

KEYWORD: Foreign Influence; Foreign Preference

DIGEST: Applicant, a native of Taiwan and a U.S. citizen since 1990, failed to successfully mitigate the security concerns of foreign influence and foreign preference. Clearance is denied.

CASENO: 03-25707.h1

DATE: 05/11/2005

DATE: May 11, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25707

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Jason R. Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a native of Taiwan and a U.S. citizen since 1990, failed to successfully mitigate the security concerns of foreign influence and foreign preference. Clearance is denied.

STATEMENT OF THE CASE

On May 13, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B for foreign influence and Guideline C for foreign preference. Applicant replied to the SOR on June 3, 2004, and requested a hearing. Department Counsel indicated he was ready to proceed on September 8, 2004, and the case was assigned to me September 10, 2004. A notice of hearing was issued on September 16, 2004, scheduling the hearing for October 13, 2004. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript October 19, 2004. Issuing a decision was delayed due to a heavy caseload.

FINDINGS OF FACT

In his Answer to the SOR, Applicant admitted the factual allegations, with explanations. His admissions are incorporated into my findings, and after a thorough review of the record, I make the following findings of fact:

Applicant is a 48-year-old married man seeking a security clearance for the first time. He is a tenured associate professor of computer science at a U.S. university. His professorial duties consist of 50% teaching and 50% research. During an academic sabbatical during 2003 - 2004, Applicant elected to work for a not-for-profit organization with expertise in, among other things, information technology. This organization engages in research and development (R&D) for the Defense Department and other governmental agencies. Applicant applied for a security clearance for this employment. Although Applicant has returned to the university, he continues as an independent consultant for the R&D organization.

Applicant was born in Taiwan (the Republic of China) in 1956. He completed his elementary, secondary, and college education in Taiwan. He earned a bachelor's degree in chemical engineering in 1978, and thereafter, he served compulsory military service in Taiwan. Applicant was an Army officer and served at the rank of second lieutenant assigned to a chemical unit where he was involved with reviewing training plans. He completed his military duties in May 1980.

Applicant married his wife, also a native of Taiwan, in May 1980, just after completing his military service. He then came to the U.S. on a student visa to further his education. He was awarded a master's degree in chemical engineering in 1983, a master's degree in computer science in 1985, and a Ph.D. in computer science in 1988. Since 1985, Applicant has worked in the field of computer science.

Both Applicant and his wife became U.S. citizens in December 1990 via the naturalization process. Applicant and his wife have two children, a daughter and son, who are both native-born U.S. citizens. Neither Applicant nor his wife have any business or financial interests in Taiwan.

Applicant has several immediate family members who are citizens of and residents in Taiwan. His mother is approximately 82 years old. She suffered a minor stroke in July 1997 and a major stroke in March 2003. As a result, she is paralyzed and wheelchair bound. She was a housewife and never worked for the Taiwanese government. Applicant's eldest brother is approximately 58 years old, is deaf, and has never been employed. Applicant's second eldest brother is a 55-year-old businessman engaged in private commerce. Applicant has a 60-year-old sister who is a retired school teacher. Applicant's mother and two brothers reside together. Applicant provides financial support to his mother and deaf brother by sending \$600.00 to \$700.00 monthly to them. Applicant describes his family members as not interested in political or governmental matters, and so they do not discuss those matters. Also, Applicant says none of his family members have ever asked him whether he has a security clearance or access to classified information or both. In addition to these three siblings in Taiwan, Applicant has a 54-year-old sister who is a U.S. citizen and resident.

Based on his marriage, Applicant has relatives who are citizens of and residents in Taiwan.

His mother-in-law has always been a housewife since her marriage. His father-in-law is a retired railroad worker.

Neither has worked for the Taiwanese government nor held a position of authority in Taiwan. Like his own family, his parents-in-law are not interested in political or governmental matters, and they have never asked Applicant about his security clearance status.

Applicant travels to Taiwan to visit his mother one to two times per year. Sometimes he goes alone, and other times his family travels with him. The trips typically last two to three weeks, and Applicant always stays with his mother. His last trip to Taiwan was in June 2004. He intends to travel to Taiwan at the same frequency so long as his mother is alive. Applicant speaks to his mother by telephone about once a week. During these calls, Applicant will also speak to his brother.

After failing to convince his mother to move to the U.S., Applicant accepted a teaching position at a university in Taiwan so he could spend more time with his mother given her age. He worked full-time at the university from September 1994 to June 1996. Applicant used his Taiwanese passport to show proof of citizenship to facilitate his employment with the university rather than going through the more complicated process of obtaining permission to work as a non-citizen.

Applicant was employed full-time at the Taiwanese university until July 1996 when he took a year of leave without pay so he could accept a position as a visiting professor to do research and teaching at a university in the U.S. In May 1997, Applicant completed his visiting professorship and returned to Taiwan. When entering Taiwan, Applicant used his Taiwanese passport as his employment status with the Taiwanese university was still effective. Applicant formally terminated his employment with the Taiwanese university in June 1997, returned to the U.S. in July 1997, and has been a professor at the same university since August 1997.

Applicant's Taiwanese passport expired in August 1998, and he has not sought to renew it. Applicant has held a U.S. passport since becoming a U.S. citizen in 1990.

Applicant denies any intention to return to Taiwan to live permanently. Applicant has achieved his career as an established scholar in the field of computer science in the U.S. All his research connections, his friends, as well as his wife and two children are in the U.S.

As requested by Department Counsel, I took administrative or official notice of some of the matters set forth in Exhibit 3. In particular, it is well established that Taiwan is one of the seven most active countries collecting intelligence in the U.S., and data collection includes technological, financial, and commercial information.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or

absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

In August 2000, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I), issued a memorandum clarifying the application of the foreign preference security guideline for cases involving possession and/or use of a foreign passport (Exhibit 1--the so-called Money memorandum, because it is signed by Assistant Secretary Arthur L. Money). In pertinent part, the Money Memorandum "requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains approval for its use from the appropriate agency of the United States Government."

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ There is no presumption in favor of granting or continuing access to classified information.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.⁽⁵⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽⁸⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Guideline B-Foreign Influence

Under Guideline B for foreign influence, a security concern may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service.

Here, based on the record evidence as a whole, the government established its case under Guideline B. Applicant has family ties to Taiwan through his immediate family members and his in-laws. In particular, his temporary residence in Taiwan and his regular trips to Taiwan to visit his mother shows the strength of the family ties. It's clear Applicant is a dutiful son who is close to his mother, and he believes he must be attentive to her to the extent his time allows. Taken together, these circumstances raise a security concern under DC 1. ⁽¹¹⁾ The remaining DC do not apply based on the facts and circumstances here.

I have reviewed the MC under Guideline B and conclude that only MC 5 ⁽¹²⁾ applies in Applicant's favor. MC 5 applies because neither Applicant nor his wife has any financial interests in Taiwan. The remaining MC do not apply based on the facts and circumstances here. I have weighed the disqualifying and mitigating information, and conclude Applicant has failed to successfully mitigate the foreign influence security concern. In reaching this conclusion, I have given weight to the fact that Taiwan is known for its aggressiveness in collecting intelligence information in the U.S., and that information includes technology information. Given that Applicant (1) is a tenured professor in computer science, (2) is seeking a security clearance for employment as a consultant with a R&D organization, and (3) has close ties of affection or obligation or both to family members in Taiwan, it is not mere conjecture to suggest that Applicant's situation could create the potential for foreign influence that could result in the compromise of classified information. Accordingly, Guideline B is decided against Applicant.

2. Guideline C-Foreign Preference

Under Guideline C, a security concern may exist when a person acts in such a way as to indicate a preference for a

foreign country over the U.S. In particular, the exercise of dual citizenship raises a security concern because the active exercise of foreign citizenship may indicate a preference for that foreign country over the U.S. Dual citizenship by itself, however, is not automatically a security concern. Absent the exercise of dual citizenship or indicia of some affirmative action demonstrating foreign preference, mere possession of foreign citizenship by virtue of birth does not fall within the scope of Guideline C.

Here, based on the record evidence as a whole, the government established its case under Guideline C. By his actions--possessing and using a Taiwanese passport--Applicant demonstrated a preference for Taiwan. He used the passport to enter Taiwan and to facilitate his employment at the Taiwanese university. Under these circumstances, DC 1, ⁽¹³⁾ DC 2, ⁽¹⁴⁾ and DC 4 ⁽¹⁵⁾ apply against Applicant. In particular, a legitimate foreign preference security concern is raised due to (1) his possession and use of the foreign passport, (2) his residence in Taiwan, and (3) his employment at the Taiwanese university, all of which took place after obtaining U.S. citizenship in 1990. In addition to these matters, Applicant remains in possession of an expired Taiwanese passport, which may trigger the provisions of the so-called Money Memorandum. ⁽¹⁶⁾ But this matter was not alleged in the SOR, Department Counsel did not move to amend the SOR during the hearing, and Department Counsel did not mention the policy in closing argument. Given this lack of notice to Applicant, I will not address the Money memorandum issue on the merits.

I reviewed the four mitigating conditions under Guideline C and conclude none apply. Although Applicant has lived in the U.S. since 1980, has been a U.S. citizen since 1990, and has developed both professional and personal roots in the U.S., his affirmative actions noted above show a divided preference between the U.S. and Taiwan. Nevertheless, this decision should not be construed as an indictment of Applicant's loyalty and patriotism to the U.S., as those matters are not at issue. Instead, the clearly-consistent standard requires I resolve any doubt against Applicant, and his divided preference between the U.S. and Taiwan creates such doubt. Accordingly, Guideline C is decided against Applicant.

To conclude, Applicant failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I considered the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline B: Against the Applicant

Subparagraphs a - f: Against the Applicant

SOR ¶ 2-Guideline C: Against the Applicant

Subparagraphs a - c: Against the Applicant

DECISION

In light of all 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.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
10. *Egan*, 484 U.S. at 528, 531.

11. E2.A2.1.2.1. "An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country."

12. E2.A2.1.3.5. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."

13. E2.A3.1.2.1. "The exercise of dual citizenship."

14. E2.A3.1.2.2. "Possession and/or use of a foreign passport."

15. E2.A3.1.2.4. "Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country."

16. ISCR Case No. 01-24306 (September 30, 2003) at p. 5 (Addressing the issue of an expired foreign passport, the DOHA Appeal Board stated that "[s]urrender contemplates returning it to the issuing authority, and merely keeping a foreign passport until it expires does not satisfy this requirement in the ASDC3I memo.") (citation omitted).