

DATE: June 27, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 04-07835

## **DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Sabrina Redd, Esq., Department Counsel

#### **FOR APPLICANT**

Thomas C. Houck, Esq.

### **SYNOPSIS**

Applicant, a naturalized citizen of the United States for more than 36 years, has lived, studied, worked, and raised a family in the U.S. continuously since 1969. He has one sister who is a citizen and resident of the People's Republic of China (PRC), and a brother who is a U.S. citizen doing business in the PRC. Applicant has a one-half interest in a condominium located in the Republic of China (Taiwan) that he and his brother inherited from their parents. Applicant's mother-in-law and brother-in-law are citizens and residents of Taiwan. He has mitigated the foreign influence security concern alleged in the Statement of Reasons. Clearance is granted.

### **STATEMENT OF THE CASE**

On April 29, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline B (foreign influence). Applicant submitted an answer to the SOR, dated May 8, 2004, that did not indicate his intention concerning a hearing. Following a telephone conversation with a DOHA department counsel, Applicant submitted a letter, dated September 17, 2004, and requested a hearing. Applicant admitted all SOR allegations with explanations.

The case was assigned to me on March 24, 2005. A notice of hearing was issued on April 22, 2005, scheduling the hearing for May 11, 2005. The hearing was conducted as scheduled. The government submitted seven documentary exhibits that were marked as Government Exhibits (GE) 1-7. GE 1 and 2 were admitted into the record and administrative notice was taken of the information contained in GE 5 without objection. Applicant's objections to GE 3, 4, and 7 were overruled, and administrative notice was taken of the information contained therein. Applicant's objection to GE 6 was sustained. Applicant testified, called one witness to testify on his behalf, and submitted 17 documentary exhibits that were marked as Applicant Exhibits (AE) 1-17. AE 1 and 2, AE 4-15, and AE 17 were admitted into the record without objection. Administrative notice of the information contained in AE 16 was taken without objection. Department Counsel's objection to AE 3 was overruled, and that document was admitted into the record. <sup>(2)</sup> The transcript was received May 20, 2005.

## FINDINGS OF FACT

After a thorough review of the pleadings, testimony, and exhibits, I make the following findings of fact:

Applicant is a 61-year-old man who has been employed by the same defense contractor, presently as a technical adviser, since April 1986. He was born in the Peoples Republic of China (PRC) in December 1943. His father worked as a policeman for the Chinese Nationalist Government during the 1940s, and, in order to avoid execution, fled with other government employees to what is now the Republic of China (Taiwan) during the communist take over of the PRC. When Applicant was six years old, he and his mother joined his father in Taiwan. Applicant's infant sister was about 18 months old when the mother fled to Taiwan, and, because she was too ill to make the journey, was left with a maternal uncle. The sister was never reunited with her family, and instead wound up being sent to a labor camp in northwestern China when she was 15 years old. The sister remained interned in the camp for 15 years.

Applicant was raised through his childhood and teenage years in Taiwan, and attended college there. He served a compulsory one-year term as a lieutenant in the Taiwan Air Force following his college graduation, and then worked as a high school teacher for two years while he saved enough money to come to the United States to pursue a higher education. He entered the U.S. on a student visa in 1969, attended a state college and earned a master's degree, and was granted permanent resident alien status in 1971.

Applicant met his wife, herself a Taiwanese citizen at the time, while attending college in the U.S. They were married in the U.S. in September 1970. Applicant and his wife both became U.S. citizens on December 21, 1978. They have three children, a 31-year-old son who is a college graduate and employed in the U.S., a 27-year-old daughter who is attending medical school in the U.S., and a 19-year-old son who is attending college in the U.S. All the children are natural-born U.S. citizens.

Applicant's wife is a real estate broker, owns her own business, and employs three people. Her business did approximately ten million dollars worth of real estate closings in 2004. Her salary from the business was \$142,177.37 in 2003, and she filed a form 1099 with her federal income tax return disclosing an additional \$5,306.66 income. Applicant's salary in 2003 was \$129,520.22. Applicant has resided in the same house since March 1981. He and his wife purchased the house for \$81,000.00. He estimates its current value to be about \$250,000.00. Applicant has approximately \$500,000.00 in a 401k account, \$150,000.00 invested in stocks and bonds, and \$55,000.00 in saving and checking accounts, and certificates of deposit. His wife has her own retirement account that Applicant estimates is worth about \$20,000.00. Additionally, Applicant and his wife jointly own eight rental properties and some vacant land that he estimates are worth between one and two million dollars.

Applicant continued his education after being hired by his present employer, and earned a Ph. D in December 1994 and an MBA in August 1996. He has possessed a secret security clearance since 1981. There have never been any complaints made alleging he mishandled classified material. No prior action has been taken to revoke or downgrade his clearance. Applicant's witness, a former co-worker, supervisor, and friend, considers Applicant to be a superb mathematician. The witness himself possessed a top secret clearance, and, during the approximately 12 years he worked with Applicant on an almost daily basis, he frequently used classified information with Applicant. He considers Applicant's handling of classified material to be outstanding and meticulous. Overall, he considers Applicant to be trustworthy, reliable, and a loyal U.S. citizen. The letters of recommendation and performance appraisals Applicant submitted corroborate the witness' opinion.

Applicant's brother is 52 years old, a naturalized U.S. citizen, and resides in a state located thousands of miles from the state of Applicant's residence. The brother was until recently a director of a company that is one of the largest international manufacturers of silicon chips. He recently resigned from that company and began his own business providing the same type service and product. The nature of both his former employment and present business requires that he live in the PRC about six months out of the year. Applicant corresponds with his brother by e-mail three or four times a year, and by telephone about every three months. Although Applicant estimated he sees his brother in person about once every two or three years, (3) the last time he remembers seeing him in person was at their mother's funeral in Taiwan in 1998. Applicant has never visited with the brother in the PRC.

Applicant and his brother each own a one-half interest in a condominium located in Taiwan that they inherited from their parents. The value of the condominium is about \$110,000.00. The condominium is rented to a family that is not related to Applicant, and the rent is deposited directly into a Taiwan bank account that Applicant maintains for receipt of the rent to be applied as needed to maintenance of the condominium. Depending on the current exchange rate, the Taiwan bank account presently contains somewhere between \$25,000.00 and \$30,000.00. Applicant and his brother have retained ownership of the condominium primarily to honor their parents who were very proud of their ability to acquire it as refugees from the PRC. Aside from its sentimental value, the condominium and bank account make up a very small portion of Applicant's and, most probably, his brother's net worth. Applicant has expressed a willingness to give his share of the money in the bank account to his brother, and to either sell his share of the condominium or give it to his brother if their retention is considered to be an unacceptable security risk.

Applicant has a sister who is a citizen and resident of the PRC, although the record is somewhat unclear if he was even aware of her existence before his mother told him about her when she was dying of cancer. At any rate, there was no correspondence with the sister until Applicant visited with her for four days in 2000 to honor his mother's dying request. His sister is a school teacher and school groundskeeper, and her husband manages a fertilizer commune. They have two children. Since meeting her in 2000, Applicant has maintained correspondence with her about twice a year. He sends her small cash gifts on special occasions, but does not provide other monetary support. He does not anticipate visiting her again.

Applicant's mother-in-law and brother-in-law (his wife's half-brother) are citizens and residents of Taiwan. The mother-in-law is in her 90s, resides in a convalescent home, and has recently undergone a mastectomy due to breast cancer. Applicant has no contact with his brother-in-law, and his only contact with his mother-in-law is to sign greeting cards that his wife sends to her. Applicant's wife has very little contact with her mother due to her age and physical condition, and little to no contact with her half-brother.

Applicant's mother came from Taiwan to live with him in the U.S. in about 1994, and obtained permanent resident status. Applicant traveled with her to Taiwan in 1996 to perform repairs on the condominium she owned and had rented to tenants. He returned with her to Taiwan in 1998 after she was diagnosed with a terminal illness and expressed her desire to say goodbye to family and friends. They remained in Taiwan for about two weeks, returned to the U.S., and his mother died within two weeks thereafter. He then returned with her body to Taiwan in 1998 to arrange for her burial next to his father. He remained in Taiwan for about three weeks on that occasion. Applicant's last visit to Taiwan was during his trip to visit his sister in 2000. He stopped in Taiwan on his way back to the U.S. to visit his parent's graves and to tell his mother that he had honored her wish for him to see his sister.

## POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon 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. Considering the evidence as a whole, Guideline B, pertaining to foreign influence with its respective DC and MC, is most relevant in this case.

## BURDEN OF PROOF

The sole 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.<sup>(4)</sup> The government has the burden of proving controverted facts.<sup>(5)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence,<sup>(6)</sup> although the government is required to present substantial evidence to meet its burden of proof.<sup>(7)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(8)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(9)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(10)</sup>

No one has a right to a security clearance<sup>(11)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(12)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(13)</sup>

## CONCLUSIONS

**Foreign Influence.** A security risk 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 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 coercion, exploitation, or pressure.

Based upon the allegations in the SOR, Disqualifying Condition (DC) 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*; DC 2: *Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists*; and DC 8: *A substantial financial interest in a country, or in any foreign-owned or -operated business that could make the individual vulnerable to foreign influence* must be evaluated in determining whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant under Guideline B.

DC 1 applies in this case because Applicant's brother resides in the PRC for about six months out of every year, and his sister is a citizen and resident of the PRC. DC 2 applies because Applicant's wife's mother and half-brother are citizens and residents of Taiwan. Applicant's one-half interest in a condominium and bank account in Taiwan are insubstantial in comparison to his two to three million dollar net worth in the United States. Accordingly, DC 8 does not apply. To whatever extent anyone might consider Applicant's holdings to be "a substantial financial interest" they would be overwhelmingly mitigated by application of Mitigating Condition MC 5: *Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities*.

Once the government meets its burden of proving controverted facts<sup>(14)</sup> the burden shifts to an applicant to present evidence demonstrating

extenuation, mitigation, or changed circumstances.<sup>(15)</sup> Further, the government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating conditions, and an Administrative Judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition.<sup>(16)</sup>

The following Mitigating Conditions (MC) must be evaluated in determining whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant under Guideline B: MC 1: *A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitants, or associate(s) in question 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;* and MC 3: *Contact and correspondence with foreign citizens are casual and infrequent.*

Applicant's contact with his brother is limited to telephone calls and e-mail exchanges several times a year. His contact with his sister is even more limited, consisting of a single four-day visit in 2000 to honor his mother's dying request, and thereafter sending her infrequent correspondence, and small monetary gifts on special occasions. Although he visited Taiwan several times in recent years, those visits were in connection with his mother's declining health, her death, funeral arrangements, and the last visit in 2000 to visit his parent's graves. With his mother's passing it is unlikely he will travel to Taiwan with any degree of frequency, if at all, in the future. Although Applicant's mother-in-law and brother-in-law are citizens and residents of Taiwan, he has virtually no contact with them. His wife's contact with her relatives in Taiwan is extremely limited due to her mother's advanced age and declining health, and the apparently distant relationship she has with her half-brother.

There is no evidence to suggest that Applicant's in-laws are, or ever have been, Taiwanese agents, so the issue under MC 1 concerning them is whether they are in a position to be exploited by Taiwan. Taiwan is a country that has been and continues to be friendly with the United States. Of course, despite Taiwan's close and long-standing friendly relations with the United States, it also must be observed that Taiwanese citizens and business entities have been recognized as some of the most active participants engaged in economic espionage directed at U.S. businesses. (GE 3) However, there is absolutely no evidence to indicate that either the Taiwanese government or any persons in Taiwan have ever attempted to exert any pressure or duress on any resident of Taiwan or their relatives abroad in an attempt to get them to participate in espionage activities directed against the United States or U.S. businesses.

More specific to the facts of this case, Applicant has been a resident of the United States for almost 36 years, a citizen for 27 years, and a security clearance holder for 24 years. His Taiwanese in-laws have resided in that country during this time, and he and his wife have traveled to Taiwan on a number of occasions. The best predictor of whether Applicant's relatives are in a position to be exploited in the future is the Taiwan government's past conduct. Since Applicant came to the United States in 1969, there is no evidence that any action has ever been taken by the Taiwanese government to exploit his relationship with relatives in Taiwan, including his now deceased parents.

Th PRC also has been identified as a country actively and aggressively engaged in economic espionage. (GE 3) Further, long-standing bilateral issues exist between the U.S. and the PRC, not the least of which is the status of Taiwan. (GE 5) Although relations between the two countries have gained unusual stability since January 2001, economic and trade disagreements began to increase noticeably during the second half of 2003. (GE 5) Applicant's sister is a teacher in the PRC, and, considering the nature of the PRC government, must be considered to be an agent of the PRC. While there is no evidence to indicate Applicant's brother is an agent of the PRC, his presence and substantial financial interest in the PRC clearly makes him subject to potential duress and exploitation by the PRC.

Accordingly, Applicant is entitled to application of mitigating condition 1 to his Taiwanese in-laws, but not to his sister and brother in the PRC. However, Applicant has no more than minimal contacts with his relatives in the PRC, and an almost complete lack of contact with his in-laws in Taiwan. Coupled with his strong ties to the U.S., those minimal contacts make clear the applicability of MC 3.

Applicant also receives credit under the "whole person" concept for his steady and outstanding employment with a defense contractor for 18 years; having held a secret security clearance for 24 years without any complaints having been made alleging the mishandling of classified material, disciplinary action having ever been taken, or other security violations or concerns being noted. Likewise, the stability he has displayed by living in the same residence for the past 24 years, during which he raised three children, his wife formed a very successful business, and he and his wife accumulated substantial assets and wealth are indicative of a steady, and responsible individual. Finally, the testimony, letters of recommendation submitted on his behalf, and his employment performance appraisals all strongly indicate he is a trustworthy individual, and a loyal United States citizen.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I am satisfied that Applicant has presented sufficient evidence of refutation, extenuation, and mitigation to overcome the case against him. Accordingly, Guideline B is decided for Applicant.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline B: For the Applicant

Subparagraphs a-h: For the 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 or continue a security clearance for Applicant. Clearance is granted.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Applicant voluntarily withdrew the last paragraph of AE 3 in response to Department Counsel's objection and that paragraph will not be considered in arriving at a decision in this case.
3. The frequency of contact with his brother that I am relying on is from a statement Applicant provided in March 2002. (GE 2) Applicant testified to slightly less frequent contact with the brother.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
11. *Egan*, 484 U.S. at 528, 531.
12. *Id* at 531.
13. *Egan*, Executive Order 10865, and the Directive.
14. Directive, Additional Procedural Guidance, Item E3.1.14
15. Directive, Additional Procedural Guidance, Item E3.1.15
16. ISCR Case No. 99-0597 (December 13, 2000)