

DATE: November 26, 2003

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-20356

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 43-year-old systems engineer was born in Taiwan in 1960. She came to the U.S. in 1983 to complete her education, married, raised a family, and had a career as a teacher, research scientist, and systems engineer. She renounced her Taiwan citizenship in 1999, when she became a naturalized U.S. citizen. She still has family and friends in Taiwan, with whom she keeps in touch periodically. She has no other ties to Taiwan and considers self to be only an American. She understands her obligation to report any improper contacts and is prepared to do so if the occasion arises. Her family ties to Taiwan do not represent an unacceptable risk. She has shown an unequivocal preference for the U.S. Clearance is granted.

STATEMENT OF THE CASE

On February 18, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On April 11, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The case was assigned to another Administrative Judge, but was reassigned to me on June 18, 2003, because of caseload considerations. A Notice of Hearing was issued on July 9, 2003 and the hearing was conducted on July 30, 2003. The transcript was received at DOHA on August 8, 2003.

FINDINGS OF FACT

Applicant is a 43-year-old systems engineer employed by a defense contractor.

In her response to the SOR, Applicant admits the single Guideline C allegation (1.a.) and all seven Guideline B allegations (2.a.- 2.g.). Her explanations contain admissions of factual details, which are incorporated by reference and adopted as Findings of Fact.

After considering the totality of the evidence, specifically Applicant's testimony and all exhibits, I make the following additional FINDINGS OF FACT as to each SOR allegation:

Guideline C (Foreign Preference)

1.a. - As of May 15, 2002, Applicant possessed a valid Taiwanese passport that was issued in May 1997 and was due to expire in May 2003. (AX C). She became a naturalized U.S. citizen in November 1999 (GX 2), at which time she believed she was no longer a Taiwan citizen. She obtained a U.S. passport on April 21, 2000 (AX D). On April 1, 2003, Applicant formally renounced both her Taiwan citizenship (AX D and AX E) and her right to use her Taiwan passport (AX F). On July 31, 2003, Applicant cut up her then invalid Taiwan passport and mailed it to a Taipei Economic and Cultural Office in the U.S. (AX G, AX H, AX I, and AX J).

Guideline B (Foreign Influence)

2.a. - Applicant's father (71), mother (69), stepmother, grandmother (90), half-brother, and brother and sister are citizens of Taiwan and currently reside in Taiwan;

2.b. - Applicant's older brother is a citizen of Taiwan currently residing in the U.S.;

2.c. - Applicant traveled to Taiwan to visit her family, twice in 2001, and once in 2000, 1999, 1998, and 1995;

2.d. - Applicant has periodic telephonic contact with her grandmother, mother, and father in Taiwan to check up on their health;

2.e. - Applicant has once yearly telephone contact and occasional visits in the U.S. with a friend who is a Government research scientist in Taiwan. He has known this friend since 1985, when they were both graduate students at an American university;

2.f. - Applicant traveled to the People's Republic of China (PRC) in 2001, 2000, 1998, and 1995, for acupuncture treatment and sightseeing;

2.g. - Applicant socializes weekly with a husband and wife who are citizens of the PRC. They reside in the U.S., where the husband is a Computer Science professor at a U.S. university.

Applicant is praised and recommended for a position of trust by her work supervisor, who is a retired Air Force officer with many years of having a security clearance himself. (AX A). In addition, a co-worker considers Applicant to have a high work ethic, integrity, and loyalty to the U.S. (AX B). A witness testified that he has known Applicant at work for two years, where she has worked on the non-classified parts of DoD contracts. He views her as a "person who accepts responsibility" for her actions, is "very conscientious" and "honest" and is a person who "likes to do what is best for the company." (Tr at 50-52).

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE C (Foreign Preference)

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 security concerns and may be disqualifying include:

None that are established by the evidence of record.

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 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 vulnerable to coercion, exploitation, or pressure.

Condition that could raise security concerns and may be disqualifying:

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.

Condition that could mitigate security concerns:

1. A determination that the immediate family members(s), . . . cohabitant, or associates in a foreign country 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.

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the Directive's "whole person" concept, I am not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

If the Government meets its initial burden of proof and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Guideline B - This is the area of greatest concern to the Government in this case. The issue is whether Applicant is vulnerable to foreign influence, because of (1) her family/relatives and a friend in Taiwan, (2) her travels to Taiwan to see her family and friend, to the PRC to obtain acupuncture treatment for an ongoing medical condition, and (3) her friendly relationships with individuals residing in the U.S., but who are citizens of either Taiwan or the PRC. .

Applicant was born in Taiwan in 1959. She came to the U.S. in 1983 to attend graduate school, has made her home here ever since, and has no intention of leaving. (GX 3). She married in 1995 and her Taiwanese-born husband is also a U.S. citizen only, as are all of his immediate family members. She states that she has no loyalties or allegiance to Taiwan and has no financial other ties or connections with that country other than her family.

DOHA Administrative Judges must make a risk analysis in each case. It is a basis premise of DoD's personnel security clearance program that applicants' have the ultimate burden of showing that they are eligible for a clearance. In cases involving Foreign Influence concerns, this means that applicants must show that their family and friends in other countries are (1) not agents of a foreign power and/or (2) are not in a position to be exploited by a foreign power (3) in a way that could force an applicant to choose between loyalty to the person(s) involved and the United States.

By the very nature of foreign influence concerns, Applicants with family and friends in foreign countries are placed in the difficult position of having to prove a negative. In Guideline B cases, the Government's concerns are based entirely on information provided by applicants in their security clearance applications. In some cases, the applicants have acknowledged the existence of family members or friends who are, or have been, an official of a foreign government, or high-ranking members of a foreign military or police force. In a recent case, the applicant's father had been an officer in a foreign Army, recently retired after 38 years of service, and in a position whereby in the past, he was able to obtain a NATO security clearance for Applicant as a favor from his country's Foreign inistry. (Appeal Board Decision and Reversal Order, ISCR Case No. 02-26826 (November 12, 2003).

In that case, the DOHA Appeal Board accepted the Administrative Judge's conclusion that applicant's evidence (his testimony) had adequately shown that his family members were "not currently agents of the [foreign] government," but found that the Administrative Judge erred in not also evaluating the evidence under the second element of Mitigating Condition 1, whether the relatives were nonetheless in "a position that poses a risk that they could be exploited by a foreign power to be exploited." (*Id.*, at pages 4-6). The risk of exploitation can also occur through "noncoercive means such as affection or obligation." (*Ibid.*).

In the present case, Applicant's evidence is that, as far as she knows, her family and friends in Taiwan and in the United States are not agents of a foreign power. While a credibility determination is not evidence by itself, testimony is the most common type of evidence we have in ISCR cases, and to be given any significant weight, almost by definition, it must be credible. I find Applicants testimony and exhibits to be credible and entitled to significant weight.

The second part of MC 1 must be read together with the third part, as detailed above. It is not enough simply to consider whether a relative or friend is in a position to be exploited. If read literally, anyone in a foreign country someone could be approached by an agent of that country and asked to asking that person to violate his or her duty to protect U.S. security interests. Anyone in the U.S., regardless of the location of birth, who has family or friend abroad faces the same risk. In this sense, the very existence of those individuals abroad could bar issuance of a clearance.

Mitigating Condition 1 appears to recognize this reality by requiring that beside considering whether the other person is in a position to be exploited, DOHA Administrative Judges must also consider the risk, possibility, or likelihood that an applicant would feel "force[d] . . . to choose between loyalty to the person(s) involved and the United States." Whether an applicant would feel forced to choose in such a situation is necessarily based on what the applicant says. An applicant for a security clearance is required to make a subjective estimate as to how he or she would respond at some time in the

future under hypothetical circumstances.

Under Appeal Board precedent, such statements "cannot be taken simply at face value" since it is "merely a statement of intention that is not entitled to much weight," unless there "is record evidence that the applicant has acted in an identical or similar manner in the past." (ISCR Case No. 02-26826, *supra*, at page 5). In the cited Appeal Board decision, the Board found that the Administrative Judge's conclusion that the applicant's "immediate family in [the foreign country] is not in a position to be exploited is problematic in light of the overall record." (*Id.*, at page 6). In the instant case, the circumstances of Applicant's family in Taiwan, her contact with them, and visits to Taiwan to see them and to the PRC to obtain acupuncture treatment do not approach the objective factors that reasonably cause concerns, such as the father's status in the foreign military. Under the facts and circumstances in the present case, the evidence does not suggest an unacceptable level of susceptibility to foreign influence.

In the context of the present record, including 20 years in the U.S., her education, marriage, and raising a family here, she has established feelings, loyalties and allegiances for the U.S. that add credibility to her statement of present and future intentions. A perhaps not widely recognized benefit of ISCR hearings is that applicants who may otherwise have taken their identification as U.S. citizens for granted are forced to think about the obligations that accompany that citizenship. Whatever Applicant's thoughts on this matter were in the past, they were certainly more focused by the end of the hearing. She said:

As for my relatives in Taiwan, I admit that I have contacts with them, but solely because they are my mother and father. When I call them, then they need to know that I am healthy and safe. That is all they ask of me. If there were anything that would endanger [*sic*] that someone wants to get a secret from me, then I would inform the agency of DoD in the United States right away.

It is a reality that evaluations and conclusions in Guideline B and C cases are necessarily based on information provided by the applicant. This occurs when completing a security clearance application, speaking with an agent of the Defense Security Service (DSS) during the background investigation, or during the ISCR hearing. After considering Applicant's statements, and the statements of others who are familiar with her work and personal ethics, I conclude that Applicant is a woman of integrity who does not feel she would be *forced* to choose between family and U.S. security interests. Rather, she understands what her primary obligations would be in such a circumstance, and would promptly report any such contacts. Since Applicant has never been asked to do anything improper, she has never had the opportunity to respond in the same manner she says she would in the future. However, viewed in the context of her 20 years of residency in the United States and her contributions to American society, her testimony as to how she would respond to any attempt to pressure or coerce her into acting improperly was both credible and convincing. The totality of the evidence does not create a doubt about this issue. I find her to be responsible and trustworthy. Based on these facts, Guideline B is found for Applicant.

Based on the entire record, I conclude that Disqualifying Condition (1) (an immediate family member, or a person to whom the individual has close ties of affection, is a citizen of or resident or present in, a foreign country) applies. None of the other possible mitigating conditions have been established by the record. Mitigating Condition 1(a determination that the immediate family member(s) . . . are not agents of a foreign power or in a position to be exploited. . .) is applicable.

As to *Guideline C*, the SOR alleges concerns only with Applicant's possession of a Taiwan passport. The record shows that she did not use that passport after becoming a naturalized U.S. citizen in November 1999. The passport expired in May 2003, and was not renewed. She cut up the invalid passport and returned it to Taiwan authorities July 2003, as soon as she realized the significance of her having retained it. (AX G). She did not consider herself to be a Taiwan citizen after becoming a naturalized U.S. citizen in 1999, but she also *formally* renounced her Taiwan citizenship, in April 2003, after learning that it might be a concern. In essence, the single Guideline C allegation is related to her possession of a Taiwan passport, which was never used after she became a U.S. citizen, had expired and, after she learned of the security significance of her having retained it, was cut into pieces and sent to Taiwanese authorities, along with a cover letter. Under the totality of the evidence, none of the Disqualifying Conditions have been established as applicable.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline B (Foreign Influence) For the Applicant

Subparagraph 1.a. For the Applicant

Guideline C (Foreign Preference) For the Applicant

Subparagraph 2.a.-2.g. For the 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.

BARRY M. SAX

ADMINISTRATIVE JUDGE