

DATE: November 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23629

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

SYNOPSIS

Applicant's father is retired from the Taiwan military and receives retired pay, but he resides permanently in the U.S. and has expressed interest in becoming a U.S. citizen. Her two brothers reside permanently in the U.S. and intend to become U.S. citizens. Her parents own a house in Taiwan, which they do not occupy and intend to sell. Her aunt is a citizen and resident of Taiwan, but Applicant has minimal contact with her. Applicant traveled to Taiwan in 1995 to prepare for moving permanently to the U.S. Security concerns based on her father's connection with the Taiwan military, her parents' property in Taiwan, her father's and brothers' Taiwanese citizenship, and Applicant's travel to Taiwan are mitigated. Clearance is granted.

STATEMENT OF THE CASE

On April 27, 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. 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). The SOR alleges five security concerns under Guideline B (Foreign Influence) of the Directive: Applicant's father and two brothers reside with her and are citizens of Taiwan (¶ 1.a.); her father retired as a general from the Taiwan military and receives retired pay (¶ 1.b.); her mother's sister is a citizen and resident of Taiwan (¶ 1.c.); her parents own a house in Taiwan (¶ 1.d.); and Applicant traveled to Taiwan from March 1995 to July 1995 (¶ 1.e).

Applicant answered the SOR in writing on June 1, 2004. She denied the allegations in ¶¶ 1.a. and 1.c.; admitted the allegations in ¶¶ 1.b., 1.d., and 1.e.; and requested a hearing. The case was assigned to me on August 20, 2004. On September 1, 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.

FINDINGS OF FACT

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

Applicant is a 36-year-old software engineer for a defense contractor. She has worked for her present employer for about four years. She has never held a security clearance. Among her supervisors and colleagues, Applicant is regarded as talented, reliable, honest, hard-working, conscientious, and very ethical.

Applicant was born in Taiwan. She came to the United States on a student visa in December 1988 to finish college. She decided to become a permanent resident of the U.S. because she enjoyed the lifestyle and the opportunities for advancement. She became a naturalized U.S. citizen on September 24, 1999. She considers the U.S. her "homeland."

Applicant held a Taiwanese passport and used it to travel to Taiwan in 1995, before she became a U.S. citizen. The purpose of this trip was to pack up her belongings and visit her family before settling permanently in the U.S.

Applicant's Taiwanese passport expired in 2003. She surrendered her Taiwanese passport to the Taiwanese authorities and renounced her Taiwanese citizenship in July 2004.

Applicant's parents live with her in the United States. Her mother came to the U.S. in 1993 and became a U.S. citizen in 2000. According to Applicant, "My mother's dream was to live in the U.S. one day." Her mother was a homemaker in Taiwan and has never worked for or been connected with the Taiwan government.

Applicant's father came to the U.S. in 1994 to join her mother. He is a permanent resident of the U.S. He retired from the Taiwan Army about 20 years ago as a brigadier general and then worked for about seven years in Taiwan for a private company that manufactures television and computer monitors. His military service was both before and after the U.S. recognized the People's Republic of China (PRC) and adopted a "one China" policy. He receives retirement pay from the Taiwan government. He has not been employed worked since he came to the United States. After he came to the U.S., he had no contact with the Taiwan military or government, except for receipt of his retired pay. He has siblings in mainland China, but he has no contact with them. Applicant believes that he intends to become a U.S. citizen, even if it requires him to give up his military retired pay.

Applicant's older brother came to the U.S. in 1992 to attend school, and her younger brother came in April 2001. Her younger brother lives with her and her older brother has his own home. Both brothers served their mandatory two-year term in the Taiwan military. Both intend to become U.S. citizens.

Applicant's parents still own the house in Taiwan where Applicant and her family grew up. The house is vacant. Her parents do not intend to live in it and would like to sell it.

Applicant has an aunt (her mother's sister) in Taiwan, but Applicant has very infrequent contact with her. Applicant has no financial interests in Taiwan and has no desire to ever return permanently. Neither Applicant nor any members of her immediate family provide financial assistance to anyone residing in a foreign county or to any foreign organizations or institutions. Except for her father's retired pay, none of Applicant's family members have had any contact with any foreign organizations or government since moving to the U.S.

At Department Counsel's request, I took official notice of the fact that, in the year 2000, Taiwan was one of the eight most active collectors of defense, medical, economic, and computer information in the world. (National Counterintelligence Center, Annual Report to Congress, 2000 at 15, admitted as Government Exhibit 3, p. 15)

Taiwan is a multiparty democracy, with a better human rights record than the PRC. 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, continues to provide a legal basis for the unofficial relationship between the U.S. and Taiwan and the U.S. commitment to ensuring Taiwan's defensive capability. [\(1\)](#)

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 ¶ E2.A2.1.2.1. Although Applicant denied the allegation in the SOR, ¶ 1.a., it is partially established by her admission at the hearing that her father and two brothers are citizens of Taiwan. Contrary to the SOR, only one of her two brothers resides with her. I conclude DC 1 is established by evidence that Applicant's father and two brothers are citizens of Taiwan.

In her answer to the SOR and at the hearing, Applicant admitted the allegation in the SOR ¶ 1.b that her father is a retired general in the Taiwan military and receives retired pay. A disqualifying condition (DC 3) may arise if an individual has relatives "who are connected with any foreign government." Directive ¶ E2.A2.1.2.3. I conclude DC 3 is

established because Applicant's father is connected to the Taiwan government by his retired military status and receipt of retired pay.

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 3, 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 that 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.

With respect to Applicant's brothers, they are not agents of a foreign power and not in a position to be exploited. They have no official, personal, or financial connections with Taiwan. They are not subject to the authority and control of Taiwan. They are permanent residents of the U.S. and intend to become U.S. citizens.

With respect to Applicant's father, he is not an agent of a foreign power. He is fully retired. He has no business connections that would lend themselves to exploitation or industrial espionage. Like Applicant's brothers, he is not subject to the authority and control of Taiwan. He is a permanent resident of the U.S. and has expressed interest in becoming a citizen. He knows little about Applicant's job and they do not discuss her work. His only contact with the Taiwanese military is his receipt of retired pay. His retired pay is not a likely means of exploitation, because he has expressed willingness to give it up in order to become a U.S. citizen. His property in Taiwan is a potential source of exploitation, but Applicant's parents appear to have no particular emotional attachment to the property and are not dependent on that property for income or as a future residence.

It is important to consider the totality of an applicant's family ties to a foreign country as well as each individual family tie. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003) After considering each family member's individual circumstances as well as the totality of Applicant's family ties, I conclude that MC 1 is established with respect to Applicant's father and brothers.

In her answer, Applicant denied the allegation in the SOR ¶ 1.c. that her mother's sister is a citizen and resident of Taiwan, but she admitted it during her testimony at the hearing. She also testified that she has very infrequent contact with her aunt. I conclude that DC 1 is not established because Applicant's aunt is not an immediate family member, and Applicant has no close ties of affection or obligation with her aunt. Thus, even though the allegation is established, it

does not raise any security concerns. Furthermore, any security concerns would be mitigated because Applicant's contact with her aunt is casual and infrequent. Directive ¶ E2.A2.1.3.3.

Applicant admitted in her answer and at the hearing that her parents own a house in Taiwan. A disqualifying condition (DC 8) may arise if an applicant has a substantial financial interest in a country. Directive ¶ E2.A2.1.2.8. I conclude that DC 8 is not established because there is no evidence that Applicant owns an interest in the house or has any expectation of financial gain from the house. To the contrary, the house is owned by her parents, who do not discuss or share their financial interests with Applicant, and they intend to sell it. Thus, even though this allegation is established, it does not raise any security concerns. Furthermore, any security concerns would be mitigated by the fact that Applicant's interest in the house is minimal. Directive ¶ E2.A2.1.3.5.

Applicant admitted the allegation that she traveled to Taiwan from March 1995 to July 1995 (SOR ¶ 1.e.). This travel preceded Applicant's naturalization as a U.S. citizen. The evidence shows that the purpose of the travel was to visit her family, who have since emigrated to the U.S., and to gather her belongings in preparation for moving permanently to the U.S. Even though this allegation is established, it does not raise any security concerns. Furthermore, any security concerns would be mitigated by the benign purpose of the trip.

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

Paragraph 1.e.: 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. Neither party requested that I take official notice of the facts recited in this paragraph. As a general rule, the parties are entitled to know what information an Administrative Judge will consider in making a decision. However, there are two exceptions to this general rule: official or administrative notice, and matters known to an agency through its cumulative expertise. *See* ISCR Case No. 99-0452, 2000 WL 739501 at 3 (App. Bd. Mar. 21, 2000), citing federal cases and treatises. Official notice may be taken, in appropriate cases, of official documents posted by federal departments or agencies on their web sites. *Id.* at n. 7. *See also* ISCR Case No. 02-26976 at 4 (App. Bd. Oct. 22, 2004). The basis for official notice of the facts recited in this paragraph is found in the U.S. Department of State Background Note: Taiwan, September 2004; Background Note: China, October 2004; and the U.S. Department of State Country Reports on Human Rights Practices, February 25, 2004. All these documents are available on the internet at www.state.gov.