

DATE: June 29, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07177

ECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Jason R. Collins, Esq.

SYNOPSIS

Applicant's brother-in-law and two sisters-in-law are citizens and residents of the Republic

of China (Taiwan). In 1995, 14 years after becoming a U.S. citizen, Applicant acquired a Taiwan passport and gave it to his mother as a memento. In 1997, on a security clearance application, Applicant acknowledged having the active Taiwan passport, stated he acquired it "to replace an old Taiwanese passport," and further stated it had expired in September 1996. Applicant did not acknowledge possessing the Taiwan passport on his 2002 security clearance application. Applicant failed to mitigate disqualifying conditions under Guidelines B, C, and E of the Directive. 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 January 18, 2006, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision—security concerns raised under Guideline B (Foreign Influence), Guideline C (Foreign Preference), and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing March 10, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me April 13, 2006. Pursuant to ¶ E3.1.8. of Enclosure 3 of the Directive, Applicant acknowledged he had received 15 days actual notice of his hearing and waived the 15-day notice provision of the Directive. On May 24, 2006, I convened a hearing 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, offered three exhibits for admission to the record (Ex. 1, 2, and 3), and offered three documents, enumerated I through III, for administrative notice. The Government's exhibits and documents offered for administrative notice were admitted to the record without objection. Applicant testified on his own behalf, called two additional witnesses, and offered five exhibits for admission to the record. Applicant's exhibits were marked Ex. A through E and were admitted to the record without objection. On June 6, 2006, DOHA received the transcript (Tr.) of the proceeding.

FINDINGS OF FACT

The SOR contains two allegations under Guideline B, Foreign Influence, three allegations under Guideline C, Foreign Preference, and one allegation under Guideline E, Personal Conduct. Applicant admitted one Guideline B allegation and admitted in part the other Guideline B allegation relating to the citizenship and country of residence of his two sisters-in-law and one brother-in-law. He reported his mother-in-law had died in March 2004. He admitted the three allegations under Guideline C. He admitted the facts of Guideline E allegation but denied falsifying his answer to Question 15 on the security clearance application he signed April 17, 2002. Applicant's admissions are incorporated as findings of fact.

Applicant is 56 years old and employed as a principal engineer by a government contractor. He holds both a bachelor's degree and a master of science degree in engineering. (Ex. 1; Tr. 70.)

Applicant was born in Taiwan and came to the U.S. in 1977. He served in the U.S. Army from 1977 to 1980, received a meritorious service medal and several commendations, and was honorably discharged. (Ex. A, B, C, D, and E) In 1981, he became a naturalized U.S. citizen. He has held a security clearance since 1983. (Ex. 1; Tr. 22)

Applicant and his wife were married in 1974. They are the parents of two adult children. (Ex. 1; Tr. 37.) Applicant's wife has a brother and two sisters who are citizens and residents of Taiwan. Applicant's wife's younger sister is a housewife with four children; her brother is a factory worker; and her older sister is a street-sweeper. None of the wife's siblings has ties to the government of Taiwan. (Tr. 37-41.) Applicant's wife's mother, also a citizen and resident of Taiwan, died in March 2004.

Applicant's wife last traveled to Taiwan to visit her family in February or March of 2005. (Tr. 45-46.) Applicant's wife communicates with her older sister by telephone and e-mail approximately once a month. She talks with her younger sister sometimes once a month and sometimes every two months. She talks with her brother approximately every other month. (Tr. 48-49.) Applicant's contacts with his wife's family are through his wife. (Tr. 38-42; 64.) Applicant traveled with his wife to Taiwan to visit her family in 1991, 1993, 1999, and 2000. His most recent trip to Taiwan to visit his wife's family occurred in October 2003. (Answer to SOR at 2.)

In 1995, fourteen years after becoming a U.S. citizen, Applicant applied for and received a Taiwan passport. He gave the passport to his mother, a naturalized U.S. citizen living in the U.S., who requested he obtain it and give it to her as a souvenir. The passport expired in February 2001. Applicant's mother kept the passport until she died in February 2003. Applicant never used the passport for travel abroad. (Tr. 60- 63.)

In August 1997, Applicant completed a security clearance application (SF-86). Question 15 on the SF-86 read: "**Your Foreign Activities - Passport** In the last 7 years, have you had an active passport that was issued by a foreign government?"

In response to Question 15, Applicant responded "yes." He stated that on September 1, 1995, he had been issued a passport by the government of Taiwan. He further stated the passport had expired on September 1, 1996. He indicated he had acquired the Taiwan passport "to replace old Taiwanese passport." (Ex. 1 at 8.) In his testimony Applicant reported he listed the passport expiration date as September 1996 because when he was preparing his answers on his SF-86 in 1997, he called his mother and she told him the expiration date was September 1996. Applicant admitted he had held a Taiwan passport before becoming a U.S. citizen but could not remember the number of years for which a Taiwan passport was issued. He stated he knew his U.S. passport was issued for ten years. (Tr. 73-74.)

On April 17, 2002, Applicant completed a SF-86. In response to Question 15 on the SF-86, Applicant responded "no," even though he had held an active passport issued by a foreign government in the last 7 years. (Ex. 2 at 7.) Applicant claimed he had forgotten about the passport and when he completed the SF-86 in 2002, he did not take time to refresh his memory and carefully answer Question 15. (Tr. 70-71.) In November 2005, when Applicant was interviewed by an authorized investigator for the Department of Defense, he was in possession of the Taiwan passport which had been issued to him on September 25, 1995 and which had expired on September 25, 2001. In a letter, dated November 4, 2005, in response to interrogatories from DOHA, Applicant asserted the passport was never used for foreign travel and that he did not report it in a 2002 interview because it was not in his possession and he had totally forgotten about it.

(Ex. 3 at 1.)

Applicant claims dual citizenship with Taiwan because of his birth in Taiwan. (Ex. 3 at 1.) Sometime before his hearing, Applicant went to the embassy of Taiwan and attempted to renounce his Taiwanese citizenship. He was told he could not renounce his Taiwanese citizenship unless he had an active Taiwan passport. Applicant's Taiwan passport expired in 2001. He was also informed in a telephone conversation with the embassy of Taiwan that Taiwan would not accept the surrender an expired Taiwan passport. (Tr. 66-67.) Applicant said he would renounce his dual citizenship with Taiwan if it were possible to do so. (Tr. 67; Ex. 3 at 1.)

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. (Government Document II for Administrative Notice: U.S. Department of State: Background Note: Taiwan, at 5-7.) 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. (Government Document I for Administrative Notice: Annual Report to Congress on Foreign Economic Collection and Industrial Espionage: 2000 Appendix at 1-2.)

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.

In addition to the guidelines in the Directive, official DoD policy guidance must also be considered. Of particular relevance in this case is an August 16, 2000, memorandum from Assistant Secretary of Defense Arthur L. Money (Money Memorandum) clarifying the application of Guideline C, Foreign Preference, to cases involving an applicant's possession or use of a foreign passport

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 mother-in-law, brother-in-law, and two sisters-in-law are citizens and residents of Taiwan (¶ 1.a.); and that Applicant traveled to Taiwan in 1991, January 1993, August 1999, November 2000, and in October 2003 (¶ 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, close friends, or professional associates in a foreign country, or to persons in the United States whose first loyalties are to a foreign country. 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 the government of Taiwan has aggressively sought privileged and classified information from U.S. businesses and government contractors. Even though Taiwan is not hostile to the U.S., some of its leaders desire access to U.S. technology in order to stave off possible incursions from the Peoples' Republic of China, and a thus political climate exists that could threaten U.S. security interests. *See* ISCR Case No. 02-26976, at 4-5 (App. Bd. Oct. 22, 2004).

At his hearing, Applicant reported that his mother-in-law died in March 2004, and thus that part of SOR ¶ 1.a. alleging Applicant's mother-in-law is a citizen and resident of Taiwan is moot. Applicant's remaining admissions raise two possible Guideline B security concerns. Applicant's two sisters-in-law and one brother-in-law are citizens and residents of Taiwan. The citizenship and residency of these family members with whom Applicant has close ties of affection and obligation, through his wife, raise security concerns under E2.A2.1.2.1. of Guideline B. Additionally, Applicant's wife, with whom he shares his home, has close ties of affection and obligation to her brother and sisters, who are citizens and residents of Taiwan, thus raising the potential for foreign influence or duress, a security concern under E2.A2.1.2.2. of Guideline B.

An applicant may mitigate foreign influence security concerns by demonstrating that immediate family members 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 brother-in-law and sisters-in-law are agents of a foreign power, they are all citizens and residents of Taiwan, and Applicant failed to demonstrate that they could not be exploited by a foreign power in a way that could force him to choose between loyalty to them and to the U.S. Additionally, Applicant failed to demonstrate that his relationship with his wife and his wife's relationship with her three siblings could not be exploited in a way that could force him to choose between loyalty to his wife and her family members and the security interests of the United States. ISCR Case No. 03-15485, at 4-6 (App. Bd. Jun. 2, 2005)

Foreign connections derived from marriage and not from birth can raise Guideline B security concerns. In reviewing the scope of MC E2.A2.1.3.1., DOHA's Appeal Board has stated that the term "associate(s)" reasonably contemplates in-laws and close friends. ISCR Case No. 02-12760, at 4 (App. Bd. Feb. 18, 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 he shows his contacts and correspondence with foreign citizens are casual and infrequent. C E2.A2.1.3.3. Applicant is committed to his wife, a relationship that is enduring and familial. His wife's contacts with her siblings who are citizens and residents of Taiwan are based on family obligation and affection and are therefore not casual. Applicant's wife speaks on the telephone or exchanges e-mails with one of her siblings monthly; she communicates with the other two siblings monthly or every other month. Applicant's wife is aware of her siblings' needs and her obligations to them. While her contact with her siblings is not always frequent, it is not casual. Accordingly, MC E2.A2.1.3.3. does not apply to Applicant's wife's relationships with her brother and two sisters, and the two Guideline B allegations of the SOR are concluded against the Applicant.

Guideline C - Foreign Preference

In the SOR, DOHA alleged that Applicant exercised dual citizenship with Taiwan and the

United States (§ 2.a.); that he applied for and was issued a Taiwan passport on September 25, 1995, even though he had become a naturalized U.S. citizen in January 1981 § 2.b.); and that, as of November 4, 2005, when he was interviewed by an authorized investigator for the Department of Defense, he possessed a Taiwan passport that had been issued on September 25, 1995, and expired on September 25, 2001 (§ 2.c.) Applicant admitted the allegations and offered mitigating circumstances.

A Guideline C security concern exists when an individual's conduct indicates a preference for a foreign country over the United States. A preference for another country could lead a person to provide information or make decisions that are harmful to the interests of the United States. Applicant's possession of a Taiwan passport while, at the same time, possessing a valid U.S. passport, raises security concerns under DC E2.A3.1.2.1. and DC E2.A3.1.2.2. of Guideline C.

We turn to an examination of applicable mitigating conditions under Guideline C. An applicant may mitigate Guideline C DC E2.A3.1.2.1. security concerns if he shows his dual citizenship is based solely on his parents' citizenship or birth in a foreign country (MC E2.A3.1.3.1.), if the conduct indicating a possible foreign preference occurred before obtaining United States citizenship (E2.A3.1.3.2.), and if he expressed a willingness to renounce dual citizenship. (MC E2.A3.1.3.4.)

Applicant's assertion that his dual citizenship was based solely on his birth in Taiwan was not credible. In 1995, he took affirmative action to exercise his Taiwanese citizenship by obtaining a Taiwan passport. He took this action fourteen years after becoming a U.S. citizen and while holding an active security clearance. He testified his mother asked him to acquire a Taiwan passport and to give it to her as a souvenir. Applicant complied with his mother's unusual request, and his mother kept the passport until she died in 2003. During the years that Applicant's mother had his active Taiwan passport in her possession, Applicant was exercising dual citizenship. A whole person analysis requires that Applicant's willingness to renounce his dual citizenship at his hearing must be viewed in the context of his earlier actions. Accordingly, MC E2.A3.1.3.1., MC E2.A3.1.3.2., and MC E2.A3.1.3.4. are inapplicable to the facts of Applicant's case.

On August 16, 2000, Assistant Secretary of Defense Arthur L. Money issued a policy statement (Money Memorandum), which clarified the application of the foreign preference adjudicative guideline to cases involving an applicant's possession or use of a foreign passport. The policy guidance was deemed necessary to clarify Guideline C in cases "involving the possession and/or exercise of dual citizenship, including especially cases involving the use of dual passports." The Money Memorandum specified that Guideline C "contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country" and it directed "that any 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." (Money Memorandum at 1.)

Possession and use of a foreign passport may be a disqualifying condition under DC E2.A3.1.2.2. of Guideline C. DOHA's Appeal Board has interpreted the policy guidance of the Money Memorandum and has concluded that possession of an expired passport is not equivalent to surrender. *See* ISCR Case No. 01-24306 at 4 (App. Bd. Sept. 30, 2003) The policy of the Money Memorandum applies to all Guideline C adjudications and identifies the following security concern: "the possession and use of a foreign passport in preference to a U.S. passport raises doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States."

Applicant testified he obtained a Taiwan passport and gave to his mother as a sentimental gift or convenience and that he did so while holding an active U.S. passport. The policy articulated in the Money Memorandum requires that a clearance be denied or revoked unless Applicant surrenders the passport or obtains official U.S. government approval for its use. Applicant has taken neither course of action.

At his hearing, Applicant testified he had attempted to renounce his Taiwan citizenship and surrender his expired Taiwan passport but had been rebuffed by authorized officials at the Taiwan embassy who invoked the requirements of Taiwan law. Today, the passport in Applicant's possession is no longer valid, but as long as Applicant retains his Taiwan nationality, even against his expressed intent to renounce it, it could be renewed at some later date. As a U.S.

citizen, Applicant's duty is to comply with U.S. law and not to be deterred from doing so by assertions of foreign law. I have considered the evidence as a whole, including each of the factors enumerated in Section E2.2. of the Directive (whole person analysis). After weighing the applicable Guideline C disqualifying and mitigating conditions, the policy guidance of the Money Memorandum, and the factors in the whole person analysis, I conclude allegations 2.a., 2.b. and 2.c. of the SOR against the Applicant.

Guideline E - Personal Conduct

In the SOR DOHA alleged Applicant falsified material facts on the SF-86 he executed on April 17, 2002, when he answered "no" to Question 15 and deliberately failed to list the Taiwan passport he had been issued September 25, 1995 and which expired September 25, 2001. (¶ 3.a.) Guideline E conduct, which involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, could indicate an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. Where the facts proven by the Government or admitted by the applicant raise doubts about the applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nevertheless security worthy

With respect to the Guideline E conduct alleged in the SOR, the Government has established its case. Applicant twice addressed the issue of his Taiwan passport on security clearance applications. In his answer to Question 15 on his 1997 security clearance application, he admitted possession of a Taiwan passport issued to him in September 1995. He listed the passport's expiration date as September 1996, one year after it had been issued to him and one year before he completed his security clearance application. He also stated he obtained the passport "to replace old Taiwanese passport." At his hearing, when Applicant was asked how it was the passport could have expired in only one year, he answered that his mother told him it expired in 1996. Applicant is an educated man and a world traveler. He is familiar with the validity dates of passports. He failed to testify credibly about the information he supplied in his answer to Question 15 on his 1997 SF-86.

Additionally, Applicant's testimony regarding his failure to acknowledge and list the passport in response to Question 15 on his 2002 SF-86 lacked credibility. Applicant has held a security clearance since 1983. His failure to answer Question 15 completely, truthfully, and correctly on his 2002 security clearance application raises a security concern under Disqualifying Condition (DC) E2.A5.1.2.2 of Guideline E. Applicant claimed he forgot he had the passport. He also claimed he did not take time to answer the question carefully, truthfully, and thoroughly. His concealment of information he considered embarrassing or professionally damaging could make him vulnerable to coercion and blackmail. DC E2.A5.1.2.4. His conduct raises additional concerns under DC E2.A5.1.2.5. because it suggests a pattern of dishonesty or rule violation. Applicant's reticence to reveal the truth about his conduct suggests that, under some circumstances, he may put his interests before those of the Government.

Mitigating condition (MC) E2.A5.1.3.1. does not apply to the facts of this case: the information Applicant withheld is pertinent to a determination of his judgment, trustworthiness, and reliability. Only one other mitigating condition under Guideline E might be applicable to the instant case. The security concern raised by Applicant's disqualifying conduct could be mitigated if the falsification was an isolated incident, was not recent, and if the Applicant subsequently provided the correct information voluntarily. MC E2.A5.1.3.2. Applicant supplied the correct information only after he was questioned by an authorized investigator of the Defense Department. While Applicant's failure to answer Question 15 on his 2002 SF-86 was one event, it was recent and not isolated when viewed in context with his answer to the same question in 1997 and his failure to testify credibly about his earlier answer at his hearing. Accordingly, MC E2.A.6.1.3.2. does not apply to the facts of Applicant's case. I conclude Applicant's falsification of his answer to Question 15 on his 2002 SF-86 was deliberate. The Guideline E allegation in the SOR is concluded against the Applicant.

Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Therefore, nothing in this decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's

allegiance, loyalty, or patriotism.

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 C: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a.: 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.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended.