



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



In the matter of:)	
)	
)	ISCR Case No. 07-15487
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: Pro Se

October 22, 2008

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is denied.

Applicant submitted his Security Clearance Application (SF 86), on April 5, 2007. On June 20, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines C and B 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 June 25, 2008. He answered the SOR in writing on June 30, 2008, and requested a hearing before an administrative

judge. DOHA received the request on July 3, 2008. Department Counsel was prepared to proceed on July 14, 2008, and DOHA assigned this case to another judge on August 8, 2008. Because of a conflict of interest, I received the case assignment on August 12, 2008. DOHA issued a notice of hearing on September 2, 2008, which Applicant received on September 11, 2008. I convened the hearing as scheduled on September 30, 2008. The government offered three exhibits (GE) 1 through 8, which were received and admitted into evidence without objection. Applicant and two witnesses testified on his behalf. He did not submit any exhibits for admission into the record. The record closed on September 30, 2008. DOHA received the transcript of the hearing (Tr.) on October 7, 2008.

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 and the Peoples Republic of China (PRC). (Tr. 10-12.) The request and the attached documents were not admitted into evidence, but were included in the record as Administrative Exhibits I through XVIII. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his Answer to the SOR, dated June 30, 2008, Applicant admitted the factual allegations in the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.¹

Applicant, who is 49 years old, works as senior staff research engineer, scientist and mathematician for a Department of Defense contractor. He has worked for this employer for nine years. During these years, Applicant has designed and developed many inventions. He holds one United States (U.S.) Patent, filed more that 85 invention disclosures, and has 22 pending patent applications.

Applicant, who was born in Taiwan, received his bachelor's degree from a university in Taiwan in 1981. After graduation, he served a mandatory two years in the Taiwan military. In 1983, he emigrated to the U.S. to attend graduate school at a major university. He received a masters degree in 1985 and a Ph.D. in 1988 from this university. He became a U.S. citizen in May 1996. He holds a U.S. passport and did, simultaneously, hold a Taiwanese passport for a short time. He destroyed his Taiwanese passport.²

¹Response to the SOR, dated June 30, 2008.

²GE 1 (Applicant's Security Clearance Application (S-86)) at 2, 3, 6-9; Tr. 28-29, 31, 57-58, 61.

Applicant married his first wife, a U.S. citizen who was also born and raised in Taiwan, in 1984. They separated in 1998 and divorced in 2001. To his knowledge his ex-wife resides in the U.S. His daughter from this marriage is 23 years old and a U.S. born citizen, residing in the U.S.³

Following his separation from his wife, an old friend from his military service introduced Applicant to his current wife. At the time of their introduction, she worked as an accountant for a U.S. company in Beijing, China. Their relationship started through e-mail communications followed by telephone calls. In 2000, he traveled to the PRC to meet his future wife and her family. He traveled to the PRC twice more, in 2001 and 2002, as part of his courtship of her. When she received her K-1 visa in 2003, she emigrated to the U.S. They married in March 2003, days after she arrived in the U.S. He advised his office of his marriage. His wife has a permanent green card and plans on becoming a U.S. citizen when she is eligible. Their son was born in the U.S. in 2004 and is a U.S. citizen, residing with them in the U.S. His wife knows little about his job duties, but does know that he holds a security clearance.⁴

Applicant's parents are 74 years old, citizens of Taiwan and live in Taiwan. His father is a retired builder and his mother was a homemaker. His father has some health issues. His mother is in very poor health as a result of her diabetes. His parents live off their savings. They do not received a government retirement income, but receive health care through the Taiwanese government's universal health care program. His parents are not involved in politics and do not have contact with the Taiwanese government. Applicant's parents last visited him in the U.S. in 1997, when their health was better. He visited his parents in 2000, 2001, 2002, 2003, 2005, 2006, and 2008. His recent visits have been because of his mother's declining health. Except for his visit in 2006, Applicant traveled only on his U.S. passport. In 2006, he traveled on both his U.S. and newly issued Taiwanese passport. He destroyed the Taiwanese passport in April 2007. When he is in Taiwan, he does not report his presence to the police or any other government official. He has not had any contacts with government officials while in Taiwan. He talks with his father by telephone twice a week, but he does not talk with his mother any more because she is on a feeding tube.⁵

Applicant's sister is a citizen and resident of Taiwan. She is married with two children and works as an elementary teacher for the local government. His brother is a U.S. citizen, residing in the U.S. He talks with his sister every two to three weeks and visits with her when he is in Taiwan. In 2006, he renewed an identification (ID) card issued by the Taiwan government at the request of his father. His father owns several pieces of land, one of which he believes is titled in his name. His father pays the taxes

³GE 1, *supra* note 2, at 14-15, 17; Tr. 59-60.

⁴GE 1, *supra* note 2, at 12-13, 16-17; Tr. 30, 46, 58, 60, 63-65.

⁵GE 1, *supra* note 2, at 19-16; GE 2 (Interrogatories and Applicants answers) at 3-4, 7; Tr. 38-43, 72-73, 78, 80.

and all cost of upkeep on this land. His father needed the ID to get a power of attorney to sell the land, which may be in Applicant's name. The ID card has expired since Applicant does not live in Taiwan.⁶

Applicant's father-in-law, mother-in-law, and two brothers-in-law are citizens and residents of the PRC. He met his in-laws during his travels to the PRC while courting his wife. Since their marriage, he and his wife have return to the PRC once, in 2005. His in-laws have visited he and his family in the U.S. twice, one time for a year. His father-in-law and mother-in-law are retired, and he believes they receive a government pension. One brother-in-law works for a city government in the PRC and the other brother-in-law is unemployed. His wife talks with her parents two to three times a week and to her elder brother once a month. She talks with her younger brother less often. His contacts with his in-laws are infrequent. When he visited the PRC and his in-laws, he did not register with the police nor was he approached by any government officials. His wife's family did not request information about his job and they are not involved in politics or government activity. He does not know if his in-laws have any knowledge about his job duties or the fact he has a security clearance.⁷

Applicant's former long-time supervisor, who hired applicant in 1999, worked closely with Applicant for eight years. He describes Applicant as a very bright, top-notch mathematician who is very good and quick at solving challenging problems with innovative approaches. Applicant has an inquisitive mind and enjoys life. He has published papers and a lot of responsibility at work. He knows that Applicant served in the Taiwanese military and traveled to the PRC several times. He knew as soon as Applicant married in 2003 and has met his wife. He and Applicant socialize occasionally outside of the office. He trusts Applicant and recommends him for a security clearance.⁸

A long time friend and former co-worker, who is a retired Navy captain, testified on behalf of Applicant. He worked with Applicant between 1996 and 1999. Since this time, they have remained good friends. He plays ping-pong with Applicant on a regular basis. They visit each other's homes frequently. He has met his wives and children. He is not aware of any problems from Applicant's past trips to Taiwan and the PRC. He describes Applicant as extremely intelligent and very competent. He recommends Applicant for a clearance.⁹

Applicant has not purchased any property in Taiwan nor does he have any financial assets or investments in Taiwan or the PRC. He owns a house in the U.S., his

⁶Response to SOR at 4; Tr. at 31-34, 36-37, 43, 78- 80.

⁷Tr. at 43-52, 65-71.

⁸*Id.* at 85-101.

⁹*Id.* at 104-112.

bank accounts are in the U.S., he purchases U.S. savings bonds, and has a retirement investment account in the U.S.¹⁰

I take administrative notice of the following facts. Taiwan is a multiparty democracy, a U.S. ally, and a major trading partner. Its Constitution provides its citizens with many rights similar to those provided to U.S. citizens. It has a good human rights record. It maintains a large military establishment whose primary mission is the defense of Taiwan against the Peoples Republic of China. The Taiwan Relations Act, 22 U.S.C. §§ 3301-3316, is the legal basis for the unofficial relationship between the U.S. and Taiwan. On the other hand, Taiwan is an active collector of defense, medical, economic, and computer information through industrial espionage. There are reports of cases involving the export of certain devices to Taiwan without approval of the Department of Commerce.

The PRC is an authoritarian, communist party-led state. Human rights violations continue to be problematic. Concerns regarding the PRC's weapons development, theft of classified technology information between 1979 and 1999, and industrial espionage activities remain. The PRC continues to have active intelligence operations in the U.S., which seek to obtain military and industrial secrets through Americans of Chinese ancestry. On the other hand, the PRC supports the U.S.'s anti-terrorism position and activities. The U.S. and the PRC have developed joint trade agreements, resulting in the sale of goods to each other, and work together on environmental issues. The PRC enjoys a most favored nation status in trading with the U.S. The PRC has opened its doors to outside investment.

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 common sense 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

¹⁰*Id.* at 81-83; GE 2, *supra* note 2, at 21.

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.¹¹

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

¹¹After any decision, the losing party has a right to appeal the case to the Defense Office of Hearings and Appeals Appeal Board, which under its decisional law does not review a case *de novo*. See ISCR Case No. 07-10396 (App. Bd., Oct. 2, 2008) and ISCR Case No. 07-07144 (App. Bd., Oct. 7, 2008). The Supreme Court in *United States v. Raddatz*, 447 U.S. 667.m 690 (198) succinctly defined the phrase “*de novo* determination”:

[This legal term] has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 23 (1974), the Court had occasion to define “*de novo* proceeding” as a review that was “unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency’s] determination is supported by substantial evidence.” And, in *United States v. First City National Bank*, this Court observed that “review *de novo*” means “that the court should make an independent determination of the issues” and should “not . . . give any special weight to the [prior] determination of” the administrative agency.

(internal footnotes omitted). In ISCR Case No. 05-01820 (App. Bd. Dec 14, 2006), the Appeal Board criticized the administrative judge’s analysis, supporting grant of a clearance for a PRC-related Applicant, and then decided the case itself. Judge White’s dissenting opinion cogently explains why credibility determinations and ultimately the decision whether to grant or deny a clearance should be left to the judge who makes witness credibility determinations. *Id.* at 5-7. See also ISCR Case No. 04-06386 at 10-11(App. Bd. Aug. 25, 2006)(Harvey, J., dissenting) (discussing limitations on Appeal Board’s authority to reverse hearing-level judicial decisions and recommends remanding cases to resolve material, prejudicial error) and ISCR Case No. 07-03307 (App. Bd. Sept. 29, 2008).

applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9 the security concern involving foreign preference arises, “[W]hen 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.”

In 2006, at the request of his father, Applicant obtained an ID card issued by the Taiwanese government when he was visiting Taiwan. His father requested Applicant obtain the ID so he could obtain a power of attorney to sell a piece of land owned by Applicant’s father, but had been titled in Applicant’s name by his father. His father paid all the taxes and expenses related to up keeping this land. Applicant did not use the ID card to obtain any benefits of Taiwanese citizenship or to show a preference for Taiwan over the U.S. Rather, his father needed the ID card to obtain a power of attorney to sell a piece of land. The card expired after 6 months. The government has not established a security concern under disqualifying condition AG ¶ 10. Guideline C is found in favor of Applicant.

Guideline B, Foreign Influence

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 6:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial 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 any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Under the potential disqualifying conditions described in AG ¶ 7, the following conditions could raise a security concern and may be disqualifying in this case:

(a) contact with a foreign family member, business or professional associate, friend, or other person 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;

(b) connections to a foreign person, group, government, or country that 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; and

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion;

Applicant's parents and sister are citizens and residents of Taiwan. His wife's parents and two brothers are citizens and residents of the PRC. Both Applicant and his wife maintain a normal familial relationship with their parents and siblings. They talk by internet telephone with their family members on a regular basis. Applicant has visited his parents in Taiwan seven times since 2000 and visited the PRC four times since 2000. These relationships are not *per se* a reason to deny Applicant a security clearance. The government must establish that these family relationships create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion or would create a potential conflict of interest between his obligations to protect sensitive information and his desire to help his family members.

In determining if a heightened risk exists, I must look at Applicant's relationship and contacts with family members as well as the activities of the governments of the Taiwan and the PRC. See ISCR Case No. 07-05809 (App. Bd. May 27, 2008). Concerning the intelligence gathering activities of the PRC, in ISCR Case No. 07-02485 (App. Bd. May 9, 2008) the Appeal Board agreed with the government's argument, concluding that substantial evidence of a security risk exists when an Applicant has family members living in the PRC because the PRC is an active collector of intelligence and sensitive proprietary information from U.S. defense contractors; considers U.S. citizens of Chinese ancestry to be "prime intelligence targets"; and monitors its citizens' telephone, fax and e-mail communications. The risk that an Applicant could be targeted for manipulation or induced into compromising classified information is real, not theoretical. Applicant's wife's relationship and contacts with her family in the PRC raise a heightened risk that the government of the PRC will use her family members to pressure him into revealing classified information. Because of his extensive contacts with his parents and sister and his frequent travels to Taiwan, there is a heightened risk that Applicant will be targeted. The government has established its case under AG ¶¶ 7(a) and (b).

In deciding if Applicant has submitted evidence of mitigation, under AG ¶ 8 (a), I must consider:

the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country 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, group, organization, or government and the interests of the U.S.

and under AG ¶ 8(b), I must consider if

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. interests.

Applicant's normal relationship with his family members is not a basis to deny him a security clearance; however, his burden of proof on mitigation requires more than statements about the limited scope of his conversations and contacts with his wife's family members. See ISCR Case No. 07-02485 (App. Bd. May 9, 2008). Applicant's father-in-law and mother-in-law are retired and depend upon the government of the PRC to provide their retirement benefit. Applicant traveled to the PRC three times in the last eight years to visit his wife and family members before they were married, and once since their marriage five years ago. His wife continues to speak with her parents and brothers on a regular basis. In light of the intelligence activities of the PRC directed to the U.S. through Americans of Chinese ancestry, Applicant has not mitigated the government's security concerns under AG ¶¶ 8 (a) and (b) as to his in-laws. However, because of Applicant's loyalty to the U.S, his long-standing ties to the U.S and Taiwan's close relationship with the U.S., even though it is an active collector of industrial information, there is no conflict of interest for Applicant as a result of his family ties in Taiwan. Applicant has mitigated the government's security concerns as to his family contacts.

Finally, under AG ¶ 8(c), I must consider if the "contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation." Applicant's contacts with his parents and sister are not infrequent and casual, nor are his wife's contacts with her family infrequent and casual. Thus, Applicant has not mitigated the government's concerns under AG ¶ 8(c). None of the remaining mitigating conditions are applicable in this case. Applicant has not mitigated the government's security concerns under AG ¶ 6.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant came to the U.S. 25 years ago as a graduate student. Following his graduation, he decided to remain in the U.S. His first wife, his brother and his two children are citizens and residents of the U.S. There is no security concern regarding his relationship with these family members. Applicant is a highly respected mathematician and scientist. Through his commendable efforts and as a result of his sharp intellect, he has developed many inventions which are of great assistance to the U.S. His inventions are not classified works for security clearance purposes, but are the proprietary work of his employer. His colleagues trust him based on their many years of working with him and/or an ongoing personal relationship. They view him as highly skilled and an asset to his employer and the U.S. His wife intends to become a U.S. citizen when she is eligible. He is living the American dream. He have a good income, is saving for his retirement, and raising his son in the American way of life. He abides by the laws and manage his finances. He is a highly respected individual in his profession and at his job. Applicant's managers and co-workers praise his worth ethic and character. The Appeal Board has held that all these highly admirable qualities are not enough to mitigate the government's security concerns when an Applicant has family ties to the PRC. See ISCR Case No. 07-02485 (App. Bd. May 9, 2008).

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under the foreign influence guideline, although he mitigated the foreign preference security concerns.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant

Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	For Applicant
Subparagraph 2.f:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARY E. HENRY
Administrative Judge