

DATE: November 8, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-00740

## **DECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jason Perry, Esq., Department Counsel

Sabrina Redd, Esq., Department Counsel

#### **FOR APPLICANT**

Sheldon I. Cohen, Esq.

### **SYNOPSIS**

Applicant has a long-standing friendship with the widow of her first cousin once-removed. The widow and her son are citizens and residents of Taiwan. Applicant visited her friend and her son in Taiwan in 2001. In 2002 and 2003, Applicant, who held a security clearance, was reprimanded by her employer for noncompliance with security regulations. Applicant failed to mitigate the security concerns arising from her friendship with her distant relatives in Taiwan and her noncompliance with security regulations. Clearance is denied.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On November 29, 2004, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) and Guideline K (Security Violations) of the Directive. Applicant answered the SOR in writing January 28, 2005, and elected to have a hearing before an administrative judge. On June 13, 2005, the case was assigned to me. I convened a hearing on August 29, 2005, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses, introduced three exhibits, and offered three documents for administrative notice. The Government's exhibits were identified as Ex. 1, 2, and 3. The documents offered by the Government for administrative notice were designated Ex. I, II, and III. Applicant called two witnesses and introduced five exhibits, which were identified as Ex. A through E. Applicant offered eight documents for administrative notice, which were designated Ex. F through M. Applicant's counsel also submitted a 19-page hearing memorandum for entry into the record. The Government's exhibits were admitted into evidence without objection.

Applicant's counsel objected to the consideration of the three documents submitted for administrative notice by the Government. The Government's three documents were identified as a consular information sheet on Taiwan prepared by the U.S. Department of State, the 2000 annual report to Congress on foreign economic collection and industrial

espionage, prepared by the National Counterintelligence Center, and a Federal Bureau of Investigation publication entitled "Facts and Figures 2003," which discussed attempts by foreign parties or governments to engage in economic espionage against the United States. Applicant's counsel objected to the Government's Ex. I on the grounds of relevance and materiality (Tr. 16.), to Government's Ex. II on the grounds of relevance, competence, materiality, and hearsay (Tr. 19), and to Government Ex. III on the grounds of relevance and materiality. (Tr. 26-27.) The Government was provided an opportunity to reply to Applicant's counsel's objections. Applicant's counsel's objections were overruled, and the Government's documents offered for administrative notice were entered in the record, consistent with Item E3.1.19, Additional Procedural Guidance, of the Directive. All of Applicant's exhibits and documents offered for administrative notice were admitted into the record without objection. DOHA received the transcript (Tr.) of the proceeding September 13, 2005.

### **RULINGS ON PROCEDURE**

After Applicant testified about her security violations, Department Counsel moved to amend allegation 2.b. of the SOR to reflect the facts as established and admitted by Applicant. Without objection, allegation 2.b. of the SOR was revised to read: "You failed to secure a classified security container at the end of a work day at [identity and location of institution omitted] sometime between January and February 2003 in violation of paragraphs 5-100 and 5-303 of the National Industrial Security [Program] Operating Manual (NISPOM) (DoD 5220.22-M) dated January 1995."

### **FINDINGS OF FACT**

The SOR contains two allegations of disqualifying conduct charged under Guideline B, Foreign Influence, and two allegations of disqualifying conduct charged under Guideline K, Security Violations, of the Directive. In her answers to the SOR and the amended SOR, Applicant admitted all four allegations. Her admissions are incorporated as findings of fact.

Applicant worked continuously for a government contractor from 1984 to August 2005. She was employed as a technical staff member and her work involved sensor data analysis. (Ex. 1., at 1-2; Tr. 75; 78.) In August 2005, Applicant took a position with another government contractor. Her work with the second employer is similar to that she carried out with her previous employer and requires a security clearance. (Tr. 79-80.)

Applicant is divorced and has two grown children. Both children were born in the U.S. and are U.S. citizens. (Ex. 1; Tr. 77.) Applicant sought U.S. citizenship because it was a requirement of her employer. (Tr. 75.) Applicant was unclear about when she became a U.S. citizen. She testified she became a U.S. citizen in "about 1980 or 1981." On her security clearance application (SF-86), she stated she became a naturalized U.S. citizen in July 1984. (Ex. 1, at 1.) Applicant offered no explanation for this discrepancy.

Applicant is now 56 years old. She was born in 1948 at the time the Chinese Communists were taking control of the Chinese mainland. Her father was an officer in the Chinese Nationalist Army. When Applicant was one month old, her family fled from their home in what is now the People's Republic of China to the Republic of China (Taiwan), where the family then lived and where Applicant was raised. Applicant attended college in Taiwan. In 1970 she received a bachelor of science degree in electrical engineering. (Ex. 1; Tr. 73-74.)

Applicant left Taiwan in 1970 to continue her studies in the U.S. She obtained two master's degrees and a Ph.D. degree in computer science in the U.S. She has held a security clearance. (Ex. 1, at 1, 7.)<sup>(3)</sup>

Applicant's father is deceased. Applicant's mother lives with her and is a naturalized U.S. citizen. Applicant's older sister is also a naturalized U.S. citizen and lives with her family in the U.S. Applicant has no immediate family members who are citizens or residents of Taiwan. (Tr. 76-78.) Her only familial contacts in Taiwan are an 83-year-old woman, identified by Applicant as her "aunt," who is the widow of Applicant's first cousin, once removed, and the woman's son, Applicant's second cousin, who is 56 years old. (Ex. C.) The "aunt" is a retired school teacher and receives a pension from the government of Taiwan. The second cousin owns a company in Taiwan which manufactures automobile parts. (Tr. 87.)

As a college student in Taiwan, Applicant developed a friendship with her first cousin once removed, who was a

professor, and his wife. The couple lived in the town where Applicant attended college. They were her family's only relatives living in Taiwan. Applicant's friendship with the couple was close and familial. She referred to her cousin and his wife as "uncle" and "aunt," even though they were not close relatives. (Tr. 88-89.) After the first cousin, once removed, died, Applicant's friendship continued with his widow. At some unidentified time, the couple's daughter moved to the U.S. Applicant's "aunt" came to the U.S. to visit her daughter approximately once a year and when she was in the U.S., Applicant would invite them to her home. When the "aunt's" son and his family came to the U.S. to visit, Applicant and her family entertained them once in their home. (Tr. 89.) Over time, the "aunt" became unable to travel. Her last visit to the U.S. occurred in approximately 1995. (Tr. 105.) In 2001, Applicant and her daughter visited the "aunt" and her son in Taiwan for two days. They stayed with the "aunt" in her apartment. (Tr. 90.) Applicant talks with the "aunt" by telephone approximately once a year. (Tr. 106.)

Applicant was employed by one government contractor for most of her professional career. (Tr. 75.) After being granted a security clearance, Applicant received training in handling classified information. (Tr. 107.) She worked in facilities where most employees held security clearances and worked with classified information. From 1998 to August 2005, Applicant's former employer assigned her to work at a secure government facility where she was issued a safe in which to store classified documents when she was not working on them. During an average work week, Applicant worked with classified information about half of the time. (Tr. 97.) On a daily basis, security checks were made of the work spaces to which Applicant and her colleagues were assigned. (Tr. 99.) Applicant usually arrived at work later than many of her colleagues, and she was usually the last person to leave the office premises in the evening. (Tr. 98.)

After the terrorist attacks of September 11, 2001, Applicant and her co-workers were required to participate in emergency evacuation drills. (Tr. 98.) One day, sometime between May 2002 and June 2002, an office-wide evacuation drill occurred while Applicant was working with a classified document. Applicant was unsure about what to do with the classified document when she left the premises during the evacuation drill. She put the classified document in her desk drawer and left the building. (Tr. 98-99.) When she returned to her desk after the drill, she did not retrieve the classified document and forgot she had placed it in her desk drawer. (Tr. 98-99.)

Sometime later, a guard came to Applicant's work area as a part of a daily security check. As he passed Applicant's desk, the guard noted she had material designated For Official Use Only (FOUO) on her desk top. He told Applicant the FOUO material could not be left in plain view on her desk top and had to be secured inside a desk drawer. He opened one of Applicant's desk drawers in an attempt to secure the FOUO material and found the classified document Applicant had sequestered there during the evacuation drill. (Tr. 98-100.) The guard reported Applicant's security breach, and the facility security manager was notified of her failure to follow basic procedures for protecting classified information. (Ex. 2.) The security manager reprimanded Applicant, and she was provided with additional training on the proper handling of classified information. (Tr. 109-110.)

Applicant was responsible for a second security violation which occurred when her office moved from one location to another. (Tr. 111.) Initially, she could not remember when the office move took place and the second security violation occurred. (Tr. 110; 111; 113-114; 115; 118; 119.) She initially recollected the second violation took place in January or February of 2002, although that would have placed the second violation chronologically before the acknowledged first violation in May or June of 2002. Upon further questioning by counsel, Applicant recollected the second violation occurred sometime between January and February 2003. (Tr. 122-124.)

In January or February 2003, as Applicant was working in her new office, she removed a classified document from her safe. After reviewing the document, Applicant returned it to the safe but did not lock the safe. She did not lock the safe when she left the office that day. A guard found her safe unlocked and reported a security breach. Applicant was again reprimanded, and her employer supplied her with additional remedial training. (Tr. 111-112.)

Applicant presented performance appraisals for 1986, 1988, 1999, and 2002. (Ex. D.) The evaluations attested to her high level of technical competence, her good judgment, and her commitment to hard work. A colleague and friend, also a naturalized American citizen born in Taiwan, who was also for a period of time Applicant's supervisor, appeared as a witness at the hearing and praised Applicant's integrity, honesty, and dedication to her work. (Tr. 66-67.)

I take administrative notice of on-going political tensions between Taiwan and the People's Republic of China (PRC)

Taiwan seeks to become an independent State, an aspiration which is strongly opposed by the PRC, which sees Taiwan as a province of the PRC. (U.S. Department of State: Background Note: Taiwan, at 5-7, Applicant's Document G, for Administrative Notice.) Additionally, I take administrative notice of Taiwan's active and historic roles as collector of competitive information and perpetrator of industrial espionage against U.S. companies producing militarily critical technologies (MCTs) such as information systems, sensors and lasers, and electronics. (Annual Report to Congress on Foreign Economic Collection and Industrial Espionage: 2000, Government Document II for Administrative Notice.) I also take administrative notice of the following paragraph from the Annual Report to Congress on Foreign Economic Collection and Industrial Espionage: 2003 (Applicant's Document K for Administrative Notice):

Among the sensitive MCTs targeted by foreigners in 2003, according to [Defense Security Service] data. . . information systems attracted the most attention, having been sought by more than 60 countries and accounting for more one-fifth of all suspicious incidents. Sensors and lasers were second, with entities from 46 countries attempting purchases in 2003 and accounting for 17 percent of suspicious incidents. Also in high demand were armaments and energetic materials (44 countries, 9 percent of suspicious incidents) and electronics (32 countries and 9 percent of suspicious incidents).

Additionally, I take administrative notice of paragraphs 5-100 and 5-303 of the National Industrial Security Program Operating Manual (NISPOM), DoD 5220.22-M, dated January 1995, incorporating Change One (July 1997) and Change Two (February 2001). (Ex. 3.)

### 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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.

### CONCLUSIONS

#### **Guideline B - Foreign Influence**

In the SOR, DOHA alleged, under Guideline B of the Directive, that Applicant's aunt and cousin are citizens and

residents of the Republic of China (¶ 1.a.); and that Applicant's most recent trip to the Republic of China was in 2001 (¶ 1.b.).

A Guideline B security concern exists when an individual seeking clearance is bound by ties of affection, influence, or obligation to immediate family members or other persons who are not citizens of the U.S or who may be subject to duress. A person who places a high value on family obligations or fidelity to relationships in another country may be vulnerable to duress by the intelligence service of the foreign country or by agents from that country engaged in industrial espionage, terrorism or other criminal activity. The more faithful an individual is to family ties and obligations, the more likely the chance that the ties might be exploited to the detriment of the United States.

Applicant's case requires the recognition that Taiwan and the PRC are engaged in an on-going struggle regarding Taiwan's political and economic autonomy and identity. In their efforts to gain strategic or economic advantage, some individuals and groups in Taiwan seek to obtain, through illegal methods, MCTs from companies doing business as government contractors in the United States. These actions threaten U.S. security interests. American citizens with immediate family members, close friends, or professional associates who are citizens or residents of Taiwan could be subject to duress that could result in the compromise of classified information.

Applicant admits both allegations under Guideline B. At her hearing she explained that her "aunt" was the wife of her first cousin, once removed, and the "aunt's" son was her second cousin. While Applicant's evidence demonstrates the aunt and cousin were not her immediate family members, her relationship with the "aunt" also manifests a friendship of more than 35 years with a citizen and resident of a foreign country, and perhaps collateral ties of obligation to her second cousin, also a citizen and resident of a foreign country. These admissions raise security concerns under Disqualifying Condition (DC) E2.A2.1.2.1. Applicant's long-standing friend, her "aunt" and the "aunt's" son are citizens and residents Taiwan. The presence of these persons, to whom Applicant has ties of affection or obligation, in Taiwan raises security concerns under E2.A2.1.2.1 of Guideline B. Applicant acknowledged one trip to Taiwan in 2001, where she and her daughter stayed in the home of the "aunt" and visited the second cousin. The visit reflected the friendship Applicant had with her "aunt, a friendship growing out of her student days and maintained by many contacts over the years with the friend when she came to the US on annual visits. Applicant's long-standing friendship with a Taiwanese family could make her vulnerable to coercion, exploitation, or pressure by individuals or groups seeking MCTs to be used by the government of Taiwan.

An applicant may mitigate foreign influence security concerns by demonstrating the friends and associates in questions are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force an applicant to choose between loyalty to the foreign associates and loyalty to the U.S. mitigating Condition (MC) E2.A2.1.3.1. While the evidence does not establish that Applicant's "aunt" or second cousin are agents of a foreign power, they are citizens of a country with an uncertain political future where groups engaged in industrial espionage or illegal data collection are not constrained from acting against U.S. interests. Applicant offered no evidence to rebut the Government's assertion that her friendship with remotely-related family members in Taiwan could be exploited by these groups in a way that could force her to choose between loyalty to these individuals and the security interests of the United States. (ISCR Case No. 03-15485, at 4-6 (App. Bd. June 2, 2005) Accordingly, MC E2.A2.1.3.1 does not apply to Applicant's case.

An applicant may also mitigate foreign influence security concerns if she shows her contacts and correspondence with foreign citizens are casual and infrequent. MC E2.A2.1.3.3. Applicant's contacts with her remotely-related family members who are citizens and residents of Taiwan are not frequent, nor are they casual. While Applicant communicates less frequently with her second cousin, than with her "aunt," her contacts with the widow of her first cousin, once removed, are based on long-standing ties of affection and obligation. Accordingly, while mitigating condition E2.A2.1.3.3. might apply to Applicant's relationship with her second cousin in Taiwan, it does not apply to her relationship with the widow of her first cousin, once removed, who has been her friend for 35 years or more and who is affectionately called "aunt."

Nothing in Applicant's answers to the Guideline B allegations in the SOR suggested she was not a loyal American citizen and a credit to her adopted country. However, she was unable to put forward evidence that could mitigate the security concerns alleged in subparagraphs 1.a. and 1.b. of the SOR and demonstrate that she would not be vulnerable to

foreign influence that would result in the compromise of classified information. Accordingly, allegations in subparagraphs 1.a. and 1.b. under Guideline B of the SOR are concluded against the Applicant.

## **Guideline K - Security Violations**

In the amended SOR, DOHA alleged Applicant left a Secret document in her desk drawer, which was not an authorized location for the storage of classified information, sometime between May 2002 and June 2002, in violation of paragraphs 5-100 and 5-303 of the NISPOM, dated January 1995 (¶ 2.a.), and failed to secure a classified security container at the end of a work day, sometime between January and February 2003, in violation of paragraphs 5-100 and 5-303 of the NISPOM, dated January 1995 (¶ 2.b.).

Noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information. E2.A11.1.1. In her answer to the SOR, Applicant admitted two security violations in 2002. When it became apparent that both violations could not have occurred at the same time, she was hesitant in her testimony to identify the date of the second violation. She revealed somewhat reluctantly that the second violation occurred sometime in January or February 2003. Applicant's inability to recollect when the second violation occurred may be attributable to simple inattentiveness. However, her inability or unwillingness to recall a date so important to her professional interest raises a concern.

Applicant's everyday work conditions required using and protecting classified information. Because her work could be included in a category of sensitive CTs targeted by foreigners engaged in industrial espionage, Applicant had a special duty of care to protect the classified information entrusted to her. Applicant was cited by her former employer for two security violations which occurred approximately six months apart. The first violation was discovered after a security officer admonished Applicant for having FOUO material in plain view on her desk. When he opened her desk drawer to put the FOUO material out of plain view, he discovered a classified document she had sequestered there, in violation of the requirements of the NISPOM. Later, Applicant neglected to lock her safe after returning a classified document to the safe, and then she also neglected to lock the safe when she left her office at the end of the day. Applicant acknowledged many years of employment that had required her frequent use of classified information. She also acknowledged receiving thorough training in security procedures required for the protection of classified information. Applicant's testimony suggested her security violations were not deliberate. However, her violations were multiple and appear to have been caused by negligence, thereby raising security concerns under Disqualifying Condition (DC) E2.A11.1.2.2. of Guideline K.

We turn to an examination of applicable mitigating conditions under Guideline K. An applicant may mitigate security violation concerns if she shows the security violations were inadvertent ¶ E2.A11.1.3.1; isolated or infrequent ¶ E2.A11.1.3.2.; due to improper or inadequate training ¶ E2.A11.1.3.3.; or if the individual demonstrates a positive attitude toward the discharge of security responsibilities ¶ E2.A11.1.3.4.

Applicant's security violations appear to have occurred not through inadvertence but through a failure to exercise the due care required of a person entrusted with the responsibility for working with and protecting classified information. (See NISPOM, 5-100 and 5-303.) Her violations were not isolated or infrequent, but occurred within a context of inattentiveness that suggests a habit or pattern of behavior. Accordingly, mitigating conditions E2.A11.1.3.1 and E2.A11.1.3.2 do not apply to Applicant's case.

Over a span of many years, Applicant had received training in the correct handling and use of classified information. Additionally, she received a reprimand and remedial training after each of her two security violations. I conclude Applicant's security violations did not occur as the result of improper or inadequate training, and, therefore, mitigating condition E2.A11.1.3.3 is inapplicable to the facts of her case.

Applicant is a highly trained scientist whose livelihood is premised on work requiring her to protect classified documents and information. While Applicant expressed an intent to avoid conduct leading to security violations in the future, she did not evince a positive attitude toward the discharge of her security responsibilities, nor did she articulate a specific plan for avoiding future security violations. Accordingly, I conclude that mitigating condition E2.A11.1.3.4. is inapplicable.

SOR allegations 2.a. and 2.b. under Guideline K of the Directive are concluded against the Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Guideline K: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

### **DECISION**

In light of all of the circumstances 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.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Applicant stated on her SF-86 that her background was investigated by the Defense Department in 1978 and 1985 and that she had been granted secret level security clearances. (Ex. 1, at 7.) She testified she was first granted a security clearance in 1979 and has held a security clearance continuously since that time. (Tr. 83.)