



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
)	ISCR Case No. 07-08124
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Robert Bohn, Esquire

November 12, 2009

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Questionnaire for National Security Positions (QNSP), on January 14, 2008. On April 24, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines B and E for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on May 1, 2009. He answered the SOR in writing through counsel on May 15, 2009, and requested a hearing before an Administrative Judge. DOHA received the request on May 18, 2009, and I received the case assignment on July 13, 2009. I granted Applicant's request for a delay "until the week of August 17, 2009," in order for his counsel to be available. DOHA issued a notice of hearing on July 17, 2009, and I convened the hearing as scheduled on August

19, 2009. By way of stipulation, the Government offered Exhibits (GXs) 1 through 6, and the Applicant offered Exhibits (AppXs) A through Q; all of which were received into evidence. DOHA received the transcript of the hearing (TR) on August 27, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Taiwan. The request was granted. The request, and the attached documents, were not admitted into evidence, but were included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a.~1.e. and 2.a. of the SOR, with explanations. He denied the factual allegations in ¶¶ 1.f., 1.g., and 2.b.~2.e. of the SOR.

Guideline B - Foreign Influence

The Applicant was born in Taiwan in 1940, but came to the United States in 1964 to further his education (TR at page 58 lines 7~9, and GX 1 at pages 1 and 2).

1.c. From 1961~1962, the Applicant served as a Second Lieutenant in the Taiwanese Army (TR at page 113 line 13 to page 114 line 14). During this mandatory service, the Applicant did not receive a Taiwanese security clearance (*Id*).

The Applicant received a Master's Degree in 1966; and a Ph.D. in 1971, both degrees are from American universities (GX 1 at page 2). In 1973, he was naturalized as an American (TR at page 58 lines 4~10, and GX 1 at page 1). He also held a security clearance from 1973 to 2002, nearly 30 years (TR at page 67 lines 4~14).

The Applicant has two brothers, both of whom are U.S. citizens and reside in the U.S. (TR at page 99 line 1 to page 100 line 2, and GX 1 at page 5). He also has three sisters, two of whom are U.S. citizens and reside in the U.S. (TR at page 100 lines 9~25, at page 102 line 24 to page 103 line 19, and GX 1 at page 5).

The Applicant has substantial assets in the U.S., and none in Taiwan (TR at page 127 line 15 to page 131 line 13, and AppXs E~J). He owns a home, free and clear, worth between \$1,500,000 and \$1,700,000 (TR at page 128 line 20 to page 129 line 3, and AppX E). He also owns income property worth more than \$1,000,000 (TR at page 129 line 14 to page 13 line 3, and AppX F). The Applicant has over \$28,000 in

two checking accounts (TR at page 130 lines 4~11, at page 130 line 25 to page 131 line 13, AppX G, and AppX J at page 3).

1.a. The Applicant has one sister who is a citizen and resident of Taiwan (TR at page 101 line 1 to page 102 line 20, and GX 1 at page 5). She was a permanent resident of the U.S. from 1983 to 1990, but moved back to Taiwan to care for their, now deceased, mother (TR at page 101 line 1 to page 102 line 20). She is a retired accountant, who comes to the U.S. to visit the Applicant “about once a year” (*Id*).

The Applicant’s sister-in-law is a citizen of Taiwan, but is a permanent resident of the U.S. (TR at page 107 line 3 to page 106 line 17). He sees this sister-in-law “a couple of times a year,” . . . “when she comes to visit with . . . [her] children,” who are American citizens (*Id*).

Neither the Applicant’s sister nor his sister-in-law work for the Taiwanese government (TR at page 107 lines 3~11). They do not know the specifics of what the Applicant does for his employer, and the Applicant would not be subject to coercion or exploitation vis-a-vis these Taiwanese relatives (*Id*, and TR at page 131 line 14 to page 132 line 12).

1.b. The Applicant traveled to Taiwan in 1977, twice in 1990, twice in 1997, and the last time in 2000 (TR at page 107 line 24 to page 113 line 12, and GX 1 at pages 6 and 9). In 1977, he traveled to Taiwan “to pay respects to . . . [his] father-in-law,” who had died “the year before” (TR at page 107 line 24 to page 108 line 9). In 1990, he traveled to Taiwan the first time to visit his sick mother, and the second time “to attend her funeral” (TR at page 108 lines 10~15). In 1997, he traveled to Taiwan the first time to attend his “oldest brother’s funeral,” and the second time, at the behest of his American employer to seek business with the Taiwanese government (TR at page 109 lines 3~25). This second business trip was unsuccessful (*Id*).

1.d. In the early 1990’s, the Applicant, along with others, was invited to review a Taiwan economic five year plan (TR at page 114 line 15 to page 116 line 21). This review was to be conducted in the U.S., at the behest of a private group, but it was held at the Taipei Economic and Cultural Representative Office (TECO) (*Id*). However, once the Applicant was informed that the reviewers’ comments would be published not only in the U.S., but also in Taiwan, he quit as one of the reviewers, as he did not “want to have any connection with the Taiwanese” government (TR at page 114 line 15 to page 116 line 21).

1.b., 1.e., 1.g. and 2.a. The Applicant’s last trip to Taiwan was in 2000 (TR at page 110 line 17 to page 113 line 12). He attended a conference for community leaders of overseas Chinese (TR at page 116 line 22 to page 118 line 3). He went in his private capacity, as a member of the Chinese-American professional association, and as a member of a scholastic society (TR at page 120 line 21 to page 124 line 20). His manager at work knew of his attendance, and “thought it an honor to be invited” (TR at 112 line 7 to page 113 line 1).

The Applicant sat in an audience with other overseas Chinese (TR at page 140 line 8 to page 142 line 10, and at page 161 line 13 to page 162 line 25). He described the conference in the following terms: “we are on the receiving side. Receiving information. So I don’t even talk to [the] presenter” (TR at page 161 line 13 to page 162 line 25). However, he did receive reimbursement for airfare, and free room and board (TR at page 116 line 22 to page 118 line 3, and at page 144 line 12 to page 146 line 10). He did not report these gratuities to his employer, however, his Manager knew of the trip to Taiwan and its purpose (*Id*). The Applicant attended this 2000 conference in his private capacity as a member of both the professional association and of the scholastic society, and the Government has not established that the Applicant had any affirmative obligation to report any gratuities received during this private trip to Taiwan.

1.f. and 2.d. In 2002, a secretary from TECO called the Applicant inquiring as to the marital status of one of his fellow employees (TR at page 118 line 4 to page 120 line 20). The daughter of “someone important in Taiwan” wished to marry this employee, and they were inquiring if he was, in fact, single (*Id*). The Applicant confirmed that his fellow employee was single (TR at page 118 line 4 to page 120 line 20).

Guideline E - Personal Conduct

2.b. It is alleged that the Applicant’s security clearance was suspended in 2003 for providing a false statement to a Federal agent. The Applicant has consistently and repeatedly denied this allegation, and the Government has failed to establish that the Applicant provided any such false statement (TR at page 29 line 16 to page 34 line 3, at page 74 line 4 to page 75 line 10, and at page 86 line 20 to page 88 line 14).

2.c. It is alleged that the Applicant failed to fully disclose all of his “interactions with AFOSI and FBI agents in 2002 [and] to an authorized investigator for the Department of Defense when interviewed.” The investigator testified as a Government witness at the Applicant’s, and testified to the contrary; i.e. that the Applicant was fully cooperative and told her what he knew of those “interactions” (TR at page 38 line 9 to page 54 line 15, see *also* TR at page 88 line 18 to page 89 line 1).

2.e. In answer to question “**17 YOUR FOREIGN ACTIVITIES**” on his January 2008 QNSP, the Applicant answered “No” that he had not had “any contact with a foreign government . . . or its representatives” (GX 1 at page 6). The Applicant answered this posited question by using his employer’s security manual as a guide (AppX K). That guide states the following:

4. Contact with Foreign Nationals must be reported to Security when the following occur:

4.1. An effort by an individual, regardless of nationality, to obtain illegal or unauthorized access to classified or sensitive unclassified material, or to compromise an employee.

4.2. Employee contact with known or suspected intelligence officers from any country.

4.3. Attempted exploitation of an employee by the intelligence services of another country (AppX K at page 1, and TR at page 124 line 22 to page 126 line 17).

Applicant's conduct and comments, namely his abandoned review of Taiwan's five year development plan, in the early 1990's, does not come within the purview of his employer's guide. His sitting in an audience of overseas Chinese in Taiwan in 2000; and listening to presenters, also does not come within the purview of his employer's guide. Finally, his giving the marital status of a fellow employee to a secretary from TECO does not come within the purview of his employer's guide (TR at page 152 line 14 to page 153 line 25, and at page 161 line 13 to page 162 line 25). I find no willful falsification here.

I take administrative notice of the following facts: Taiwan has an elected democratic government. It has the 17th largest economy in the world and is a leading producer of high-technology goods. It engages in industrial and economic espionage. Proprietary information technology is high on the Taiwanese list of targeted information to be acquired by their agents from foreign governments and business. Although the U.S. now recognizes Taiwan as part of "one-China," it continues to maintain strong unofficial relations with Taiwan.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on

the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B - Foreign Influence

Paragraph 6 of the new adjudicative guidelines sets out the security concern relating to Foreign Influence:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by a foreign interest.”

Here, Subparagraph 7(a) is applicable: “*contacts with a foreign family member . . . who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.*” The Applicant’s sister is a citizen and resident of Taiwan. His sister-in-law is also a citizen of Taiwan. This is countered, however, by the first mitigating condition, as “*the nature of the relationships with foreign persons, the country in which these persons are located . . . are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual . . . and the interests of the U.S.*” The

Applicant's sister, a retired accountant, has no connection with the Taiwanese government. His Taiwanese sister-in-law lives in the U.S. with her American children, and also has no connection with the Taiwanese government.

Subparagraph 7(b) is arguably also applicable: *"connections to a foreign person . . . create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information."* This is clearly countered by the second mitigating condition, as *"there is no conflict of interest. Either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest."* The vast majority of the Applicant's family, and all of his wealth are in the U.S. He has worked for a defense contractor for more than 35 years with glowing reviews, which will be discussed more under the Whole Person Concept, below. He has absolutely no incentive to help Taiwan or any other foreign government. In the early 1990's, he quit as one of the reviewers of Taiwan's five year economic plan. In 2000, he attended a conference for community leaders of overseas Chinese, in his private capacity. He merely sat in an audience, and had little, if any, contact with any Taiwanese representative.

Guideline E - Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in Paragraph 15: "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information."

If find no Disqualifying Condition applicable here, as the Applicant answered question 17 on his January 2008 QNSP to the best of his knowledge and belief. He used his employer's security manual as a guide, and answered the posited question accordingly. There is no wilful falsification.

The second Disqualifying Condition is also not applicable, as he fully cooperated with the Government's investigators, as testified to by one of its investigators.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a public trust position by considering the totality of the Applicant's conduct and all the circumstances. Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

The Administrative Judge should also consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Those who work with the Applicant have only glowing comments as to his character (AppX A~C, and Q). A Principal Director at his employer avers, in part, the following:

6. I have known . . . [the Applicant] since he first started with . . . [his employer] in 1973. Since then, we have worked together as colleagues, and I have been his supervisor. . . . 8. [The Applicant] is a hard and dedicated worker. I found him to be open, honest, trustworthy and reliable. 9. I believe that he is conscientious and consistently follows all company rules and procedures, including those that relate to the protection of sensitive information. . . . 12. Based on the foregoing, and my knowledge of and interactions with . . . [the Applicant], I support . . . [the Applicant's] security clearance candidacy (AppX Q).

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the trustworthiness concerns arising from his alleged Foreign Influence and Personal Conduct.

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 B:	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
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Richard A. Cefola
Administrative Judge