

DATE: June 24, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24788

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Melvin H. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a Republic of China (Taiwan) born, former dual citizen of Taiwan and the United States, has fulfilled the requirements of the Memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence, dated August 16, 2000, (Money Memorandum) by returning his Taiwanese passport to the Taiwanese Government. Additionally, he has renounced his Taiwanese citizenship. Applicant's wife and children are U. S. citizens. None of Applicant's family members, who are citizens and residents of Taiwan, are in a position to be exploited by Taiwan in a way that could force Applicant to choose between loyalty to these family members and his loyalty to the United States. Mitigation has been shown. Clearance is granted.**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated December 30, 2004, to the Applicant which detailed reasons 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 the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, or denied. The SOR was based on Foreign Preference (Guideline C) related to his exercise of dual citizenship with the United States and Taiwan and Foreign Influence (Guideline B) concerns because of the foreign residency and/or citizenship of close family members.

Applicant filed a notarized response, dated January 25, 2005, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On March 23, 2005, the case was assigned to this Administrative Judge to conduct a hearing, and pursuant to formal notice dated May 10, 2005, a hearing was held on May 25, 2005.

At the hearing, Department Counsel offered 11 documentary exhibits (Exhibits 1 - 11) and no witnesses were called. Applicant offered four documentary exhibits (Exhibits A - D) and offered his own testimony. The transcript (Tr) was received on June 10, 2005.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of the Directive. The SOR contains five allegations, 1.a. through 1.e., under Guideline C, and six allegations, 2.a. through 2.f., under Guideline B. Applicant admitted SOR allegations 1.b. through 1.e., and 2.a. through 2.f. Those admissions are incorporated herein as Findings of Fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR and the documents, and upon due consideration of that evidence, I make the additional Findings of Fact:

Applicant is 46 years old and is employed as a Systems Engineer by a United States defense contractor, which seeks a security clearance on his behalf.

Applicant was born in Taiwan in 1959. He moved to the United States in 1983, and became a United States citizen in 1989. He received a Master of Science Degree in Mechanical Engineering from a United States university.

Applicant is married and has two children. His wife was also born in Taiwan, but she became a United States citizen. Their children were born in the United States and are United States citizens.

Paragraph 1 (Guideline C - Foreign Preference)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has acted in such a way as to indicate a preference for another country over the United States.

In 1992, Applicant accepted employment in Taiwan because a downturn in the United States economy caused him to lose his employment there. While he was there he was employed by a Taiwanese company, which was not associated with the Taiwanese Government. After he stopped employment with that company, he started his own computer company, which also was not affiliated with the Taiwanese Government. He is now only employed by a United States company.

Applicant resided in Taiwan until 1999, longer than he had planned, because his brother became ill with Nasopharyngeal Carcinoma (NPC), a deadly form of cancer, from which he died and which also afflicted his mother and five out of seven of her siblings. In 1997, Applicant was diagnosed himself with NPC.

Despite the fact that Applicant became a United States citizen in 1989, he renewed his Taiwanese passport on July 22, 1997. Applicant never used this passport as a means to enter or exit any country after he became a United States citizen. He renewed his Taiwanese passport so that he could receive medical services in Taiwan for the NPC.

In 1999, Applicant returned to the United States and has resided here since. He has no plan to reside in Taiwan again. On June 5, 2002, Applicant sent to the Taiwan Consulate Office a letter in which he surrendered his Taiwanese passport (Exhibits 5, A). He also renounced his Taiwanese citizenship on September 25, 2002 (Exhibit 6). Applicant testified that he has no intention to ever renew his Taiwanese citizenship or renew his passport (Tr at 46).

Paragraph 2 (Guideline B - Foreign Influence)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has immediate family members or people to whom he may be bound by affection or obligation who are not citizens of the United States, or may be subject to duress.

Applicant's mother and two sisters are citizens of Taiwan, but have permanent resident status in the United States. His mother resides with him, and his two sisters both expect to reside in this country permanently. His mother-in-law also is a citizen of Taiwan, with permanent resident status in the United States (Tr at 41-42). Finally, his sister-in-law is a resident and citizen of the United States. None of these family members belong to, participate in, or are active with any national government agency of Taiwan.

Applicant traveled to Taiwan several times from 1999 to 2003. His trips were for business and family, including the funeral of his father. He also traveled to Hong Kong for pleasure, and he made one trip to the People's Republic of China in 2001 to go sight seeing (Tr at 43-46).

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, 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 which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2.

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 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. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which 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. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern 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 criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. *See* Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of those who testified, I conclude the following with respect to Guidelines C and B:

(Guideline C - Foreign Preference)

Guideline C is based on actions taken by an individual that indicate a preference for a foreign country over the United States. Applicant's decision to renew his Taiwanese passport after becoming a United States citizen, and his living, working and receiving medical services in Taiwan raises serious Foreign Preference (Guideline C) concerns. Initially Disqualifying Condition DC (E2.A3.1.2.1.), the exercise of dual citizenship, and DC (E2.A3.1.2.2.), possession and/or use of a foreign passport, could be argued to apply. However, Applicant has subsequently surrendered his Taiwanese passport. Neither the Money Memorandum nor DC (E2.A3.1.2.2.) now applies in this case. Mitigating Condition (MC) (E2.A3.1.3.4.), an individual has expressed a willingness to renounce his dual citizenship, is applicable, as Applicant has actually renounced his Taiwanese citizenship.

(Guideline B - Foreign Influence)

Under Guideline B, a security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he is bound by affection, influence or obligation, are not citizens of the United States or may be subject to duress. The evidence of immediate family members, who are citizens and residents of Taiwan comes within DC (E2.A2.1.2.1.), an immediate family members, or persons to whom the individual has close ties of affection or obligation, are citizens of, or resident or present in, a foreign country. Based on the nature of the overall record and the totality of the evidence, including the lack of government involvement of Applicant's family members in Taiwan, and Applicant's long and powerful attachment, with his wife and children, to the United States, I have determined that his family members in Taiwan do not constitute an unacceptable security risk, and MC (E2.A2.1.3.1.), a determination that the immediate family members, 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 involved and the United States, applies.

After considering all of the evidence of record on this issue, I conclude that the mitigating evidence substantially outweighs the evidence supporting the SOR, and even in the unlikely event pressure was exerted upon Applicant to compromise classified information, he would reject it, and would report the incident to the proper authorities. On balance, it is concluded that Applicant has overcome the Government's evidence opposing his request for a security clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline C: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline B: FOR APPLICANT

Subparagraph 2. a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

Subparagraph 2.f.: 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 or continue a security clearance for Applicant.

Martin H. Mogul

Administrative Judge