

DATE: May 10, 2004

In re:

SSN: -----

Applicant for Security Clearance

)

ISCR Case No. 02-24060

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Although his family ties to Taiwan raise a security concern, Applicant has successfully mitigated the concern because the totality of facts and circumstances show his family ties do not pose an unacceptable risk or concern of foreign influence. Clearance is granted.

STATEMENT OF THE CASE

On August 18, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline B for foreign influence based on Applicant's family members (immediate and in-laws) who are resident citizens of Taiwan (Republic of China). Applicant answered the SOR on September 5, 2003, and requested a hearing.

Department Counsel indicated she was ready to proceed on October 29, 2003, and the case was initially assigned to an administrative judge the same day. On November 13, 2003, the case was reassigned to me due to case load considerations. A notice of hearing was issued scheduling the hearing for December 18, 2003. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript January 9, 2004.

FINDINGS OF FACT

In his Answer, Applicant admitted, with explanation, to all the SOR allegations, and his admissions are incorporated into my findings. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant testified during the hearing, and I find his testimony credible. In making this finding, I note that English is not

Applicant's native language and allowances have been made for potential communication problems.

Applicant is a 50-year-old married man. He is seeking to obtain access to classified information for his employment as a staff engineer for a defense contractor.

Applicant was born and raised in Taiwan. As required by Taiwanese law, from September 1973 to September 1975, Applicant served in the Taiwanese Army. He was an enlisted soldier and was trained as a medic. He satisfactorily completed his Taiwanese military obligation and that was verified when Applicant immigrated to the U.S.

In approximately July 1977, the then 24-year-old Applicant immigrated to the U.S. He obtained a family-based visa through his sister's sponsorship as she had obtained U.S. citizenship in 1974. He has resided continuously in the U.S. since his arrival in 1977.

From September 1979 to July 1982, Applicant was a student at a large U.S. university. He completed his studies, and in September 1982 was awarded a bachelor's degree in electrical engineering. He has since been employed by a variety of companies (including defense contractors), and his area of expertise is working in the microwave field.

In June 1984, Applicant obtained U.S. citizenship through the naturalization process. In April 1985, Applicant was granted a security clearance for his employment at that time.

Applicant started working for his current defense contractor employer in April 2001. In February 2002, Applicant completed a security-clearance application (Exhibit 1) disclosing he was born in Taiwan, obtained U.S. citizenship in 1984, and had immediate family members who are Taiwanese citizens residing in Taiwan. He disclosed traveling to Taiwan in 1996, 1997, 1999, 2000, and 2001. His most recent trip to Taiwan to visit family was in November 2003. Applicant also disclosed that his wife is a naturalized U.S. citizen who was born in Taiwan.

Applicant began dating his spouse while on a trip to Taiwan. They married in 1988, and she was allowed to immigrate to the U.S. in 1989. All of her family members are citizen residents in Taiwan.

Applicant's father is deceased. He was employed for the Taiwanese Liquor and Tobacco Bureau, which was a government agency that regulated the sale of those items. Applicant's mother worked for a few years, but was primarily a housewife. Besides his U.S. citizen sister, Applicant has an older brother who is a citizen resident of Taiwan. He is a retired school teacher. Applicant maintains monthly contact by telephone with his mother, while he has telephone contact with his brother two to three times per year. As his mother is 83 years old, Applicant intends to make annual trips to Taiwan to visit her.

Since his father's death, Applicant's brother has provided financial support to Applicant's mother. Since his brother's retirement, Applicant assists his brother by providing about \$300.00 monthly to his mother.

Applicant's in-laws (father-in-law, mother-in-law, and two brothers-in-law) are citizen residents of Taiwan. His father-in-law is retired, but formally worked in an office that processed visas for Taiwanese citizens to travel to the U.S. It appears the father-in-law was employed by the U.S. Government as a local national employee. Applicant's mother-in-law, since her marriage, has worked as a housewife raising her three children and taking care of household matters. One brother-in-law works as a television director, and the other works in human resources for a private company. Other than mandatory military service, the brothers are not employed by or connected with the Taiwanese government, military, or law enforcement. Applicant's spouse has monthly contact by telephone with her parents, and she speaks with her brothers two to three times per year. When in Taiwan with Applicant, his spouse also visits her family.

Applicant is a homeowner and he has lived at the same address since 1991. He estimates the market value of his home at \$400,000.00. He and his spouse have about \$200,000.00 in savings and investments. Neither he nor his spouse has any financial interests in Taiwan.

Applicant considers the U.S. his home as he has lived here longer than he lived in Taiwan.

Applicant pledges his loyalty to the U.S., and he would never compromise classified information, and he would report

any approaches or suspicious contacts he encountered. In particular, although he has family members in Taiwan, Applicant points to his sister, spouse, and his son, a native-born U.S. citizen, as his highest concern:

As I said before, my highest concern is my family in the United States, my son, my wife, all my properties here. So, even they point a gun either to my mother or my in-laws head, there's no way - - I will say it again - - no way - - never I trading or sacrifice American Government's benefit or hurt American Government and just try to protect that family member because I also have to take care of my own family and they are in the United States (sic).⁽²⁾

As requested by Department Counsel, I took official or administrative notice of the following facts: Taiwan is one of several countries that is actively engaged in economic espionage against private industry in the U.S. (Exhibit 3).

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the record evidence as a whole, the following security guideline is most pertinent here: Guideline B for foreign influence.⁽³⁾

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁴⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁵⁾ The government has the burden of proving controverted facts.⁽⁶⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.⁽⁷⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁸⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁹⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽¹⁰⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹¹⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹²⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline B for foreign influence, a security concern 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 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. Common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service. Concerning family ties, the language of Guideline B does not require a conclusion that an unacceptable security concern exists based solely on an applicant's family ties in a foreign country.⁽¹³⁾ An administrative judge must consider the record evidence as a whole in deciding if the facts and circumstances of an applicant's family ties pose an unacceptable security concern under Guideline B.⁽¹⁴⁾

Applicant's compulsory military service as a medic in the Taiwanese Army during the mid-1970s is of little if any

security significance. It took place before he immigrated to the U.S. in 1977 and before he obtained U.S. citizenship in 1984. Moreover, military duty and training as a medic does not make Applicant more susceptible to foreign influence as opposed to military duty and training in some other field such as military intelligence. Finally, military service for a foreign country is usually a matter alleged under Guideline C for foreign preference, not Guideline B for foreign influence. Given these circumstances, SOR subparagraph 1.e is decided for Applicant.

Addressing the remaining SOR subparagraphs, based on the record evidence as a whole, the government has established its case under Guideline B. The concern here is Applicant's immediate family members and in-laws in Taiwan. DC 1⁽¹⁵⁾ applies because Applicant's spouse is a dual citizen of the U.S. and Taiwan, his mother and brother are resident citizens of Taiwan, and his in-laws are resident citizens of Taiwan. Although his in-laws are not immediate family members, I presume Applicant has close ties of affection or obligation to them through his spouse. In addition, DC 6⁽¹⁶⁾ applies based on Applicant's nearly annual travel to Taiwan since it has the potential to make him vulnerable to foreign influence. Along with Applicant's family members in Taiwan, these circumstances raise a security concern due to the potential for foreign influence.⁽¹⁷⁾ The remaining disqualifying conditions do not apply given the record evidence.

I have reviewed the MC under Guideline B and conclude that MC 1⁽¹⁸⁾ applies for Applicant.

The record evidence shows Applicant's family members are not Taiwanese agents, and so the issue under MC 1 is if the family members are in a position to be exploited by the Taiwanese authorities. Because Taiwan is one of several countries engaged in economic espionage against private industry in the U.S., Applicant has the burden to show his family ties to Taiwan do not pose a security risk or concern. On this point, I note that none of his family members are employed by or connected to the Taiwanese government and therefore vulnerable to pressure from that government. Likewise, none of his family members are associated with a political, scientific, commercial, or other activity that would benefit from obtaining U.S. national security information. All his family members are involved in rather ordinary, work-a-day lives that make it most unlikely that they would have an undue interest in Applicant's work or that they would come to the attention to Taiwanese authorities. For example, the record shows his 83-year-old mother is a retired housewife, and his brother is a retired school teacher. Given these circumstances, there is not a reasonably foreseeable risk⁽¹⁹⁾ that his family ties might be exploited. Accordingly, I conclude Applicant has met his burden of showing that MC 1 applies.

Although MC 1 is the only applicable mitigating condition, the analysis does not necessarily end as other facts and circumstances may mitigate the security concern. Applicant's ties or connections to the U.S. are substantial and deserving of consideration in mitigation. He has lived in the U.S. since 1977--since the age of 24--nearly all his adult life. Since his arrival here, Applicant can fairly be described as a model immigrant. He earned a college degree in electrical engineering and has worked in his field since 1982, he possesses and uses a U.S. passport to the exclusion of a foreign passport, and he pays state and federal income taxes. Moreover, his spouse and native-born son, professional career, and financial interests are in the U.S. and that situation is unlikely to change. These are examples of ties that bind most members of a participatory democracy such as the U.S. His substantial ties to the U.S. reinforce and lend credibility to Applicant's pledge that he would resist and report any potential foreign influence or pressure by either coercive or non-coercive means.

To sum up, the record evidence demonstrates Applicant has all the indicators of an industrious, mature, responsible, and trustworthy individual. After weighing the record evidence as a whole, it is my commonsense determination that the facts and circumstances show Applicant's family ties to Taiwan do not pose an unacceptable risk or concern of foreign influence. In reaching my decision, I have considered the whole-person concept and the appropriate factors and guidelines in the Directive. And I have weighed the record evidence as a whole, and conclude the favorable evidence outweighs the unfavorable evidence. Under the totality of the facts and circumstances, I conclude Applicant has met his burden. Accordingly, Guideline B is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline B: For the Applicant

Subparagraph a : For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: 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. Clearance is granted.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Transcript at p. 62.

3. Directive, Enclosure 2, Attachment 2, at pp. 21-22.

4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

5. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

6. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

7. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

8. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

9. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

10. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

11. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

12. *Egan*, 484 U.S. at 528, 531.

13. ISCR Case No. 98-0419 (April 30, 1999) at p. 5.

14. *Id.*

15. "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."

16. "Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government."

17. *See* ISCR Case No. 99-0511 (December 19, 2000) at pp. 10-11 (foreign influence issues are not limited to situations involving coercive means of influence; rather, they can include situations where an applicant may be vulnerable to non-

coercive means of influence).

18. "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(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."

19. Consistent with the whole-person concept, the security-clearance process is about risk management. With a few notable exceptions (for example, 10 U.S.C. § 986), it is not a black-and-white process, but it depends upon adjudicators and administrative judges alike to make a fair and impartial commonsense determination on a case-by-case basis.