

DATE: January 14, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22543

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant immigrated from Taiwan to go to college in the United States. He became a U.S.

citizen in 1996. In 1997 he renewed his Taiwanese passport, and used it and his U.S. passport to travel to Taiwan in 1998 and 2000. His wife is a citizen of Taiwan, and a permanent resident of the U.S. His parents are dual U.S.-Taiwanese citizens residing in the U.S. His in-laws are citizens of and residing in Taiwan. Applicant's use of a foreign passport shows a foreign preference which is not mitigated. His in-laws's citizenship shows a foreign influence which is not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On June 9, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under the personnel security Guideline C (Foreign Preference) and Guideline B (Foreign Influence) 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 Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated October 4, 2003, Applicant responded to the SOR allegations. He requested a hearing. This case was assigned to me on November 17, 2003.

A Notice of Hearing was issued on November 17, 2003, setting the hearing for December 3, 2003. On that date, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented six exhibits which were admitted into evidence, including two exhibits of information on Taiwan for administrative notice. Applicant appeared and testified, and offered two exhibits, all of which

were admitted into evidence. I received the transcript (Tr.) of the hearing on December 30, 2003.

FINDINGS OF FACT

Applicant admitted the allegations in subparagraphs 1.a., 1.d., and all the allegations in subparagraph 2 of the SOR. Those admissions are incorporated herein as findings of fact. Applicant denied allegations 1.b. and 1.c. of subparagraph 1. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 38 years old. He is married. He graduated from college and obtained a Ph.D. in electrical engineering. He works for a defense contractor. Applicant immigrated in 1990 to the United States on his Taiwanese passport to study in the United States. Applicant had a Taiwanese passport and used it for immigration purposes. His Taiwanese passport was issued in 1997, and expired in 2003, yet he has not surrendered it to anyone because he cannot find any governmental official to accept it. He has Taiwanese citizenship. He became a naturalized United States citizen in 1996. When Applicant became a United States citizen, he took the standard citizenship oath required by United States law and the Immigration and Naturalization Service. Applicant is willing to renounce his Taiwanese citizenship and has been seeking guidance from the Taiwanese and U.S. governments on how to accomplish this renunciation. (Exhibits 1, 2 and 3; Answer at 2 and 3; Exhibit 4 at 2, 3; Tr. 11 to 13, 24 to 29)

Applicant used his Taiwanese passport for trips to Taiwan in 1998 and 2000, after he became a U.S. citizen. Applicant has also used his U.S. passport for the same trips, as shown by the customs and immigration stamps on the passports. Applicant used both passports so he would be under the protection of both governments during his time in Taiwan. He also used his Taiwanese passport because he understood it would be easier to enter Taiwan using it rather than his U.S. passport. Applicant also used his Taiwanese passport to avoid being forced again into the Taiwanese military because his U.S. passport showed he was born in Taiwan, and no information showed on the passport that he already fulfilled his military obligation. (Answer at 3; Exhibit 2 at 3 and 4; Exhibit 3 at 3 to 5; Exhibit 4 at 2; Tr. 12, 13, 29 to 34, 45, 46, 49, 56, 65)

Applicant served in the Taiwanese Army as a nurse from October 1987 until August 1989 in accordance with Taiwanese law requiring two years of military service from every male citizen. Subsequent to his military service he immigrated to the U.S. He registered for the draft in October 1990 in the U.S. Applicant answered "no" to question 11 on the Security Clearance Application (SCA) which inquired about military service, and he now admits it was an incorrect answer. (Answer at 3; Exhibit 4 at 3; Tr. 12, 34, 35)

Applicant's wife is a citizen of Taiwan, and is a conditional permanent resident of the U.S. She can apply to be a U.S. citizen in 2004. Applicant's two children were born in the U.S. and are citizens of the U.S. (Answer at 4; Tr. 14, 36 to 39, 68, 69)

Applicant's parents and sister are citizens of Taiwan and the United States. They lived in the U.S. for the past 19 years. Applicant does not know the citizenship status of his brother. (Answer at 3 and 4; Tr. 14, 41, 42, 55)

Applicant's parents-in-laws and sister-in-law are citizens and residents of Taiwan. His mother-in-law is retired, and his father-in-law owns and operates his own import-export business. Applicant has contact with them three to five times per year, and his wife contacts them monthly. Applicant's sister-in-law works for an American telecommunications company. Applicant seldom talks to her, and his wife talks to her monthly. Applicant describes his relationship with his in-laws as close and affectionate. Applicant sends his in-laws \$600 a month to help them enhance the quality of their lives. (Answer at 4 and 5; Exhibit 4 at 5 and 6; Tr. 14, 15, 42, 54)

Applicant does not have any financial interest or property outside the U.S. (Exhibit 4 at 6)

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* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

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. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

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., Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition 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 other behavior specified in the Guidelines.

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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. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a prima facie case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of 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. Directive ¶ E2.A3 .1.1.

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

The exercise of dual citizenship. Directive ¶ E2.A3.1.2.1.

Possession and/or use of a foreign passport. Directive ¶ E2.A3.1.2.2.

Military service ... for a foreign country. Directive ¶ E2.A3.1.2.3.

E2.A3.1.3. Conditions that could mitigate security concerns include:

Dual citizenship is based solely on parents' citizenship or birth in a foreign country. Directive ¶ E2.A3.1.3.1.

Individual has expressed a willingness to renounce dual citizenship.

Directive ¶ E2.A3.1.3.4.

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 potentially vulnerable to coercion, exploitation, or pressure.

Directive, ¶ E2.A2.1.1.

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

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. Directive, ¶ E2.A2.1.2.1.

Conditions that could mitigate security concerns include:

A determination that the immediate family member(s) 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, ¶ E2.A2.1.3.1.

Applicable also is the Memorandum of August 16, 2000, entitled "Guidance of DoD Central Adjudication Facilities (CAF) Clarifying the Application of Foreign Preference Adjudicative Guidelines", by the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I), commonly known as the "Money Memo". This memorandum guidance states that

possession and/or use of a foreign passport may be a disqualifying condition. . . The only applicable mitigating factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline are that the possession and use of a foreign passport in preference to a U.S. passport raised 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 until the applicant surrenders the

foreign passport or obtains official approval for its use from the appropriate agency of the

United States Government.

The United States citizenship oath, found at 8 U.S.C. § 1448, states in part, "I hereby declare, on oath, That I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; That I will support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; That I will bear true faith and allegiance to the same; . . ."

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Guideline C - Foreign Preference: The Government met its burden and established the facts by substantial evidence. Individuals who act in ways that indicated preference for a foreign country over the United States may be prone to provide information or make decisions that are harmful to the interests of the United States. (Directive ¶ E2.A3.1.1.) Applicant used his Taiwanese passport for his own convenience which indicates a foreign preference, exercising the rights and privileges of a citizen of that country, holding himself out as a citizen of that country and not as a citizen of the United States. ISCR Case No. 99-0295, 2000 DOHA LEXIS 219 at *15 (App. Bd. Oct. 20, 2000) Applicant declared he is a dual citizen, and he exercised dual citizenship by using a Taiwanese passport after he became a United States citizen. Clearly, Applicant does have a foreign preference based on his use of the Taiwanese passport. Applicant cannot have a foreign preference and a security clearance in the United States. Lastly, Applicant performed military service, albeit mandatory, for Taiwan. DC 3 applies. Therefore, Disqualifying Conditions (DC) 1 (dual citizenship) and 2 (possession and use of a foreign passport) apply.

Applicant must now meet his burden to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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. Here, Applicant has failed to meet his burden. He has not overcome the requirements of the ASDC3I memorandum which reiterates that the failure to surrender the foreign passport is a disqualifying condition. Applicant had a valid Taiwanese passport until March, 2003. While he has taken some steps to surrender it, he has not accomplished that task. It is not the obligation of the United States to seize the passport, but rather the obligation for Applicant to take the initiative and surrender the passport. He has not done so.

Mitigating Condition (MC) 1 (Dual citizenship is based solely on the parent's citizenship or birth in a foreign country) might apply here. However, Applicant is now an adult and can make his own decision about his citizenship. He took the oath voluntarily in 1999, but has not complied with it. In addition, the willingness to renounce dual citizenship is MC 4. But Applicant has not taken any action to renounce his dual citizenship. The willingness to renounce is hollow absent the actions of renunciation. Moreover, they do not outweigh the disqualifying weight of the ASDC3I memorandum requirements, coupled with Applicant's use of a foreign passport after becoming a United States citizen. Therefore, I find against Applicant on this guideline.

Guideline B - Foreign Influence: Disqualifying Conditions (DC) 1 (An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen or, or resident or present in, a foreign country) and 2 (Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists) apply here. The Government presented sufficient evidence to establish its allegations. Applicant's parents and sister are dual citizens. His wife is a citizen of Taiwan. Her family resides in and are citizens of Taiwan. Applicant sends them \$600 monthly. Applicant's parents and sister are dual citizens. Therefore, these two DC apply.

I find Mitigating Condition (MC) 1 (the immediate family members are not agents of a foreign power or in a position to be exploited) is applicable here in part. There is no record evidence that any of Applicant's family members are agents of any government. However, Applicant may be in a position at some time of vulnerability to be influenced by coercive or noncoercive means because of his in-laws living in Taiwan. Applicant's contacts with his in-laws are not casual or infrequent. These foreign contacts are considered in light of all of the evidence on the record. This one MC does not outweigh the DC which are applicable. I find against Applicant on this Guideline.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline C: Against Applicant

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Paragraph 2 Guideline B: Against Applicant

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

DECISION

In light of all the circumstances and facts 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.

Philip S. Howe

Administrative Judge