying condition may arise from “exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member.” This includes but is not limited to: “(1”) possession of a current foreign passport.” AG ¶ 10(a)(1). Applicant lived in Taiwan from 2003 until 2004 so that he could be with his wife when she gave birth to their son. His wife was working and had medical benefits through her employer. As a spouse, Applicant received some medical benefits. That no longer applies. He obtained a residency card when he lived in Taiwan. It expired in 2004. This is not equivalent to citizenship. He has no desire to live in Taiwan or lose his U.S. citizenship. He obtained the card for travel convenience. He had no thought of the consequences for a future security clearance. Applicant has mitigated any foreign preference security concerns.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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 individual’s age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline B and C in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a U.S. citizen by birth. He married a woman who is a Taiwanese citizen. He has a son who has dual citizenship with Taiwan and the United States. His wife and son live in Taiwan and periodically visit Applicant in the United States. His wife is a professor at a Taiwanese university. She has not applied for U.S. citizenship. Despite the fact that recently Applicant filed a complaint for divorce, he waived at the hearing as to whether he would get divorced. His son attends school in Taiwan. His son is obviously precious to Applicant. Applicant also travels to Taiwan frequently.

Applicant chose to marry a Taiwanese citizen. Granted, he does not wish to live in Taiwan at any time in the future. He wants his son to attend high school in the United States, and he is contemplating a divorce. Despite the fact that there is no evidence that Applicant has had any incidents with his security clearance, there is the possibility of

conflict given the present situation. Applicant vacillated on a number of points. He was unsure about completion of his divorce. After assessing his credibility, demeanor, and sincerity at his hearing, I have doubts as to Applicant's suitability to retain his security clearance.

His wife knows that Applicant has a security clearance and the issues surrounding the case. I am not questioning his loyalty to the United States, but I have doubts as to his overcoming any manipulation or inducement concerning the welfare of his son or his wife. All doubts must be resolved in favor of the government.

After weighing the disqualifying and mitigating conditions under Guidelines B and C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign preference but not foreign influence. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegation in the SOR:

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| Paragraph 1, Guideline B: | AGAINST APPLICANT |
| Subparagraphs 1.a-1.b: | Against Applicant |
| Subparagraphs 1.c-1.d: | For Applicant |
| Subparagraphs 1.e-1.f: | Against Applicant |
| Paragraph 2, Guideline C: | FOR APPLICANT |
| Subparagraphs 2.a-2.c: | For Applicant |

Conclusion

In view of all the circumstances presented in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Noreen A. Lynch
Administrative Judge