

DATE: June 7, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28125

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Department Counsel

FOR APPLICANT

Elizabeth Lou, Esq.

SYNOPSIS

Applicant, born in the Republic of China (Taiwan), came to the United States in 1959 and became a United States citizen in 1973. His wife, two children, and three sisters are also United States citizens. He has a brother and mother-in-law, who are citizens of Taiwan and reside in Taiwan. His contacts with them are extremely infrequent. None of these family members, belong to, participate in, or are active with any government agency of Taiwan. They are not in a position to be exploited by Taiwan in a way that could force Applicant to choose between loyalty to these family members and his loyalty to the United States. Applicant's strong attachment to the United States makes it unlikely that he would respond favorably to any efforts to act against United States interests. litigation has been shown. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated October 20, 2003, to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, or denied. The SOR was based on Foreign Influence (Guideline B) concerns because of the foreign residency and/or citizenship of close family members.

Applicant filed a notarized response, dated November 17, 2003, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On February 2, 2004, the case was assigned to this Administrative Judge to conduct a hearing. Pursuant to formal notice dated February 12, 2004, a hearing was held on March 25, 2004.

At the hearing, Department Counsel offered two documentary exhibits (Government Exhibits 1 and 2) and no witnesses

were called. Applicant, through his counsel, offered five documentary exhibits (Exhibits A-E) and offered his own testimony. The transcript (TR) was received on April 13, 2004.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline B (Foreign Influence) of the Directive. The SOR contains four allegations, 1.a., through 1.d., under Guideline B. Applicant admitted SOR allegations 1.d. and denied 1. a. through 1.c. The admitted allegation is incorporated herein as a finding of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 68 years old. He has been employed as a Senior Engineering Specialist by a United States defense contractor for twenty years. The company wants him to retain the security clearance that he has had for approximately twenty years.

Applicant was born in Taiwan. He served in the Taiwanese military in 1957 and 1958. He came to the United States in 1959, and became a naturalized United States citizen in 1973. He received a Ph. D. degree in Electrical Engineering in 1976 from a United States university. Applicant's wife also became a United States citizen in 1973. They have a son and a daughter, both of whom were born in the United States and are United States citizens.

Applicant has three sisters, who are citizens of and reside in the United States. His sisters have lived in the United States since the early 1970s. A brother, who also was a citizen of and resided in the United States, died in 2004.

Guideline B (Foreign Influence)

Applicant has one brother, who is a citizen of and resides in Taiwan. His brother was in the Taiwanese army for two years. His brother, who is now retired, was employed as a textile engineer, by a company that is partially funded by the Government of Taiwan. Applicant last saw his brother in 1987, and he indicated that they do not have a close relationship, because when Applicant moved to the United States in 1959, his brother was only ten years of age. He communicates with his brother once a year (Tr at 29-36). Applicant had one additional brother, who was a citizen of and resided in Taiwan. He died in 2002.

Applicant's mother-in-law is also a citizen of and resides in Taiwan. She is 90 years of age and in failing health. He last saw her in 1978, and he does not communicate with her at all. His wife

speaks to her by telephone approximately every other month (Tr at 36, 37).

Applicant last traveled to Taiwan in 1987 to attend the funeral of his mother. In 1999, he traveled to the People's Republic of China as part of a pleasure tour. Since he has worked for his present employer, he always has briefings with his company's security officer, prior and subsequent to any trips abroad (Tr at 46).

Applicant does not have any inheritance or financial interest in Taiwan. He estimated that his financial holdings in this country are worth one million dollars (Tr at 40).

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, etc.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (*See* Directive, Section E2.2.1. of Enclosure 2).

Based upon a consideration of the evidence as a whole, I find the following guidelines and concerns most pertinent to an evaluation of the facts of this case:

FOREIGN INFLUENCE (GUIDELINE B)

E2.A2.1.1. 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 not citizens of the United States or may be subject to duress. These situations 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.

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

Under Guideline B, a security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he is bound by affection, influence or obligation, are not citizens of the United States or may be subject to duress. Based on the evidence of record, the Government has established a reason to deny Applicant a security clearance because of Guideline B (Foreign Influence). Applicant has a brother and mother-in-law, who are citizens of and reside in Taiwan. The Taiwan citizenship and residency of Applicant's family create the potential for foreign influence that could result in the compromise of classified information because it makes Applicant potentially vulnerable to coercion, exploitation, or pressure. The possession of such ties raises a security concern sufficient to require Applicant to present evidence in rebuttal, extenuation, or mitigation sufficient to meet his burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for him.

The evidence of Applicant's brother and mother-in-law, who are citizens of and reside in Taiwan comes within Disqualifying Condition (DC) E2.A2.1.2.1, "immediate family members, or persons to whom the individual has close ties of affection or obligation, who are citizens of, or resident in, a foreign country."

The primary factors in mitigation that I have considered include: Applicant's history since coming to the United States

in 1958 and becoming a U. S. citizen with his wife in 1973; his positive record during the past twenty year period during which he has worked for one United States contractor and held a security clearance; the lack of government involvement of Applicant's brother and mother-in-law and the extremely limited and infrequent contact he has with them; his devotion to his wife and children; and his strong feelings concerning this country. Based on the nature of the overall record and the totality of the evidence, I have determined that his family in Taiwan does not constitute an unacceptable security risk, and Mitigating Condition (MC) E2.A2.1.3.1, "a determination that the immediate family member(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," applies. MC E2.A2.1.3.3. also applies because Applicant's contact with his family in Taiwan is extremely casual and infrequent.

After considering all of the evidence of record on these issues, I conclude that the mitigating evidence substantially outweighs the evidence supporting the SOR and even in the unlikely event pressure was exerted upon Applicant to compromise classified information, he would resist it and would report the incident to the proper authorities.

On balance, it is concluded that Applicant has overcome the Government's information opposing his request for a security clearance.

FORMAL FINDINGS

Paragraph 1. Guideline B: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: 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 Applicant.

Martin H. Mogul

Administrative Judge