

DATE: September 14, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-17654

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Melvin Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 35-year-old mechanical engineer who works as a business consultant for a federal contractor since 2000. He was born in the U.S. to Thai parents and returned to Thailand while growing up. He studied in the U.S. earning his advanced degrees. His wife is a Thai citizen who resides with him in the U.S. His parents and parents-in-law are citizens and residents of Thailand with whom he and his wife have regular contact. In 2000, Appellant applied for, was granted, and currently possesses a valid Thai passport. It does not expire until 2008. He is reluctant to renounce his Thai citizenship, but expressed he would if it were a condition of his employment. Applicant failed to mitigate the security concerns under Guidelines C and B. 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 August 1, 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 C, (foreign preference) and Guideline B (foreign influence) of the Directive. Applicant answered the SOR in writing on May 15, 2006, and elected to have a hearing before an administrative judge. In his Answer, Applicant admitted all of the allegations under Guidelines C and B. The case was assigned to me on July 7, 2006. A notice of hearing was issued on August 1, 2006, scheduling the hearing for August 22, 2006. I conducted the hearing as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance. The Government offered seven exhibits for admission into the record that were marked as Government Exhibits (GE) 1-7. The exhibits were admitted into evidence without objection. Applicant testified on his own behalf. No documents were offered or witnesses presented. DOHA received the hearing transcript (Tr.) on September 1, 2006.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR, are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 35-year-old mechanical engineer who has been employed by a defense contractor since 2000. He was born in the United States in 1970 to Thai parents who were attending school. They returned to Thailand in 1973 with their son where he grew up. He attended university in Thailand and graduated in 1992. Upon graduation he returned to the U.S. from 1992 to 1994 to further his education. He returned to Thailand in 1994 and worked for a private company. Applicant returned to the United States in 1995 to work on his Ph.D. From 1995 to 2000 he attended a university where he also taught. He has lived in the U.S. continually since 1995.

Applicant married his wife in 2001 in the U.S. She was also a student from Thailand attending school in the U.S. She is a citizen of Thailand and has a U.S. green card. She intends on applying for U.S. citizenship when she meets the appropriate time requirements. She is an environmental engineer who works for the local county government. She is pregnant with twins, the couple's first children.

The parents and parents-in-laws of Applicant are all citizens and residents of Thailand. His parents are both retired university professors; his father an instructor in civil engineering and his mother a child psychologist. Neither works in their retirement. They own a home and other real estate in Thailand. Applicant and his wife have monthly contact with their parents, usually by telephone and occasionally by email. He and his wife visit their parents approximately once a year. He anticipates their visits will be more frequent once the children are born. His parents are planning a 2-3 month visit after the children are around six months old. He anticipates his mother-in-law will also visit once the children are born. His parents-in-law are separated so he is not sure if his father-in-law will visit. Applicant has one brother who is an architect and lives in Thailand. He also has college friends in Thailand that he keeps in contact with occasionally by email.

In 2000, upon completion of his schooling and feeling a sense of emancipation, Applicant applied for, and received a Thai passport, through the Thai government. To obtain a Thai passport he had to show that his parents were Thai citizens. He traveled to Thailand from December 23, 2000 until January 1, 2001, December 21, 2001 until January 6, 2002, January 1, 2003 until January 12, 2003, November 15, 2003 until November 30, 2003, and for a period of time in 2005. He tries to visit once a year.⁽³⁾ Applicant renewed his Thai passport on November 10, 2003, and it expires on November 9, 2008. When traveling to Thailand, Applicant did not carry his Thai passport but traveled exclusively on his U.S. passport. He has not used his Thai passport for any foreign travel and claims he obtained it for cultural reasons and as a means of identification to show that he is also from Thailand.⁽⁴⁾ He considers himself a dual citizen of the U.S. and Thailand.⁽⁵⁾

Applicant is aware of the "Money Memo"⁽⁶⁾ and contacted the Thai consulate for guidance on returning his passport. He was advised that if he wanted to surrender his passport he had to do it in person. Applicant did not surrender his Thai passport and it remains in his possession. He has not taken the time to return the passport. Applicant is reluctantly willing to renounce his Thai citizenship if it is required for his job. However, he is not willing to renounce his Thai citizenship or return his passport if the job does not require him to do so. He does not want to do either, unless it is a condition of his employment. He does not plan on obtaining Thai passports for his children when they are born. He claims he considers the United States his citizenship, but Thailand his heritage.

Thailand is a democratically governed constitutional monarch.⁽⁷⁾ Thailand experiences ongoing terrorist insurgency in its southern regions.⁽⁸⁾ In the area of human rights "the government generally accepts the human rights of its citizens, however there were significant problems in some areas."⁽⁹⁾ The problems ranged from arbitrary and unlawful killings by both security force personnel and insurgents as well as deaths in police custody, torture and excessive use of force by police; arbitrary arrest and prolonged detention without charge and widespread corruption.⁽¹⁰⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along

with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹¹⁾ The government has the burden of proving controverted facts.⁽¹²⁾ The burden of proof is something less than a preponderance of evidence.⁽¹³⁾ 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.⁽¹⁴⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁵⁾

No one has a right to a security clearance⁽¹⁶⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁷⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹⁸⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹⁹⁾ 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.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline C-Foreign Preference is a security concern because when an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

Guideline B-Foreign Influence is a concern because 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 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 interest in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guidelines are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guidelines C and B.

Based on all the evidence, Foreign Preference Disqualifying Condition (FP DC) E2.A3.1.2.1 (*The exercise of dual citizenship*) and FP DC E2.A3.1.2.2 (*Possession and/or use of a foreign passport*) apply. Applicant is a U.S. citizen by birth. At the age of 30 he applied for and received a Thai passport. He renewed the passport in 2003 which does not expire until 2008. He continues to maintain the passport in his possession. The possession and/or use of a foreign passport is an exercise of dual citizenship. The above disqualifying conditions apply.

I have considered all the mitigating conditions and especially considered Foreign Preference Mitigating Condition (FP MC) E2.A3.1.3.1 (*Dual citizenship is based solely on parents ' citizenship or birth in a foreign country*, FP MC E2.A3.1.3.2 (*Indicators of possible foreign preference (e.g. foreign military service) occurred before obtaining United*

States citizenship) and FP MC E2.A3.1.3.4 (*Individual has expressed a willingness to renounce dual citizenship*), and conclude none apply. Applicant affirmatively applied for, received and renewed a passport from a foreign country. Although his parents are Thai citizens, Applicant was born in the U.S. and is a citizen. He obtained his Thai citizenship by his exclusive affirmative actions. Thus, both FP MC E2.A3.1.3.1 and FP C E2.A3.1.3.2 do not apply. Applicant's willingness to renounce his Thai citizenship is qualified. That is he would renounce it if necessary to retain his job, but he would prefer not to renounce and retain his Thai citizenship. I find Applicant's lack of commitment and willingness do not reach the necessary level to qualify for FP MC E2.A3.1.3.3 as he may likely retract his renunciation based on his job prospects. He also continues to possess an active Thai passport that does not expire until 2008. He would prefer to keep his passport as demonstrated by his failure to return it. In accordance with the "Money Memo" Applicant's retention of his Thai passport precludes him from obtaining a security clearance. I find under the above analysis he also has failed to mitigate the foreign preference concerns.

Based on all the evidence, 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 of, or resident or present in, a foreign country*) and FI DC E2.A2.1.2.2 (*Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists*) apply. Applicant's wife lives with him in the U.S. and is a citizen of Thailand. She holds a U.S. green card and eventually intends on applying for U.S. citizenship when eligible. Applicant's parents and parents-in-law are immediate family members who all are citizens of and reside in Thailand. There is a rebuttable presumption that a person has close ties of affection for, or obligation to, the immediate family members of the person's spouse. ⁽²⁰⁾ An immediate family includes spouse, father, mother, sons, daughters, brothers, and sisters. ⁽²¹⁾ Applicant and his wife both keep in contact with their parents on a regular basis and it is likely to increase with the birth of their twin children. There is potential for foreign influence due to Applicant's family ties.

I have considered all of the mitigating conditions and especially considered Foreign Influence Mitigating Condition (FI MC) E2.A2.1.3.1 (*A determination that the immediate family member(s) (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, 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 FI MC E2.A2.1.3.2 (*Contacts and correspondence with foreign citizens are casual and infrequent*), and I conclude they do not apply.

Applicant's family and in-laws are not agents of a foreign power since there was no information that they are engaged in intelligence work, but are retired or work in the private sector. ⁽²²⁾ The question remains whether the relatives are in a position to be exploited by a foreign power in a way that could force Applicant to choose between loyalty to his family and in-laws versus the United States. The disqualifying condition requires that a foreign power would exploit its citizens or residents in such a way as to have Applicant act adversely to the interests of the United States. A factor to consider, while not determinative, is the character of the foreign power and entities within the foreign country. This review is not limited to countries that are hostile to the United States. Friendly countries may have profound disagreements with the United States or have engaged in espionage against the United States especially in economic, scientific, military, and technical fields. A friendly relationship is not determinative, but it may make it less likely that a foreign government would attempt to exploit a U.S. citizen through relatives or associates in that country. Although the government of Thailand historically has had close ties with the U.S., it is still a country that has terrorist activities and factions. Its human rights record is a serious concern. Thus I find FI MC E2.A2.1.3.1 does not apply.

Applicant and his wife maintain more than casual and infrequent contact with their parents. The contact is very likely to increase once their twin children are born. Obviously, Applicant has a live-in relationship with his wife who is a citizen of Thailand. He speaks with his parents regularly. Applicant's wife speaks regularly with her parents. Applicant and his wife's ties to their families are more than casual and infrequent. FI MC E2.A2.1.3.1 does not apply.

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 life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. 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 considered the whole person and I find Applicant failed to mitigate the security concerns regarding foreign preference and foreign influence. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guidelines C and B are decided against Applicant.

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:

Paragraph 1. Guideline C: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Paragraph 2. Guideline B: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Carol G. Ricciardello

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Tr. 23.
4. Tr. 20
5. Tr. 21.
6. In accordance with a memorandum issued by Assistant Secretary of Defense for Command, Control, Communication, and Intelligence, Arthur L. Money, dated August 16, 2000, (Money emorandum), a security clearance must be denied or revoked for an Applicant with a foreign passport "unless the applicant surrenders the foreign passport."
7. GE 6, U.S. Department of State, Country Reports on Human Rights Practices 2005.
8. GE 5 at 14, U.S. Department of State, Country Reports on Terrorism, April 28, 2006.

9. GE 6 at 1.

10. *Id.*

11. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).

12. ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.

13. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

14. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.

15. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.

16. *Egan*, 484 U.S. at 531.

17. *Id.*

18. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

19. Executive Order 10865 § 7.

20. ISCR Case No. 01-02452 (App. Bd. Nov. 21, 2002).

21. Directive E2.A2.1.3.1.

22. *See*, 50 U.S.C. secs. 435, 438, and 1801 (b), *See also*, ISCR Case No. 02-24254 (App. Bd. Jun. 29, 2004) for a broader definition of "agent of a foreign power."