

DATE: May 11, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-22405

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a dual citizen of the United States and Taiwan, has a brother and a sister who are citizens and residents of Taiwan, and another sister who is a citizen of Taiwan and resident of Japan. Although he has been a U.S. citizen since January 1993, Applicant applied for a Taiwanese passport in December 1995, renewed that passport in March 2002, and that passport does not expire until March 2012. Although he has expressed a willingness to surrender the Taiwanese passport, Applicant has not presented any evidence to indicate he has done so. Applicant also failed to disclose he possessed a foreign passport in a Questionnaire for National Security Positions he submitted on August 24, 1999. Applicant has failed to mitigate the security concerns of foreign preference and personal conduct that are present in this case. Clearance is denied.

STATEMENT OF THE CASE

On July 16, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B (foreign influence) and Guideline C (foreign preference). Applicant submitted a sworn response to the SOR, dated July 26, 2003, and requested a clearance decision based on the written record without a hearing. Applicant admitted all but three of the SOR allegations.

Department Counsel prepared a File of Relevant Material (FORM) on February 4, 2004, that was mailed to Applicant the same day. Applicant submitted a response to the FORM, dated February 25, 2004. The case was assigned to me on March 10, 2004.

PROCEDURAL MATTERS

Department Counsel moved to amend the SOR to allege the content of subparagraph 2.e. under Guideline C, as opposed to Guideline B. Applicant did not interpose any objection to the requested amendment. The motion is hereby granted and subparagraph 2.e. is renumbered subparagraph 1.f.

FINDINGS OF FACT

Applicant's partial admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 64 years old, married, and the father of two adult sons. He immigrated to the United States in approximately 1987, and, along with his wife and one of his sons, became a United States citizen in January 1993. Applicant's eldest son is presently a resident alien in the United States, and applied for U.S. citizenship in January 2004.⁽²⁾ Applicant claims he does not consider himself a dual citizen of the U.S. and Taiwan, but acknowledges he would have to relinquish his dual citizenship if he surrenders his Taiwanese passport.

Applicant served one-year compulsory military service as an ensign in the Taiwanese Navy from July 1963 to July 1964. He obtained a bachelor of science degree in engineering, naval architecture, and marine engineering from a Taiwan university in July 1967, and then worked in Japan for approximately twenty years until he immigrated to the U.S. He has been employed by a defense contractor as a naval architect since June 1999. He was previously employed from May 1998 to February 1999 by a company owned by the Peoples Republic of China (PRC) in the United States. Although Applicant had contact with the company's top officials, PRC citizens, while he worked there, he has had no contact with the company or any of its employees since February 1999.

Applicant's sister and brother are citizens and residents of Taiwan. He has a second sister who is a citizen of Taiwan but resides in Japan. Applicant's mother, who was a citizen and resident of Taiwan, died on May 10, 2003. Sometime after Applicant immigrated to the U.S., he sold a house he owned in Taiwan and left the approximate \$150,000.00 proceeds in the care of the sister in Taiwan until he could arrange to transfer the money to the U.S. The sister misappropriated the funds and used them to pay debts from her failed business venture. Applicant has not had personal contact with his foreign relatives since August 1999.

Applicant applied for a Taiwanese passport in December 1995, and renewed that passport in March 2002. The Taiwanese passport does not expire until March 2012. Although he has on several occasions expressed a willingness to surrender his Taiwanese passport, he has not supplied any information to indicate he has done so. Applicant was issued a U.S. passport in February 1993, and has used that passport for all foreign travel. He obtained and retains the Taiwanese passport so he can avail himself of the Taiwanese health care system upon retirement.

Applicant submitted a Questionnaire for National Security Positions (SF 86) on August 24, 1999 in which he failed to disclose: (1) he had an active passport issued by a foreign government; (2) had indicated he was known by another name on the foreign passport; and (3) he visited Hong Kong for two days in 1997. Applicant claims he did not disclose possession of the passport because he did not intend to use the passport, and he did not disclose the alias listed on the Taiwanese passport because he has never actually been known by that name. The trip to Hong Kong was made while he was working in Japan and needed to go to the Japanese embassy in Hong Kong to extend his visa, and his omission of this side-trip from the SF 86 was an oversight.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline B, pertaining to foreign influence, Guideline C, pertaining to foreign preference, and Guideline E, pertaining to personal conduct, with their respective DC and C, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁵⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹²⁾

CONCLUSIONS

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.

Applicant served in the Taiwanese Navy from 1963 to 1964. He was then solely a citizen and resident of Taiwan and military service was compulsory. It was only after that service that Applicant made the decision to immigrate to the U.S. and become a U.S. citizen. He strongly asserts he would no longer be willing to serve in any foreign military, and would be willing to bear arms on behalf of the U.S., including against Taiwan. Under these circumstances, Disqualifying Condition (DC) 3: *Military service or a willingness to bear arms for a foreign country* does not create a security concern in this case. Applicant's brief employment with a PRC owned company also does not create a security concern under the facts present in this case.

However, Applicant is a dual citizen of the United States and Taiwan. While he claims he does not consider himself to be a dual citizen, he possesses a valid Taiwanese passport, an exercise of Taiwanese citizenship, and justifies his possession of that passport so he can take advantage of the Taiwanese healthcare system after he retires, which would constitute another exercise of Taiwanese citizenship. DC 1: *The exercise of dual citizenship* and DC 2: *Possession and/or use of a foreign passport* apply in this case. DC 4: *Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country*, while not presently applicable, must also be weighed against Applicant based upon his stated intent to avail himself of the Taiwanese healthcare system when he retires.

Although Applicant has expressed a willingness to surrender his Taiwanese passport, there is no evidence he has done so. ASD(C3I) Memorandum, dated August 16, 2000 (the Money Memo) 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." While Mitigating Condition (MC) 4: *Individual has expressed a willingness to renounce dual citizenship* is entitled to some consideration, it is insufficient to overcome the present and contemplated future exercise of dual citizenship, and the mandate of the ASD(C3I) memorandum. Accordingly, Guideline C is decided against Applicant.

Foreign Influence. 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 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 coercion, exploitation, or pressure.

(DC) 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* applies in this case because Applicant's sister and brother are residents and citizens of Taiwan, and a second sister is a citizen of Taiwan and resident of Japan. Further, Applicant's son is still a citizen of Taiwan, although he is living in the United States on a resident visa and has applied for U.S. citizenship.

Applicant has not had any direct contact with any of his siblings since 1999. His eldest son has resided in the U.S. for a number of years now and has applied for U.S. citizenship. Considering the relations between the U.S. and Taiwan, the length of time Applicant has been in the U.S., and the exhibited lack of closeness between Applicant and his siblings, there is no reason to expect they would or could be used in a way to force Applicant to choose between loyalty to them and the U.S. MC 1: *A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitants, 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;* and MC 3: *Contact and correspondence with foreign citizens are casual and infrequent* apply. Applicant has mitigated the foreign influence security concern. Guideline B is decided for Applicant.

Personal conduct under Guideline E is always a security concern because it asks the central

question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Applicant's explanation for failing to disclose the alias listed on his foreign passport and the limited side-trip to Hong Kong while on an extended work assignment in Japan are believable. However, his failure to disclose his possession of a current foreign passport was a deliberate omission, and his explanation for the non disclosure is not credible. Applicant's lack of candor in failing to disclose the passport when he submitted the SF 86 and the testimony he provided by way of explanation severely undermine the ability to place trust and confidence in Applicant at the present time. His false and/or misleading answers and explanations raise significant security concerns.

DC 2: *The deliberate omission, concealment, or falsification of relevant and material fact*

from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities applies in

this case. I have considered all the Mitigating Conditions under Guideline E and none apply in this case. Guideline E is decided against Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find that Applicant has failed to overcome the case against him and satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline C: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: For the Applicant

Subparagraph f: For the Applicant

SOR ¶ 2-Guideline B: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: For the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: For the 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 or continue a security clearance for Applicant. Clearance is denied.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. The eldest son was not permitted to immigrate to the U.S. with Applicant based on his age and a corresponding Taiwanese legal requirement that he fulfill a military obligation.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.