

DATE: March 25, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-10237

## **DECISION OF ADMINISTRATIVE JUDGE**

**KATHRYN MOEN BRAEMAN**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Erin C. Hogan, Esq., Department Counsel

#### **FOR APPLICANT**

James F. Moran, Esq.

### **OVERVIEW**

While security concerns arose over Applicant's foreign preference because of his dual citizenship and use of a foreign passport in 1997 after he became a naturalized United States (US) citizen, he voluntarily chose to comply with the Department of Defense (DoD) policy requirements when he learned of them. Despite procedural difficulties he relinquished his foreign passport in March 2002. Although he has relatives who are citizens of a foreign country, they do not have ties to the government and are not agents of a foreign power. He also plans to end a business relationship with a foreign national. He has had a security clearance since 1981 without incident. Overall, he has mitigated the allegations of foreign preference and influence. Clearance is granted.

### **STATEMENT OF THE CASE**

The Government could not reach the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant, <sup>(1)</sup> so the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on September 14, 2001. The SOR detailed security concerns in paragraph 1 over foreign preference (Guideline C) and in paragraph 2 over foreign influence (Guideline B). Applicant received the SOR and replied to these SOR allegations in the October 2, 2001, Answer. He admitted all allegations except for 1.d.; 1.e, in part; 2.a.; and requested a hearing. The case was assigned to Department Counsel who on November 28, 2001, 2001, attested it was Ready to Proceed, and advised that Applicant was now represented by counsel.

On November 28, 2001, the case was assigned to me. Subsequently, a mutually convenient date for hearing was agreed to and a Notice of Hearing was issued on January 3, 2002, which set the matter for January 24, 2002, at a location near where Applicant works and lives. On January 9, 2002, the hearing was rescheduled for the same date at a location closer to Applicant's place of work. At the hearing the Government introduced seven exhibits (Exhibits 1-7) which were admitted into evidence. Applicant testified himself and offered three exhibits (Exhibits A through C) which were admitted into evidence. The transcript (TR) was received on February 1, 2002.

## PROCEDURAL ISSUES

### **Clarification of Department of Defense Policy on Foreign Preference**

The Department of Defense issued a policy memorandum on August 16, 2000. It clarified the policy on Foreign Preference, Guideline C and stated, in part:

The purpose of this memorandum is to clarify the application of Guideline C to cases involving an applicant's possession or use of a foreign passport. The Guideline specifically provides that "possession and/or use of a foreign passport" may be a disqualifying condition. It contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country. The only applicable mitigation factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline are that possession and use of a foreign passport in preference to a U.S. passport raises doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. Therefore, 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 State Government. Modification of the Guideline is not required.

Applicant was allowed two additional weeks to submit additional evidence until Close of Business (COB) February 7, 2002; the Government was granted three business days to review any documents and provide comments by COB February 13, 2002. (TR 71-73) On February 11, 2002, Department Counsel forwarded Applicants Exhibits D, E, and F with no objection. Exhibits D-F were admitted into evidence and the record closed on February 11, 2002.

#### **Record Re-opened**

On March 7, 2002, the Government was advised that the Taiwan Economic and Cultural Affairs Office (TECO) had rejected the Applicant's attempt to surrender his passport. (Exhibit 8) On March 15, 2002, the Government moved that the record be re-opened to accept new evidence and requested a conference call with Applicant's counsel be scheduled for March 19, 2002. A March 18, 2002, Order granted the request for the conference call. At the conference call, I granted the Government's request that the record be re-opened and accepted into evidence Exhibit 8 and Applicant's Exhibit's G & H with no objection by either party. Applicant was allowed one more day to submit any additional evidence. On March 20, 2002, Applicant's Counsel forwarded Exhibit I, to which the Government did not object, and Exhibit I was admitted into evidence. The record closed again on March 20, 2002.

#### FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 63 years old, has been the vice- president and owner of a company (Company #1) from 1978 to present. He has also been a professor at a state university in State #1 since 1970 and is now co-chair of an academic department. He previously taught at another university in State #1 from 1967-1970. He completed an Office of Personnel Management (OPM) Security Clearance Application (Standard Form 86) (SF 86) in May 1998. (Exhibits 1, 3; TR 19)

Applicant (and his wife, the subject of another proceeding) each have had a security clearance at the Secret level since February 1981 when he did research for a federal agency in the 1980's and 1990's. Although he has not done any classified work since May 1993, another federal agency asked him to obtain a Top Secret security clearance to take advantage of a Company #1 product. (Answer; Exhibit 3; TR 19-20, 24-25, 46-47) Company #1 has been a cleared facility with no deficiency notices. Applicant is the security officer for the firm. (TR 20-21, 47-48)

Applicant received his MA in August 1965 from a university in State #1 and a Ph.D. in 1967 at a university in State #3. (Exhibit 1) Applicant married his wife (Ms. X) in July 1967 and they have two children born in 1968 and 1972 in the US. (Exhibit 1)

#### **Foreign Preference**

Applicant is a dual citizen of Taiwan (Republic of China) (ROC) as he was born there and of the United States (U.S.) as he became a naturalized U.S. citizen in arch 1974. He served in the ROC military service from 1961-61, but left the ROC in 1963 to come to the U.S. to continue his education. Since coming to the U.S., he has not voted in any ROC elections and does not own property there. After becoming a U.S. citizen, he subsequently obtained a U.S. passport; his most recent passport was issued in June 1990 which was valid until June 2000. He subsequently renewed this U.S. passport.(Answer, Exhibits 1, 2, 6; TR 26, 41-42)

According to the ROC government, he is a citizen of his country of birth "for life." In October 2001 after receiving the SOR Applicant stated that he was "willing to formally renounce" his citizenship "without reservation if this is requested." (Answer; Exhibit 2; TR 33-34, 53, 57-58) (However, there is no evidence in the record that he has taken this step.)

Since 1975 he has belonged to a North American Taiwanese Professors' Association. In 1993 as president of the State #1 chapter he was invited to Taiwan to explore prospects of manufacturing and marketing Taiwanese computer software ; he accepted ROC payment of his hotel costs, but claimed he provided only a verbal assessment and does not have a preference for ROC. His wife traveled with him. (Answer; Exhibit 3, 4; TR 34-36-37) He again traveled to Taiwan in 1994, 1995, 1997 and 1998. (Exhibit 4)

In 1997 while in Taiwan for his father's funeral he provided a briefing on his software at the invitation of the ROC government as he has an export license for the software, but he did not provide the ROC with a copy of the software as he had left it in a bank vault in the U.S. His wife also attended the briefing. (Answer; Exhibits 1, 2, 3, 4; TR 37-39)

Subsequently, he has attempted to market his software to the ROC in 1998 and 1999. By a verbal agreement Applicant and his company have a business representative in Taiwan who is a citizen of the ROC who accompanied a ROC delegation to his company in 1999 to see a demonstration of the software. However, Applicant and his company have no business contract with the ROC. (Answer, Exhibits 3, 4, 7; TR 40-41, TR 43-44, 66-67, 70-71)

Also, in March 1999 he with others was paid to serve as an "external evaluator" for a university program in ROC. (Answer; Exhibit 2; TR 39-40, 65-66)

### **Use and Surrender of ROC Passport**

For twenty years Applicant did not travel to the ROC. (TR 27) However, in August1993 he applied to obtain a passport for ROC to make it easier to enter and leave the country because with a U.S. passport he would have to register with the police when visiting ROC. Applicant used the ROC passport once in 1997 to test the ROC adverse designation on his initial ROC passport. (2) (Exhibit 4; TR 28-30, 58-59) Subsequently, he used exclusively his U.S. passport to travel to ROC. (TR 30-32; 60-61) However, he re-applied for a new ROC passport in May 1998 to change the adverse designation; this passport is valid until May 2004. He stated he was unaware of any U.S. policy that would raise security concerns if he held a foreign passport; even though he is the security manager for his company, he was never advised of this policy by the Defense Security Service (DSS) that monitors his cleared facility. On the other hand he admits he never advised DSS he had obtained a ROC passport. The issue arose when a DSS investigator reviewed his security clearance application. (Answer; Exhibits 2, 3, 5; TR 21-22, 30-31, 56) Once he learned from DSS of the security concerns over his ROC passport Applicant declared to the DSS in September 2000 and again in his October 2001 Answer to the SOR that he was willing to surrender his ROC passport should it be necessary for access to classified information. (Exhibit 3; TR 22-23; 63-64)

Applicant attempted surrender his ROC passport at the hearing, but was advised to surrender it to the ROC, not the U.S. Government. The day after his security clearance hearing in January 2002 his counsel returned his ROC passport to the Taipei Economic and Cultural Office (TECO) as the counsel had been advised that was the proper place to return a ROC passport. Applicant has no intent to use his ROC passport in the future. (Exhibits D, E; TR 23, 48-49, 54, 64)

At the suggestion of TECO in February 2002 Applicant requested a confirmation from the ROC Ministry of Foreign Affairs that he and his wife had returned their ROC passports as the TECO official was not authorized to provide the requested confirmation. (Exhibits D & F)

However, on February 27, Applicant's counsel advised Department Counsel that TECO returned the ROC passport to his office. He forwarded the passport to Department Counsel to show his "continuing commitment to surrender" and authorized their destruction in any manner that would satisfy the DoD policy requirements. (Exhibit G) Applicant's counsel attempted to get further clarification from TECO on the proper procedures to surrender the ROC passport, but received none. (Exhibit H)

Since the Government is not authorized to take custody of a foreign passport, Department Counsel returned the passport on March 7, 2002, and provided guidance from DOHA decisions on alternative means of surrender that would be acceptable. (Exhibit 8) On March 20, 2002, Applicant's counsel advised that he had destroyed the ROC passport for Applicant and provided a copy of the destroyed passports which were again surrendered to TECO. (Exhibit I)

### **Foreign Influence**

Applicant and his company have a business representative in ROC who is a citizen of the ROC and a professor, but Applicant has not talked with him for one year. They have no formal written agreement. If it is U.S. policy not to use a ROC citizen as his business representative, Applicant will find another representative. (Answer; Exhibit 2; TR 42-43, 52)

Applicant has a brother and four sisters who are ROC citizens and reside in ROC, but he has a limited relationship with his siblings. Two of his sisters are also U.S. citizens. He has not spoken to his brother for years and never talks to two of his sisters. None of them or their spouses work for the ROC government. These siblings would in no way affect his loyalty to the U.S. (Answer, Exhibits 1, 2, 4; TR 44-46, 53)

Given Applicant's clear commitment to report any attempt to influence him, any risk of foreign duress or influence on Applicant and/or his immediate family would appear to be slight and clearly manageable as his family has no ties to the government.

### **References**

A former member of the U.S. foreign service who is now head of a firm that does international trade and investment consulting met Applicant through his efforts to help him market his software program. He reported Applicant's "hope that his software program will be a helpful tool in ensuring the national defense of the United States." He evaluated Applicant as being an individual who is committed to maintaining the security of his program and as someone who is not under any financial or emotional pressures. He does not suspect Applicant of having any loyalty to the government of ROC and stated that he was "confident" that Applicant would "never knowingly engage in conduct adverse to the legitimate interests of the United States." (Exhibit A)

A professional colleague, who is also an officer in the U.S. military reserves and a defense contractor, has known Applicant for thirty years and attests to his good character. He reported Applicant's "hope that his software program will be a helpful tool in ensuring the national defense of the United States." He evaluated Applicant as being an individual who is committed to maintaining the security of his program and as someone who is not under any financial or emotional pressures. He does not suspect Applicant of having any loyalty to the government of ROC and stated he was "confident" that Applicant would "never knowingly engage in conduct adverse to the legitimate interests of the United States." (Exhibit B)

Applicant's son, an M.D., is aware of concern over his father having obtained a ROC passport. He accompanied his father to a demonstration of the software program in 1998 in State #4 and emphasized his father's concern that his son protect the security of the software. He is confident his father would never engage in conduct adverse to the security interests of the U.S. (Exhibit C)

### **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility divided into conditions that could raise a security concern and may be disqualifying and conditions that could

mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. The mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed the following relevant Adjudication Guidelines:

### **Guideline C - Foreign Preference**<sup>(3)</sup>

**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.**

**Conditions that could raise a security concern and may be disqualifying include:**

- (1) the exercise of dual citizenship;
- (2) possession and/or use of a foreign passport<sup>(4)</sup>;
- (6) using foreign citizenship to protect financial or business interests in another country;

**Conditions that could mitigate security concerns include:**

- (1) Dual citizenship is based solely on parents' citizenship or birth in a foreign country;
- (4) Individual has expressed a willingness to renounce dual citizenship.

### **Guideline B - Foreign Influence**

**The concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are: (1) not citizens of the United States or (2) 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 coercion, exploitation, or pressure.**

**Conditions that could raise a security concern and may be disqualifying include:**

- (1) an immediate family member, 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

**Conditions that could mitigate security concerns include:**

- (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;

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order

to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

## CONCLUSIONS

### **Guideline C - Foreign Preference**

If an individual acts in such a way as to indicate a preference for a foreign country over the United States, this conduct raises a security concern under Guideline C (Foreign Preference) as the individual may be prone to provide information or make decisions that are harmful to the interests of the United States. Conditions that could raise a security concern and may be disqualifying include: (1) the exercise of dual citizenship; (2) possession and/or use of a foreign passport. Further, DoD policy clarification of August 16, 2000 explains that "possession and/or use of a foreign passport" may be a disqualifying<sup>(S)</sup> condition and to mitigate an Applicant must surrender his foreign passport or obtain official approval for its use. Security concerns over Applicant's possible foreign preference arose from his active exercise of dual citizenship as he has maintained his citizenship in ROC even after he became a naturalized US citizen in arch 1974. While dual citizenship is not prohibited *per se* (and in that sense is sanctioned by policies of the United States), any conduct indicating possible foreign preference does raise a security concern where such action would increase the risk of an individual being influenced by the needs, desires, or aims of a foreign nation. Also, Applicant in 1993 obtained a foreign passport and used it once in 1997 after he became a naturalized citizen of the US and after his US passport was issued to him. He re-applied for another ROC passport in 1998. Applicant chose to do so for reasons of convenience and pride as he was concerned over removing a character on the initial passport that showed him to be an "unwelcome" visitor because of his past political statements. Although he is the security manager for his company, he was not advised by DSS that to hold and use his ROC passport would raise security concerns.

Despite the concern over this isolated use of his ROC passport, Applicant meets one prong of the mitigation guidelines: under MC (1), his dual citizenship was based solely on parents' citizenship or birth in a foreign country. While there are no mitigating factors for an applicant's use of a foreign passport for reasons of convenience and pride, to his credit once he learned of the security concern over holding a foreign passport, Applicant voluntarily complied with DoD guidance. While he had delay in understanding and learning the proper avenue for ROC citizens to take corrective action to mitigate this security concern, in March 2002 Applicant surrendered his foreign passport by destroying it and returning it to the ROC.

Further, he is credible when he maintains that his principal preference is for the US. Despite the delay in surrendering his passport, he did so and fully complied with DoD policy guidance on passports. He backed up his statements with actions. He also falls within MC 4 as he expressed willingness to renounce his dual citizenship.

The Government also raised concerns over foreign preference arise under (6), using foreign citizenship to protect financial or business interests in another country. After personally assessing Applicant's conduct and demeanor, I conclude these concerns are no longer a security concern. He did not make these commercial efforts to protect financial and business interests in the ROC. Indeed he owns no property and has no financial accounts in the ROC. While Applicant has explored marketing his software in ROC on numerous trips to the ROC and has hosted ROC officials at his business in 1999 to see a demonstration of his software, he does not as yet have any business relationship in ROC. Also, Applicant's having evaluated an academic department of a ROC university in 1999 for which he was paid, does not show a foreign preference. His ROC business development efforts do not rise to a level of security concern as they were intermittent and so far unsuccessful; while in ROC he showed concern over the security of his product and the need to protect his and U.S. security interests. His long-term ties to the U.S. defense industry are at the heart of his marketing efforts.

This commitment is also supported by three favorable references, two professional colleagues and his son: he is an individual who is committed to maintaining the security of the U.S. and his software program. Both professional associates were "confident" that Applicant would "never knowingly engage in conduct adverse to the legitimate interests of the United States."

In this case, after reviewing all of the evidence in the record and considering all of the security policies, including the August 16, 2000, policy clarification memorandum, I conclude Applicant has met the DoD mitigation sufficiently to indicate his clear preference for the United States. Security clearance decisions are predictive judgments about an applicant's security eligibility in light of the applicant's past conduct and present circumstances. *Department of Navy v.*

*Egan*, 484 U.S. 518, 528-29 (1988). In this case I also considered the fact that Applicant personally and his facility have had security clearances for over twenty years with no reported violations. While acts indicative of foreign preference warrant careful scrutiny, I conclude SOR paragraph 1 and subparagraphs 1.a. through 1.i. for Applicant.

### **Guideline B - Foreign Influence**

The Government also expressed security concerns over Applicant's possible foreign influence raised by his close ties of affection to citizens of a foreign country. First, he has siblings in ROC who are citizens there, though two of his sisters are also U.S. citizens. The security concern under Guideline B, Foreign Influence, is that a security risk may exist when an individual's immediate family. . . and other persons to whom he or she may be bound by affection, influence, or obligation are: (1) not citizens of the United States or (2) 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 coercion, exploitation, or pressure. Conditions that could raise a security concern and may be disqualifying include: (1) an immediate family member, 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. On the other hand contacts with citizens of other countries are relevant to security determinations only if they make an individual potentially vulnerable to coercion, exploitation, or pressure through threats against those foreign relatives. Applicant has relatively infrequent contacts with his family in ROC with respect to visits there; further, these security concerns are mitigated by the fact that Applicant's relatives have no ties to their foreign government; nor is there any substantial likelihood that they would exercise foreign influence over Applicant. Merely because of these family ties Applicant is not vulnerable to duress. Given his history of responsible conduct, I think it improbable that his any of his family members would create a situation that could result in the compromise of classified information. Applicant has clear ties to the U.S. over a long period of time. Thus, any risk of foreign duress or influence on Applicant and/or his immediate family would appear to be slight and clearly manageable as his family has no ties to the ROC.

Second, concern was raised by his business relationship with an ROC citizen to market his software. However, that relationship is informal and established before he understood security concerns of it. Now he has promised to end his informal business relationship with the ROC citizen.

Security clearance decisions are predictive judgments about an applicant's security eligibility in light of the applicant's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). Acts indicative of foreign influence warrant careful scrutiny. After considering the Enclosure 2 Adjudicative Process factors and the Adjudicative Guidelines, I conclude these ties are not of such a nature as to create any tangible risks of undue pressure, so as to invoke such foreign influence concerns. In this case I also considered that Applicant personally and his facility have had security clearances for over twenty years with no reported violations or attempts to pressure him by the ROC government. (Indeed he was known to be a critic of earlier governments.) Thus, I resolve SOR paragraph 2 and subparagraphs 2.a. through 2.b. in Applicant's favor.

### **FORMAL FINDINGS**

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1.Guideline C: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Paragraph 2. Guideline B: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

### **DECISION**

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

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Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. Applicant explained he learned on his initial ROC passport was placed a designation of "unwelcome" because at his university in the U.S. he had spoken out since 1970 against the earlier ROC government leaders during years of martial law. This "blacklisted" designation caused a delay at the time of his arrival in ROC. After democratic elections were held he wanted to have this adverse designation changed which was done in 1998. (Answer; Exhibits 2, 3, 5; TR 49-51, 55-57, 61-62)
3. See also the DoD August 16, 2000, Policy Clarification Memorandum, quoted above.
4. DoD policy clarification of Guideline C issued in August 2000 made clear that "any clearance [must] be denied or revoked unless the applicant surrenders the foreign passport . . . ."
5. The policy contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country.