

DATE: December 28, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01707

ECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant and her husband were born in Taiwan and are naturalized U.S. citizens. Applicant's parents, father-in-law, two brothers, sisters-in-law, and brother-in-law are citizens and residents of Taiwan. Her husband works in the U.S. for a German-owned technology company. Applicant has renounced her Taiwanese citizenship and destroyed her expired Taiwanese passport. Security concerns based on foreign influence and foreign preference are mitigated. Clearance is granted.

STATEMENT OF THE CASE

On May 7, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. 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 security concerns under Guidelines B (Foreign Influence) and C (Foreign Preference) of the Directive. Under Guideline B, it alleges Applicant's parents, siblings, and in-laws are citizens and residents of Taiwan (¶¶ 1.a., 1.b., 1.c., 1.d., 1.e.); Applicant's husband is a dual citizen of Taiwan and the U.S. (¶ 1.f.); Applicant has friends and associates who are citizens and residents of Taiwan (¶ 1.g.); Applicant has traveled to Taiwan every other year since 1996 (¶ 1.h.); and Applicant's husband is employed by a German-owned company (¶ 1.i.). Under Guideline C, the SOR alleges Applicant obtained a Taiwanese passport after becoming a U.S. citizen (¶ 2.a.) and used her Taiwanese passport to travel to Taiwan (¶ 2.b.).

Applicant answered the SOR in writing on June 4, 2004, admitted the allegations except for ¶ 2.b., and requested a hearing. The case was assigned to me on September 10, 2004. On September 29, 2004, DOHA issued a notice of hearing setting the case for November 1, 2004. The case was heard as scheduled. DOHA received the transcript (Tr.) on December 6, 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 45-year-old software engineer for a defense contractor. She has worked for her current employer since April 2002. She does not have a security clearance. Her supervisors and co-workers regard her as kind, caring, technically capable, hard-working, and very trustworthy.

Applicant and her husband were born in Taiwan. They attended college in Taiwan, were married in 1984, and came to the U.S. on student visas to pursue graduate degrees. They obtained work visas in 1986, became permanent residents in 1990, and became naturalized U.S. citizens in 1995. They both held dual Taiwan-U.S. citizenship and Taiwanese passports. The passports expired in 2002. They have two sons who are native-born U.S. citizens.

Applicant and her husband renewed their Taiwanese passports in 1996 in anticipation of traveling to Taiwan to take care of her father-in-law, who was diagnosed with cancer. Without Taiwanese passports, they would have been limited to a 60-day visit. However, they did not use the Taiwanese passports because their siblings assumed responsibility for the care of their parents, making long visits unnecessary. Instead, they have used only their U.S. passports for all overseas travel.

Applicant's parents, brothers, parents-in-law, sisters-in-law, and brother-in-law are citizens and residents of Taiwan. Her older brother is an officer of a multinational camera company, and his wife is a homemaker. Applicant's younger brother is an engineer for a small, local technology company, and his wife is a pharmacist. Applicant's 81-year-old father is a retired school teacher, and her 68-year-old mother is a homemaker. Applicant's 84-year-old father-in-law is a retired university administrator. He is seriously ill with cancer and is unable to travel. Applicant's mother-in-law is deceased. Her brother-in-law is a vice-president of a technology company, and his wife is the manager of the legal department of a technology company. One sister-in-law is a local manager for an American-owned sporting goods company. Another sister-in-law is a nurse, and her husband is a clerk in an elementary school. Except for the mandatory military service by male members of Applicant's family, none have worked for the Taiwan government.

Applicant and her husband travel to Taiwan every other year to visit her parents and father-in-law. She reports all her foreign travel to her security manager. Applicant's parents and father-in-law are unable to travel to the U.S. because of their age and poor health. Applicant testified that, after her elderly parents and father-in-law are gone, there will be no reason for her to visit Taiwan.

Applicant talks to her parents by telephone once or twice a month. Her husband talks to his father by telephone once or twice a month. Applicant has virtually no contact with her husband's siblings and their spouses.

Applicant has casual friends and associates in Taiwan from her college days. She meets them rarely, at college reunions when she is visiting her parents in Taiwan. She does not maintain contact with them when she is at home in the U.S.

On December 19, 2003, Applicant destroyed her expired Taiwanese passport by shredding it in the presence of her employer's security manager. Her decision to shred the passport was based on advice from a DOHA personnel security specialist. On May 27, 2004, Applicant and her husband submitted formal renunciation of their Taiwanese citizenship to the Taipei Economic and Cultural Office (TECO), the functional equivalent of a Taiwanese embassy in the U.S.

Applicant and her husband own their home in Virginia and have mutual funds and bank accounts in the U.S. They own no foreign property and have no foreign investments.

Applicant has lived in her neighborhood for about 10 years. She has a reputation as a kind, caring, loyal, trustworthy person. In addition to her paid employment and duties as a mother, she has been very active in organizing and operating a cancer support group. She is generous with her time and often opens her home to the support group. She also volunteered to serve on the board of directors for a private school that teaches Taiwanese culture to Taiwanese-American children.

Taiwan is a multiparty democracy, a U.S. ally, and a major U.S. trading partner. It has a good human rights record. 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, is the legal basis for the unofficial relationship between the U.S. and Taiwan and the U.S. commitment to ensuring Taiwan's defensive capability.⁽¹⁾ On the other hand, Taiwan is an active collector of defense, medical, economic, and computer information through industrial espionage.⁽²⁾

Applicant's husband is employed by a Virginia corporation that is a subsidiary of a German computer software company. He works on software products used by U.S. intelligence agencies. Her husband does not have a security clearance and does not work on classified projects.

Germany is a parliamentary democracy. Germany and the U.S. enjoy close political, economic, and security relationships. They consult and coordinate with each other frequently at senior levels.⁽³⁾ Unlike Taiwan, U.S. counterintelligence sources have not identified Germany by name as an active practitioner of industrial espionage.⁽⁴⁾

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 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

Guideline B (Foreign Influence)

A security risk may exist when an applicant's immediate family, or other persons to whom the applicant 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.

The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). Applicant's ties to her family and her husband's family and the possible effects they may have on Applicant's conduct are relevant considerations under Guideline B (Foreign Influence). ISCR Case No. 01-02452 at 8 (App. Bd. Nov. 21, 2002). "[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002).

DC 1 is established by Applicant's admissions and supported by other evidence of record. Since the Government has produced substantial evidence to establish DC 1, the burden has shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country, 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").

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 they view as important to their vital interests or national security. Finally, we know 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.

None of Applicant's family members or in-laws are agents of a foreign power. Her parents and father-in-law are elderly, retired, and not associated with government or businesses involved in economic espionage. The likelihood of direct or indirect coercion against Applicant through her parents or father-in-law is remote. I conclude MC 1 is established for

these family members (SOR ¶¶ 1.a., 1.c.).

Applicant's older brother works for a multinational camera manufacturer. While cameras certainly have military applications and are possible targets of industrial espionage, the likelihood of her brother being subject to coercion or duress targeted at influencing his sister is speculative and remote in light of the nature of the Taiwan government, its human rights record, its dependence on U.S. trade and military support, and Applicant's strong sense of duty and patriotism. Her younger brother is employed by a small, local technology company. The limited size of his employer makes her younger brother an even more unlikely target. My impression of Applicant, based on her testimony and demeanor at the hearing, is that she is an intelligent, determined, strong-willed woman who would not be easily coerced or intimidated. I conclude MC 1 is established for Applicant's brothers. (SOR ¶ 1.b.)

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." The evidence reflects Applicant has virtually no contact with her brothers-in-law and sisters-in-law. Likewise, her contact with college friends and associates in Taiwan is casual and infrequent. I conclude MC 3 is applicable to SOR ¶¶ 1.d., 1.e., and 1.g.

Applicant's husband has renounced his Taiwanese citizenship. Thus, the allegation in SOR ¶ 1.f. is rebutted.

Applicant's biannual visits to Taiwan are focused on family. They do not involve contacts with government or industry. Given the relationship between Taiwan and the U.S., it is highly unlikely Applicant's visits will make her vulnerable to influence or coercion. I conclude the allegation in SOR ¶ 1.h. is mitigated.

Applicant's husband's employment by a German-owned Virginia corporation has minimal security significance. Given the nature of the German government and its relationship to the U.S., it is unlikely that Germany would attempt to influence Applicant through her husband's ties to a German-American business. I conclude that any security concerns arising from Applicant's husband's employment by a German-owned company are minimal. Any concerns arising from it are mitigated.

Based on my analysis of Applicant's ties to each family member and in law, as well as the totality of her ties to Taiwan, I conclude the likelihood of foreign influence is minimal, and Applicant's foreign ties do not constitute an unacceptable security risk. I conclude security concerns arising from Applicant's ties to Taiwan and her husband's ties to Germany are mitigated.

Guideline C (Foreign Preference)

Under Guideline C, "[w]hen 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." Applicable disqualifying conditions include the exercise of dual citizenship (DC 1), and the possession and/or use of a foreign passport (DC 2). Directive ¶¶ E2.A3.1.2.1, E2.A3.1.2.2. Applicant's admission she held dual citizenship and a Taiwanese passport established DC 1 and DC 2.

Two mitigating conditions (MC) are relevant. MC 1 applies when "[d]ual citizenship is based solely on parents' citizenship or birth in a foreign country." Directive ¶ E2.A3.1.3.1. MC 1 is established by the evidence in this case.

MC 4 applies when an applicant "has expressed a willingness to renounce dual citizenship." Directive ¶ E2.A3.1.3.4. Applicant formally renounced her Taiwanese citizenship by filing the appropriate documents with TECO. I conclude MC 4 is established.

When DC 2 applies, the clarifying guidance issued by the Assistant Secretary of Defense, Arthur L. Money, dated August 16, 2000 (Money Memorandum), requires that a clearance be denied or revoked "unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." The Money Memorandum also makes it clear that Guideline C recognizes "no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country." Surrender of a passport contemplates returning it to the issuing authority. Merely keeping a passport until it expires does not satisfy the guidance in the Money Memorandum. ISCR Case No. 01-224306 at 5 (App. Bd. Sep. 30, 2003).

Applicant did not surrender her passport to TECO. Instead, she shredded it, acting on the advice of a DOHA personnel specialist. It no longer exists. Her destruction of the passport was the functional equivalent of surrendering it. I conclude Applicant has complied with the Money memorandum.

Applicant's sole purpose for renewing her Taiwanese passport in 1996 was to facilitate long-term care for her father-in-law. It was not motivated by preference for Taiwan over the U.S. She never used the Taiwanese passport. Instead, she used her U.S. passport for all foreign travel, including travel to Taiwan. I conclude the conduct alleged in SOR ¶ 2.a. is mitigated and the allegation in SOR ¶ 2.b. is rebutted.

FORMAL FINDINGS

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

Paragraph 1. Guideline B (Foreign Influence): 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

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Paragraph 2. Guideline C (Foreign Preference): FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: 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. 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. These documents are available on the internet at www.state.gov.

2. National Counterintelligence Center (NACIC), *Annual Report to Congress 15* (2000) available on the internet at www.nacic.gov. The NACIC Annual Reports for 2001, 2002, and 2003 did not identify the most active practitioners of industrial espionage by name. It may well be that the "most active" practitioners can no longer be reliably identified because there are so many. In 2000, NACIC identified seven countries as "most active." The number of countries targeting the U.S. rose to 75 in 2001 and over 90 in 2002.

3. U.S. Department of State Background Note: Germany, October 2004.

4. *See note 2, supra.*