

DATE: January 30, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-00540

EMAND DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq.

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 56-year-old naturalized United States citizen, who has resided in the United States for 29 years. He has worked as an engineer for federal contractors since 1991 and was previously granted a Secret security clearance in 1997. He has two siblings and a mother-in-law who are resident citizens of Taiwan. Based on the "whole person" concept, he mitigated the security concerns raised by foreign influence. Clearance is granted.

REMAND STATEMENT OF THE CASE

On February 24, 2005, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under Guideline B (Foreign Influence) why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On April 19, 2005, Applicant filed an Answer to the SOR, admitting all of the allegations, and elected to have the case decided on the written record in lieu of a hearing. On June 15, 2005, Department Counsel prepared a File of Relevant Material (FORM) and provided Applicant with a complete copy on June 22, 2005. Applicant had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation or mitigation. Applicant received the FORM on June 28, 2005. He did not submit any additional information. The case was assigned to me on December 7, 2005.

On March 31, 2006, I granted Applicant's security clearance. Department Counsel appealed. On January 5, 2007, the Appeal Board remanded the case for a new opinion. The Appeal Board made two findings of fact and conclusions that circumscribe my discretion. The Appeal Board found, "Applicant's sister may well be a low level functionary of the

Taiwanese government, consistent with Appeal Board case law we conclude that she is an agent to that government," and Applicant's contacts with his relatives in Taiwan are not "casual." ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 5, 2007). The remand decision directed me to issue a new decision:

which includes a more detailed whole person analysis, an analysis

which identifies in detail the factors which the Judge believes are pertinent

to the case. Consistent with this opinion, the Judge's new decision may not

rely explicitly or implicitly on Mitigating Conditions 1 or 3 of Guideline B.

Id. at 7. The Appeal Board provided direction concerning the content of the whole person analysis, which is addressed, *infra*.

REMAND FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in his Answer to the SOR, I make the following findings of fact:

Applicant is a 56-year-old married man. He was born in Taiwan in 1950. From September 1976 to January 1980, he attended a university in the United States and graduated with a PhD in engineering sciences. He became a naturalized citizen in 1988.⁽¹⁾ Since 1991, he has worked as an engineer for federal contractors. He was granted a Secret security clearance in 1997.⁽²⁾ He completed another security clearance application (SCA) in May 2003.⁽³⁾

Applicant met his wife in the United States. She was born in Taiwan and became a United States citizen in 1985, the same year they were married. They have two children, both born in the United States.⁽⁴⁾ He is active in his church and community.⁽⁵⁾ He does not have any financial interests in Taiwan. In his Answer he stated, "I am a proud American citizen, who never broke a law, even a traffic ticket in past 20 years. I love America and I will never do anything to jeopardize our national security for my personal reasons."⁽⁶⁾

Applicant's parents, both deceased, were born in Taiwan. Applicant is one of six children, all born in Taiwan. Two of his brothers are deceased. One of his sisters is a naturalized citizen and resident of the United States, and his other sister, age 66, is a citizen and resident of Taiwan. His brother, age 67, is a citizen and resident of Taiwan.

The sister living in Taiwan has worked as a clerk for the Taiwanese Justice Department since she graduated from high school. Applicant has minimal contact with her, having spoken to her two or three times over the past thirty years. He described his relationship with her as "lukewarm."

Applicant's brother is a chicken farmer in Taiwan. He has had permanent resident alien status in the United States for more than 10 years, and frequently travels here. His two children and two grandchildren are citizen-residents of the United States.

Applicant's mother-in-law, age 92, is a citizen and resident of Taiwan. Because he met his wife in the United States, he has only seen his mother-in-law a few times since his marriage in 1985. She lives in an assisted living facility located in the countryside.

Over the course of the past 15 years, Applicant returned to Taiwan in 2002 to visit his parent's grave, and in 2004 to attend a high school reunion. Both times he stayed with his brother. Before leaving on the trips, he reported his activity to his facility security officer.

Applicant submitted a letter from his former supervisor, who stated that Applicant previously worked on the development of a government program of "national importance" and had access to the company's proprietary information. He considers Applicant to be very trustworthy, ethical, and competent.⁽⁷⁾ He stated, Applicant "always

displayed great leadership abilities, excellent technical knowledge, and the highest moral and ethical behavior."⁽⁸⁾ His neighbor for more than 15 years believes Applicant is devoted to his children and the community.⁽⁹⁾

The United States government views Taiwan as "a stable democracy" with "a strong and well-developed economy."⁽¹⁰⁾ A February 2004 U.S. Department of State report noted a significant improvement in the area of human rights over the past few years.⁽¹¹⁾ As of July 2003, the U.S. has solidified its relationship with Taiwan and is committed to assisting with the development of its military defense system. In a previous 2000 Archive report, prepared in collaboration with private corporations, Taiwan was identified as a collector of foreign economic information and engaged in industrial espionage.⁽¹²⁾

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth criteria which must be evaluated when determining security clearance eligibility. Within those adjudicative guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not only the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance is not necessarily a judgment about an applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that an applicant has not met the strict guidelines established by the Department of Defense 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. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). The Directive presumes a rational connection between past proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence in refutation, extenuation, or mitigation sufficient to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive, Enclosure 3, ¶ 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 clearance." *Id.*

Based upon the allegations contained in the SOR and a consideration of the evidence as a whole, the following adjudicative guideline is pertinent to an evaluation of the facts of this case:

Guideline B - Foreign Influence: A security concern may exist when an individual's immediate family, including co-habitants, and other persons to whom he or she maybe bound by affection, influence, or obligations are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercions, exploitation, or pressure.

REMAND CONCLUSIONS

After reconsidering all facts in evidence and legal standards, including the "whole person" concept, I conclude the

following in regard to the allegations contained in the SOR:

Foreign Influence

The Government's evidence and Applicant's admissions established two disqualifying conditions: (1) Foreign Influence Disqualifying Condition (FI DC) 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 or, or resident or present in, a foreign country*) applies because Applicant's brother and sister are citizens and residents of Taiwan. According to ISCR Case No. 01-03120, DOHA LEXIS 94 at 8 (App. Bd. Feb. 20, 2002), Applicant's mother-in-law also falls within the disqualification as "[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." (2) FI DC E2.A2.1.2.3 (*Relatives, cohabitatants, or associates who are connected with any foreign government*) is also applicable because his sister works in the clerk's office for Taiwan's justice system, which is part of the government.

While family ties with persons in a foreign country are not, as a matter of law, disqualifying under Guideline B, such ties do raise a *prima facie* security concern. This concern is sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance. ISCR Case No. 99-0424, 2001 (App. Bd. Feb. 8, 2001).

The Appeal Board has determined that no mitigating conditions apply because Applicant's sister is deemed to be an agent of a foreign power⁽¹³⁾ under their caselaw. ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 7, 2007). Thus, Mitigating Condition 1 cannot be applied.

In the same decision, the Appeal Board ruled that Applicant failed to prove his contacts with family members were "casual." *Id.* at 6. The term "casual" means a contact that is "more fortuitous in nature than planned or designed" or "resulting from, or occurring by chance." ISCR Case No. 04-08870 at 3 n.1 (App. Bd. Nov. 29, 2006). Arguably this definition of "casual" is inconsistent with the Directive, as it so narrows the applicability of Mitigating Condition 3 that it would only be applicable in very rare circumstances. In any event, I must follow the directions of the Appeal Board and accordingly, I conclude that Mitigating Condition 3 cannot be applied.

Applicant does not have any financial interests in Taiwan. This fact does not mitigate the foreign influence concern based on FI DC E2.A2.1.2.1 or FI DC E2.A2.1.2.3. *See* ISCR Case No. 04-02233 at 3 (App. Bd. May 9, 2006).

I conclude that no Guideline B Mitigating Conditions apply, and I expressly and specifically indicate that I have not relied "explicitly or implicitly" on any of the Mitigating Conditions listed under Guideline B of the Directive. *See* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 7, 2007).

Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under the guideline, the adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Directive ¶ E2.2.1 describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the conduct of an applicant, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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. Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation, and behavior changes, etc., the eight factor in this series is the most relevant.

The Appeal Board suggests that the whole person analysis address "evidence of an applicant's personal loyalties; the nature and extent of an applicant's family's ties to the U.S. relative to his ties to a foreign country; his or her ties social ties within the U.S.; and many others raised by the facts of a given case." ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007). In the remand decision, the Appeal Board recommended the whole person analysis in ISCR Case No. 03-02878 at 3 (App. Bd. June 7, 2006), which provides:

Applicant has been in the U.S for twenty years and a naturalized citizen for seven. Her husband is also a naturalized citizen, and her children are U.S. citizens by birth. Her ties to these family members are stronger than her ties to family members in Taiwan. She has significant financial interests in the U.S. , and none in Taiwan. She testified credibly that she takes her loyalty to the U.S. very seriously and would defend the interests of the U.S. Her supervisors and co-worker assess her as very loyal and trustworthy.

In assessing the vulnerability to exploitation of Applicant's family, it is helpful to consider several factors: the nature of the foreign government, its relationship to the United States, its human rights record, and a careful balancing of the nature and strength of Applicant's relationship to his foreign associates. Taiwan is a stable democracy with close commercial and friendly ties to the United States. It has improved its human rights record significantly in the past few years. Although friendly countries may have profound disagreements with the United States or may have engaged in espionage against the United States, especially in economic, scientific, military and technical fields, it is less likely that such a foreign government would attempt to exploit a United States citizen through relatives in that foreign country. Taiwan's continuing dependence and alliance with the United States, coupled with its democratic form of government, diminishes the risk of it using coercion, persuasion, or duress to exploit its citizens to gather classified information from United States citizens.

As noted in the Remand Statement of Facts, there are many countervailing positive attributes to Applicant's life as a U.S. citizen that weigh in favor of granting him a security clearance. He has lived in the United States for 29 years and has been a naturalized U.S. citizen for 18 years. He has close ties to the United States. His wife, two children, sister, and nephews are U.S. citizens and residents. He is active in his church and community, and received a strong letter of recommendation from his former supervisor, stating he is highly moral and ethical. He does not have a criminal background, a history of financial difficulties or a poor employment record. During the past 15 years, he made two trips to Taiwan, which he reported to his security officer as required.⁽¹⁴⁾ He has no financial ties to Taiwan. He is patriotic, loves the United States and would not betray it for personal reasons.

In considering the whole person, I did not give any weight to the fact that there is no evidence in the record to document a breach of security over the course of the nine years Applicant has held a security clearance and handled company proprietary information.⁽¹⁵⁾

In addition to the above facts, security worthiness determinations are predictive judgments and the best predictor of future performance is past performance. Based on a review of his history and substantial ties to the United States, I conclude Applicant's potential for exploitation by Taiwan, a democratic ally of the United States, appears low and unlikely to occur. Accordingly, Applicant mitigated the security concerns raised in SOR ¶¶ 1.a through 1.d, and Guideline B is decided for him.

REMAND FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are as follows:

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

REMAND DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest

to grant Applicant a security clearance. Clearance is granted.

Shari Dam

Administrative Judge

1. Item 3 at 1.

2. *Id.* at 7.

3. *Id.* at 1.

4. *Id.* at 3.

5. Item 2 at 4, 6 & 7.

6. *Id.* at 3.

7. *Id.* at 5.

8. *Id.*

9. *Id.* at 4.

10. Item 4.

11. Item 7.

12. Items 4, 6, and 9.

13. Under the Appeal Board's analysis of FI MC 1, Applicant's sister who is a clerk, is an agent of a foreign power. For a discussion of the contrary view about the scope and definition of "agent of a foreign power," *see* ISCR Case No. 03-10312 at 6-9 (A.J. May 31, 2006). 50 U.S.C. § 1801(b) defines "agent of a foreign power." The statutory definition was added to 50 U.S.C. § 438 by the Intelligence Authorization Act for Fiscal Year 1995, Public Law 103-359, October 14, 1994, and subsequently included in the Directive through Change 4, dated April 20, 1999. The statutory definition for "agent of a foreign power" was explicitly included in Executive Order 12968, Aug. 2, 1995, Part 1.1f, which established, "a uniform Federal personnel security program for employees who will be considered for initial or continued access to classified information." The Appeal Board's decision does not address why Executive Order 12968 is not controlling. Notwithstanding my concerns about the Appeal Board's approach to this issue, I will comply with the remand order.

14. In ISCR 03-02878 at 1-2 (App. Bd. June 7, 2006), the Applicant went to Taiwan yearly and spoke to his family regularly. His parents and four of his siblings were residents and citizens of Taiwan. His wife was born in Taiwan and became an U.S. citizen. However, none of his family members were employed by the government of Taiwan. The applicant in ISCR 03-02878 at 1-2 (App. Bd. June 7, 2006) has a greater connection to Taiwan, than the Applicant here.

15. *See* ISCR Case No. 06-17164 (A.J. Jan. 16, 2007).