

KEYWORD: Foreign Influence; Foreign Preference

DIGEST: Applicant and his wife were both born in Taiwan and are naturalized U.S. citizens. Applicant's sister and brother are U.S. citizens residing in Taiwan. His in-laws are citizens and residents of Taiwan. Applicant formally renounced his Taiwanese citizenship and his wife sold her stocks in a Taiwanese company. Applicant admitted a war between the U.S. and Taiwan would place him in a difficult position, but stated he would be loyal to the U.S. if the President declared war and Congress approved it. Security concerns based on foreign influence and foreign preference are mitigated. Clearance is granted.

CASENO: 04-04955.h1

DATE: 10/31/2005

DATE: October 31, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-04955

**DECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Sabrina Redd, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant and his wife were both born in Taiwan and are naturalized U.S. citizens. Applicant's sister and brother are U.S. citizens residing in Taiwan. His in-laws are citizens and residents of Taiwan. Applicant formally renounced his Taiwanese citizenship and his wife sold her stocks in a Taiwanese company. Applicant admitted a war between the U.S. and Taiwan would place him in a difficult position, but stated he would be loyal to the U.S. if the President declared war and Congress approved it. Security concerns based on foreign influence and foreign preference are mitigated. Clearance is granted.

**STATEMENT OF THE CASE**

On December 17, 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).<sup>(1)</sup>

Applicant answered the SOR in writing on January 20, 2005, admitted all the allegations except SOR ¶ 1.j. (divided loyalty in the event of war between Taiwan and the U.S.), offered explanations, and requested a hearing. The case was assigned to me on July 5, 2005, and heard as scheduled on September 7, 2005. I kept the record open to permit Applicant to submit additional documentary evidence. His additional evidence is incorporated in the record as Applicant's Exhibits (AX) A and B.<sup>(2)</sup> DOHA received the transcript (Tr.) on September 16, 2005.

## FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 46-year-old software engineer for a defense contractor. He was born in Taiwan, and he satisfied his mandatory military service by serving for two years in the Taiwanese Army. He was married in Taiwan in July 1986, and came to the U.S. in the same year. He graduated from college, obtained a master's degree, and became a naturalized U.S. citizen in June 1992. When he became a U.S. citizen, he legally changed his first name to an American name.<sup>(3)</sup> He has held a security clearance since December 1995.

Applicant's spouse also was born in Taiwan, and she became a U.S. citizen in September 1993. She has resided in the U.S. for 17 years, and she works as a computer programmer for a private company. They have two daughters, both native-born U.S. citizens.

Applicant's father is deceased. His mother is a citizen and resident of the U.S. Applicant has five siblings, all of whom are naturalized U.S. citizens. Three reside in the U.S. One sister returned to Taiwan to live with her husband, a retired civil servant. Her husband worked as a personnel director for the Taiwanese legislature and receives retirement benefits from the Taiwanese government.<sup>(4)</sup> One brother returned to Taiwan after being laid off from his job in the U.S., and is currently employed by a private company in Taiwan. Applicant did not know whether this brother was working as a computer programmer or in architectural design, because his brother's education extended to both fields.<sup>(5)</sup>

Applicant, his mother, and his siblings all held dual U.S.-Taiwan citizenship by virtue of their birthplace. Applicant testified he never exercised his Taiwanese citizenship. He obtained a U.S. passport and never used a foreign passport after he became a U.S. citizen.<sup>(6)</sup> Applicant formally renounced his Taiwan citizenship on August 26, 2005, and his renunciation was accepted on September 12, 2005.<sup>(7)</sup>

Applicant's mother-in-law and father-in-law are citizens and residents of Taiwan. They are retired retail store owners. They have never worked for the Taiwanese government or held political office.<sup>(8)</sup> Applicant's mother-in-law and father-in-law are "quite wealthy" and not dependent on Applicant or the government for financial support.<sup>(9)</sup>

Applicant's sister-in-law and two brothers-in-law are citizens and residents of Taiwan. His sister-in-law works for a manufacturing company, one brother-in-law works for a utility repair company, and one brother-in-law works for a retail store.<sup>(10)</sup> None of them receive any financial support from Applicant.

Applicant travels to Taiwan to visit family members every three or four years. His wife visits her family in Taiwan every two years. Telephonic contact is infrequent, once or twice a year. Mail contact consists of a Christmas or New Year card.<sup>(11)</sup>

Applicant's spouse held about \$15,000.00 worth of stocks in Taiwanese companies. The stocks were gifts from her parents. She sold the stocks on September 5, 2005, two days before the hearing, and deposited the proceeds in a U.S. bank.<sup>(12)</sup>

In a written statement to a security investigator on February 23, 2004, Applicant stated his loyalty might be divided if Taiwan and the U.S. were at war with each other. In his answer to the SOR, Applicant stated the security investigator suggested the answer reflected in his statement. In his answer to the SOR and his testimony at the hearing, he explained that war must be declared by the President and approved by Congress, and under those circumstances he would believe war was justified and would be loyal to the U.S.<sup>(13)</sup> At the hearing, he acknowledged the question of divided loyalty was "a little bit challenging question," and he admitted a confrontation between the U.S. and Taiwan would put him in a "difficult position," because he lived there until he was about 27 years old.<sup>(14)</sup>

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 Peoples Republic of China (PRC). The Taiwan Relations Act, 22 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.<sup>(15)</sup> Taiwan is an active collector of defense, medical, economic, and computer information through industrial espionage.<sup>(16)</sup> Taiwanese companies have been known to conduct economic espionage against U.S. companies.<sup>(17)</sup>

Taiwan's assertion of independence from the PRC is a source of conflict with the PRC and a significant factor in U.S.-PRC relations. While U.S.-Taiwan relations are friendly, the U.S. has adopted a one-China policy which complicates relations with Taiwan.<sup>(18)</sup>

## **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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

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, conditions 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

### **Foreign Influence**

A security risk may exist when an applicant's immediate family, or 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. Directive ¶ E2.A2.1.1. A disqualifying condition (DC 1) may arise when "[a]n immediate family member [spouse, father, mother, sons, daughters, brothers, sisters], 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. DC 1 is established because Applicant has a brother and a sister residing in Taiwan.

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 wife's ties to Taiwan and the possible effect they may have on Applicant's conduct are relevant considerations under this guideline. 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). Furthermore, a disqualifying condition (DC 2) may arise if an applicant is "[s]haring living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." Directive ¶ E2.A2.1.2.2. Because Applicant's wife's mother, father, sister, and two brothers are citizens and residents of Taiwan, DC 2 is established.

A substantial financial interest in a foreign-owned or operated business may be a disqualifying condition (DC 8). Directive ¶ E2.A2.1.2.8. When the SOR was issued, Applicant's wife had a substantial investment in stocks of Taiwanese companies. She has since sold the stock and transferred the funds to a U.S. bank. Thus, DC 8 is not established.

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the 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 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 chose 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"). Since the Government produced substantial evidence to establish DC 1, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

Guideline B is not limited to countries 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, 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 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.

No one in Applicant's immediate family has ever been employed by or connected with the Taiwanese government. They are not agents of a foreign power under either the statutory definition in 50 U.S.C. 1801(b) or the broader definition apparently adopted by the Appeal Board. *See* ISCR Case No. 02-24254, 2004 WL 2152747 at \*4-5 (App. Bd. Jun.29, 2004) (employee of foreign government need not be employed at a high level or in a position involving intelligence, military, or other national security duties to be an agent of a foreign power for purposes of MC 1). Thus, the first prong of MC 1 is established for Applicant's immediate family. Among Applicant's in-laws, only his brother-in-law has ever been employed by the Taiwanese government. However, he is now retired and is no longer employed by the government of Taiwan. His only connection to the Taiwanese government is his government pension. I conclude the first prong of MC 1 is established for Applicant's in-laws.

Although two members of Applicant's family currently reside in Taiwan, they are both U.S. citizens who previously resided in the U.S. His sister returned to Taiwan to care for her husband, who is disabled to the extent of being unable to drive a car. His brother returned to Taiwan for economic reasons after being laid off from his job in the U.S. All family members are employed in the private sector. They are not dependent on the government for financial support, and not involved in the high technology businesses most susceptible to government-sponsored industrial espionage or private

economic espionage.

None of the individual family circumstances discussed above are determinative. They must be considered together under the "whole person concept" mandated by the Directive ¶ E2.2.1. The Appeal Board has made it clear an applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). Applicant has presented substantial evidence of his family's lack of governmental connections, financial dependence on the government, or business connections susceptible to industrial espionage. Such evidence is relevant and encompassed in the "whole person concept." To ignore such evidence would establish a virtual per se rule against clearing applicants with foreign family ties. After evaluating each family member's individual circumstances as well as the totality of Applicant's family ties to Taiwan, I conclude MC 1 is established.

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." Applicant has telephonic contact with his family members only once or twice a year. Mail contact is even less frequent. He visits his family members every three or four years. I conclude Applicant's contacts with his Taiwanese in-laws are infrequent, but he has not rebutted the presumption of ties of affection or obligation to them and he has presented no evidence showing his contacts with them are casual. I conclude MC 3 is not established.

Applicant and his wife have been U.S. citizens for many years, and he has held a security clearance for almost ten years. He and his wife have taken significant measures to distance themselves from Taiwanese influence. Applicant adopted an American name when he became a U.S. citizen. He has formally renounced his Taiwanese citizenship. His wife sold her Taiwanese investments.

Taiwan is a close ally, friend, and trading partner of the U.S., and is dependent on the U.S. for its defense. The nature of Taiwan's government, its human rights record, and its relationship with the U.S. are clearly not determinative. Nevertheless, they are all relevant factors in determining whether Taiwan would risk damaging its relationship with the U.S. by exploiting or threatening its private citizens in order to force a U.S. citizen to betray the U.S. The relationship between the U.S. and Taiwan is friendly, but it is also complicated, sensitive, and subject to change as the relationships among the U.S., Taiwan, and the PRC evolve.

Applicant's response to questions about divided loyalty reveals his emotional attachment to the country and culture of the place of his birth, where he lived for more than 27 years. His answers in the SOR and during his testimony at the hearing were thoughtful, carefully considered, and scrupulously honest. His demeanor at the hearing reflected sincerity and honesty, but it also indicated some discomfort. He admitted he would be in a difficult position in the event of a conflict between the U.S. and Taiwan. His testimony was not glib or contrived to be politically correct. He made it clear he would place his trust in the constitutional process to ensure any conflict between the U.S. and Taiwan would be justified, and he would be loyal to the U.S. in such an unfortunate circumstance. He has demonstrated his undivided loyalty to the U.S. by formally renouncing his Taiwanese citizenship. I conclude Applicant has rebutted the allegation of divided loyalty in the SOR ¶ 1.j. After weighing the disqualifying and mitigating conditions and making a commonsense evaluation of the evidence, I conclude the security concern based on foreign influence is mitigated.



## **Foreign Preference**

When an applicant acts in such a way as to indicate a preference for a foreign country over the U.S., he or she may be prone to provide information or make decisions that are harmful to the interests of the U.S. Directive ¶ E2.A3.1.1. A disqualifying condition may arise if an individual exercises dual citizenship (DC 1), possesses or uses a foreign passport (DC 2), or performs military service for a foreign country (DC 3). Directive ¶¶ E2.A3.1.2.1., E2.A3.1.2.2., E2.A3.1.2.3. Applicant held dual citizenship until recently, and he performed his mandatory military service while living in Taiwan. He held a Taiwanese passport at one time but has never used a foreign passport since becoming a U.S. citizen. I conclude DC 1, DC 2, and DC 3 are established.

A mitigating condition (MC 1) applies if dual citizenship is based solely on parents' citizenship or birth in a foreign country. Directive ¶ E2.A3.1.3.1. This mitigating condition is established because Applicant, his spouse, his mother, and his siblings did not affirmatively seek foreign citizenship, but acquired it by virtue of birth in Taiwan to Taiwanese parents.

MC 2 applies if indicators of possible foreign preference occurred before the individual obtained U.S. citizenship. Directive ¶ E2.A3.1.3.2. This condition is established for Applicant's mandatory military service in the Taiwanese armed forces and possession and use of a Taiwanese passport, which occurred before he became a U.S. citizen.

MC 4 applies if the individual has expressed willingness to renounce dual citizenship. Directive ¶ E2.A3.1.3.4. Applicant has renounced his Taiwanese citizenship.

Starting with his adoption of an American name when he became a U.S. citizen, Applicant clearly has demonstrated his preference for the U.S. After weighing the disqualifying and mitigating conditions and evaluating the evidence in the context of the whole person, I conclude Applicant has mitigated the security concern based on foreign preference.

## **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.j.: 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 Applicant a security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

1. At Department Counsel's request and without objection from Applicant, the SOR was amended at the hearing to insert the word "Taiwan" in parentheses after the words "Republic of China" throughout the SOR, and to amend the SOR ¶ 1.h. to allege three additional siblings instead of four (Tr. 68-72).
2. AX A was received within the 15 days I allowed for additional evidence. AX B was received after the deadline. I gave Department Counsel an opportunity to object to the untimely submission but she did not. Accordingly, I accepted AX B in the absence of an objection to its untimeliness.
3. Tr. 64.
4. Tr. 54-55.
5. Answer to SOR; Government Exhibit (GX) 2; Tr. 55-56.
6. Tr. 44.
7. AX A, p. 2; AX-B.
8. Tr. 49-50.
9. Tr. 50-51.
10. GX 2, pp. 5-6.
11. Tr. 63.
12. AX A, pp. 3-8; Tr. 45..
13. Tr. 45-46; Answer to SOR, pp. 4-5.
14. Tr. 62.
15. U.S. Department of State Background Note: Taiwan, January 2005, attached to the record as Hearing Exhibit (HX) III.
16. National Counterintelligence Center (NACIC), *Annual Report to Congress 15* (2000), available on the internet at [www.nacic.gov](http://www.nacic.gov). In 2000, NACIC identified several practitioners, including Taiwan, as the "most active." The NACIC Annual Report for 2004 did not identify countries by name but noted the list of major practitioners remained unchanged. The reports for 2000 and 2004 are attached to the record as HX V and VIII.
17. Federal Bureau of Investigation, *Facts and Figures 2003*, [www.fbi.gov](http://www.fbi.gov), attached to the record as HX II.
18. Congressional Research Service, *Taiwan: Recent Developments and U.S. Policy Choices* CRS-3-4, 11 (Mar. 17, 2005), attached to the record as HX IV.