

DATE: December 2, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30752

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant married a Taiwanese citizen who is a permanent U.S. resident and aspires to be a U.S. citizen. His wife's mother, sister and brother are citizens and residents of Taiwan, but are not connected to the Taiwanese government or military. His wife has weekly telephonic contact and monthly mail contact with her mother and sister, but she has virtually no contact with her seven-year-old Taiwanese son from a previous marriage who is in the sole custody of her Taiwanese ex-husband. Applicant cannot communicate with his in-laws because of the language barrier. He visited Taiwan twice, once to visit his future wife and once to be married. Security concerns based on foreign influence are mitigated. Clearance is granted.

STATEMENT OF THE CASE

On June 14, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. ⁽¹⁾ The SOR sets out a security concern under Guideline B (Foreign Influence) of the Directive based on four allegations: Applicant's spouse is a citizen of Taiwan residing in the U.S. (¶ 1.a.); Applicant's mother-in-law, sister-in-law, and brother-in-law are citizens and residents of Taiwan (¶ 1.b.); Applicant's spouse has weekly telephonic contact and monthly mail contact with her mother and sister (¶ 1.c.); and Applicant traveled to Taiwan on September 3, 2000 and April 10, 2001 (¶ 1.d.).

Applicant answered the SOR in writing on June 21, 2004. He admitted the allegations, offered explanations, and requested a hearing. The case was assigned to me on August 20, 2004. On August 25, 2004, DOHA issued a notice of hearing setting the case for October 5, 2004. Applicant appeared as scheduled. DOHA received the transcript (Tr.) on October 26, 2004.

PROCEDURAL RULING

During cross-examination of Applicant, Department Counsel elicited the fact that Applicant's wife had a Taiwanese son from a prior marriage. Applicant did not object at the time. After the hearing, Applicant asserted it was improper to

elicit this information because it was outside the scope of the SOR. I have determined that Applicant's objection is untimely, without merit, and moot in light of my decision to grant a clearance.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 39-year-old senior engineering technician for a defense contractor. He has worked for his present employer since June 2002. He previously held a security clearance during his four-year enlistment in the U.S. Marine Corps, and it was administratively terminated after he was released from active duty. While in the Marine Corps, Applicant received meritorious promotions to private first class, lance corporal, and corporal.

Applicant met his wife in February 2000 through an internet dating service while she was a citizen and resident of Taiwan. His future wife, along with her mother and sister, came to the U.S. on a combined business and pleasure trip and visited Applicant during the Memorial Day weekend in 2000. In September 2000, Applicant traveled to Taiwan for seven days to visit her. She returned to the U.S. with him, and she remained in the U.S. on a tourist visa until she returned to Taiwan on March 10, 2001, to attend her father's funeral. On April 10, 2001, Applicant traveled to Taiwan for six days to marry her.

Applicant's wife returned to the U.S. in June 2001 and became a permanent U.S. resident. Her primary motivation for coming to the U.S. was to be with Applicant. She intends to become a U.S. citizen as soon as she is eligible. Applicant and his wife have a two-year-old son who is a native-born U.S. citizen. Applicant and his wife wanted their son to hold only U.S. citizenship. Accordingly, they did not register their son with Taiwan's National Registry or document him in any way as a Taiwanese citizen.

Applicant was previously married in June 1985 and divorced in January 1989. He has a 19-year-old daughter, a native-born U.S. citizen, from his first marriage. Applicant's wife also was previously married. She was divorced about five years ago and has a seven-year-old son from her first marriage. Her previous husband and their son are citizens and residents of Taiwan. Her previous husband, a Taiwanese court employee, has sole custody of their son. Applicant's wife has only infrequent correspondence with her son and does not provide any financial support. Applicant has never met his wife's son.

Applicant's wife worked as a graphic designer for a food company while she was in Taiwan. Since she came to the U.S., she has done occasional graphic arts work but is not employed full-time.

Applicant's father-in-law is deceased. His mother-in-law and sister-in-law are citizens and residents of Taiwan. His mother-in-law owns a herbal medicine shop and employs his sister-in-law in the shop.

Applicant's brother-in-law is a research and development manager for a Taiwanese manufacturer of industrial valves. The valves are used in commercial, nonmilitary applications. Except for his brother-in-law's mandatory military service, none of Applicant's in-laws are employed by or have any relationship with the Taiwan government.

Applicant's spouse has weekly telephonic contact and monthly mail contact with her mother and sister. The mail from Applicant's in-laws is limited to gifts of clothing and toys for Applicant's infant son and occasional greeting cards. The mail from Applicant's spouse to her mother and sister consists of crayon artwork from their son and occasional greeting cards. Applicant has very little contact with his in-laws because they cannot speak English and he cannot speak Chinese, except for a few polite phrases.

Applicant's mother-in-law and sister-in-law have visited the U.S. twice, once before Applicant and his wife were married and once when Applicant's son was born. Applicant's in-laws have no desire to live in the U.S. Applicant's wife has visited her mother twice, in May 2004 and about May 2003, but she has no desire to live permanently in Taiwan.

Taiwan is a multiparty democracy, with a good human rights record. On the other hand, Taiwan is an active collector of defense, medical, economic, and computer information through industrial espionage.⁽²⁾ Taiwan maintains a large

military establishment, and its primary mission is the defense of Taiwan against the PRC. The Taiwan Relations Act, U.S.C. §§ 3301-3316, is the legal basis for the unofficial relationship between the U.S. and Taiwan and the U.S. commitment to ensuring Taiwan's defensive capability.

Applicant has first-hand experience with economic espionage and violations of U.S. export laws. As the result of violations of U.S. export laws by a former employer, Applicant lost a highly-paid position. In his present position, he enjoys a reputation for hard work, dependability, high integrity, and exemplary adherence to security protocols.

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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that 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, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (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. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* Directive ¶ 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 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* Directive ¶ E2.2.2.

CONCLUSIONS

A security risk may exist when an applicant's immediate family, or other persons to whom he may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Directive ¶ E2.A2.1.1.

A disqualifying condition (DC 1) may arise when "[a]n 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." Directive ¶ E2A2.1.2.1. Applicant's admission that his spouse is a citizen of Taiwan establishes DC 1.

The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). Applicant's wife's ties to Taiwan and the possible effect they may have on Applicant's conduct are relevant considerations under Guideline B (Foreign Influence). ISCR Case No. 01-02452 at 8 (App. Bd. Nov. 21, 2002). "[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). Furthermore, a disqualifying condition (DC 2) may arise if an applicant is "[s]haring living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." Applicant's admission that his in-laws are citizens and residents of Taiwan establishes DC 2.

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members (spouse, father, mother, sons, daughters, brothers, sisters) . . . 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." Directive ¶ E2A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1 ("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to choose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power"). Since the Government has produced substantial evidence to establish DC 1 and DC 2, the burden has shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

Guideline B is not limited to countries that are 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). Although Taiwan historically has been regarded as friendly to the U.S., the distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

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. Finally, we know that even friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). 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.

Although Applicant's wife is a citizen of Taiwan, she has become a permanent resident of the U.S. and aspires to become a U.S. citizen as soon as possible. She has ensured that her two-year-old son will have only U.S. citizenship. She is not an agent of a foreign power or in any way connected with the government of Taiwan. Her professional training and experience as a graphic artist make her an unlikely target or means of economic espionage. She has close ties with her mother and sister, but their social and economic positions, owning and operating a herbal medicine shop, do not offer a likely opportunity for exploitation.

The maternal relationship between Applicant's wife and her son from a previous marriage appears to be virtually nonexistent. Her ex-husband has sole custody. She has little contact with her son and provides no financial support. By electing to live in the U.S., she has voluntarily increased the geographical and emotional distance between herself and her son. Her ex-husband is a court employee and not associated with industry, industrial technology, or the military.

Thus, it is unlikely he will attempt to exercise influence through Applicant's wife and her son.

Applicant's brother-in-law is not associated with the Taiwanese government or military. He works in industry, but his work is limited to commercial, nonmilitary applications.

Security concerns can be mitigated by showing that contact with foreign citizens is casual and infrequent (MC 3). Directive ¶ E2.A6.1.3.3. Applicant's inability to speak Chinese limits his contacts with his in-laws to occasional polite phrases.

After considering each family member's individual circumstances, I conclude MC 1 is established with respect to Applicant's wife, MC 1 and MC 3 are established with respect to his in-laws. Neither Applicant's wife nor any of his in-laws are employed by or connected to the Taiwanese government. Furthermore, none of them are associated with a political, military, commercial, or other activity that would benefit from the products of industrial espionage or U.S. national security information. After considering the totality of Applicant's family ties, I conclude that the security concerns based on Applicant's family ties to Taiwan are mitigated.

FORMAL FINDINGS

The following are my findings as to each allegation in the SOR:

Paragraph 1. Guideline B (Foreign Influence): FOR APPLICANT

Paragraph 1.a.: For Applicant

Paragraph 1.b.: For Applicant

Paragraph 1.c.: For Applicant

Paragraph 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 a security clearance to Applicant. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

1. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).

2. National Counterintelligence Center (NACIC), *Annual Report to Congress 15* (2000) (admitted as Government Exhibit 3), available on the internet at www.nacic.gov. The NACIC Annual Reports for 2001, 2002, and 2003 did not identify the most active practitioners of industrial espionage by name.