



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



In the matter of:)	
)	
)	ISCR Case No. 08-04191
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Pamela Benson, Esquire, Department Counsel
For Applicant: Dr. Robert Burkholder, PhD, Personal Representative

June 22, 2009

Decision

LAZZARO, Henry, Administrative Judge

Applicant’s father, a citizen and resident of Taiwan, works and resides in the People’s Republic of China (China) for more than six months each year. Applicant failed to mitigate the security concern that arises from his father’s divided residence and employment between Taiwan and China. Clearance is denied.

On December 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR alleges security concerns under Guidelines B (foreign influence) and C (foreign preference). Applicant submitted a response to the SOR that was received by DOHA on December 31, 2008. He admitted the allegations contained in SOR subparagraphs 1.b, 2.a, and 2.c, denied the allegation contained in SOR subparagraph 1.a, and requested a hearing.

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), and revised adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

The case was assigned to me on February 25, 2009. A notice of hearing was issued on April 2, 2009, scheduling the hearing for April 28, 2009. The hearing was conducted as scheduled. The government submitted 24 documentary exhibits that were marked as Government Exhibits (GE) 1-24. GE 1-3 were admitted into the record without objection. Administrative notice was taken of the contents of GE 4-24 without objection. Department Counsel submitted two documents containing written comments on the contents of GE 4-24 which were marked as Appellate Exhibits (App. Ex.) I and II and made part of the record without objection.

Applicant testified, called two witnesses to testify on his behalf, and submitted seven documents that were marked as Applicant's Exhibits 1-7. AE 1-6 were admitted into the record without objection. Department Counsel's objection to AE 7 was overruled and AE 7 was admitted into the record. Applicant also submitted decisions issued by three other administrative judges for my consideration. Those documents were marked as App. Ex. III-V and are included in the record.

Applicant's attempt to surrender his Taiwanese passport at the hearing was refused. The record was held open to provide him the opportunity to submit proof that he surrendered the passport to a proper authority after the hearing was concluded. Two documents were timely received verifying the destruction and surrender of the destroyed passport. Those documents were marked as AE 8 and 9 and admitted into the record without objection. The transcript was received on June 6, 2009.

Procedural Matters

In his response to the SOR, Applicant admitted the allegation contained in SOR subparagraph 1.b that he had visited Taiwan, but wrote in his response that he had only visited the country four times since 2000, as opposed to the five times alleged in subparagraph 1.b. At the hearing, Applicant moved to amend his answer to admit he had actually visited Taiwan five times since 2000, as alleged in the SOR. That motion was allowed without objection.

Findings of Fact

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

Applicant is a 25-year-old man who has been employed by a defense contractor as a research associate engineer since February 2008. He is single and he has no dependents. Applicant worked as a graduate research associate at the university he was attending from October 2005 until about December 2007, and as a mathematics tutor at the same university from September 2003 until June 2005.

Applicant immigrated to the United States from Taiwan with his parents and sister in 1999. He was 15 years old at the time. He completed high school in the United States in May 2001, and he immediately enrolled in a major state university. He has earned bachelor of science and master of science degrees in electrical engineering from that

university and he is currently working toward his PhD. He anticipates receiving the PhD within the next 12-18 months.

Two university professors who have worked closely with Applicant testified and wrote letters on his behalf. (AE 4 and AE 5) They consider Applicant to be hard-working, dedicated and a particularly gifted student. One of the professors recruited him to work as a graduate research associate in the university's electro-science lab because of the high regard he has for Applicant's intellectual acumen and technical skill in the field of electrical engineering. They both vouch that Applicant is trustworthy and deserving of a security clearance. They also believe he is a valuable asset to the projects he has been working on. They also believe his value to those projects will be greatly enhanced if he is granted a security clearance.

The director at Applicant's place of employment wrote that Applicant is hard-working, trustworthy and of high character. Applicant's value to his employer would be greatly enhanced if he is granted a secret security clearance. Applicant has been very careful in protecting company proprietary information. (AE 3) An associate professor at the university Applicant attends has known him for the past seven years because they are members of the same church. He has found Applicant to be sincere, reliable, trustworthy and a loyal United States citizen. (AE 6)

Applicant is a dual citizen of Taiwan and the United States. He became a naturalized United States citizen on December 13, 2005, and he obtained a United States passport on January 25, 2006. He registered with the United States Selective Service System in August 2001. He has voted in United States elections but not in Taiwanese elections. Applicant is willing to renounce his Taiwanese citizenship, but has not done so because he believes it is a long and complicated process and might have the undesired effect of causing him to be conscripted into the Taiwanese military to serve the mandatory military service required of all Taiwanese men.

Applicant's mother and sister are residents of the United States and dual citizens of Taiwan and the United States. His mother became a naturalized citizen in 2005, and his sister in or about 2006. Applicant's mother is 59 years old. She did not work outside the home for many years after she immigrated to the United States. However, she now works as a sales associate at a large department store. Applicant's sister is 30 years old. She obtained a PhD from a university in the United States. She is married to a United States citizen and is presently a homemaker.

Applicant's father immigrated to the United States with the rest of his family, but shortly thereafter he returned to Taiwan. He apparently decided he could not find suitable employment in the United States and it was in the best interest of his family for him to return to his job in Taiwan to provide support for them. He was working as a mechanical engineer exclusively in Taiwan until about 2007 when he took a job with a company that has manufacturing facilities in China. His work responsibilities now require that he work and reside in China for more than half the year. While in China, Applicant's father resides in a dormitory-type facility that is owned by his employer.

Applicant's father is 61 years old. Applicant's family hopes that his father will be able to retire within the next few years. They anticipate he will again immigrate to the United States once he is able to retire. Applicant's father owns a residence in Taiwan, but his father resides with his parents in Taiwan when he is not working in China. For unexplained reasons, the residence owned by Applicant's father is vacant.

Applicant works in a city that is about an hour and a half drive from the city where his mother lives and where he is working on his PhD. He has an apartment in the city where he works and stays there during the work week. He resides with his mother on weekends. Applicant used to speak with his father by telephone about two to three times a month. Now, his mother will call Applicant's father about once a month while Applicant is staying at her house, and those are the only times Applicant speaks with his father. Applicant does not have any other contact with his father except on the occasions when he visited Taiwan.

Applicant's father served two years of mandatory military service in Taiwan sometime in the 1960s. Other than his father's service, none of Applicant's family members have ever worked for the Taiwanese government or held official government positions in Taiwan.

Applicant visited Taiwan once in 2000, twice in 2001, once in 2002, and once in 2006. He stayed with his elderly paternal grandparents during his visits to Taiwan. The purpose of the first four visits was simply to vacation during school breaks. The last visit was to see his grandparents who are in their 90s because Applicant believed it might be the last chance he would get to see them before they die. Applicant does not have any other close relatives or friends in Taiwan. Applicant telephones his grandparents a few times a year, generally on important holidays.

Applicant renewed his Taiwanese passport in 2005. That passport expired in May 2008, and has now been destroyed and surrendered to his employer. Applicant used his Taiwanese passport to enter and exit Taiwan during his 2006 visit to Taiwan despite the fact that he was a United States citizen and had obtained a United States passport at the time. He used the Taiwanese passport because he did not have to obtain a visa by so doing and to minimize the risk he would be involuntarily conscripted into the Taiwanese military during the visit.

Applicant does not currently have any plans to travel to Taiwan. He is concerned that if he were to travel to Taiwan he might be involuntarily conscripted into the military. He is uncertain about traveling to Taiwan when his grandparents die or if his father becomes gravely ill again because of concerns about military conscription.

Taiwan is a stable democracy with a strong and well-developed economy. (GE 5) However, in 1979 the United States changed its diplomatic recognition from Taiwan to China. (GE 4) Since then, absent diplomatic relations, the United States has maintained economic and security relationships with Taiwan, including the sale of defensive military weapons and services. (GE 6)

Over the past several years, Taiwan has relaxed restrictions on unofficial contacts with China, and cross-Strait interaction has mushroomed. China is Taiwan's largest trading partner, and Taiwan is China's fifth-largest. Estimates of Taiwan investment on the mainland, both officially approved by Taiwan authorities and investment made by Taiwan firms through third parties, start from \$100 billion, making Taiwan and Hong Kong the two largest investors. (GE 4)

China is a Communist party-led state. It has a well-documented and continuing practice of abusing human rights in violation of internationally recognized norms, stemming both from the authorities' intolerance of dissent and the inadequacy of legal safeguards for basic freedoms. (GE 18)

The Ministry of State Security (MSS) is the preeminent civilian intelligence collection agency in China. The primary operational focus of the MSS is "Taiwan work," namely, conducting intelligence activities against Taiwan in every intelligence and covert political action arena. The "Third Bureau" of the MSS has geographical intelligence responsibility for operations in Taiwan. The main activities of the Third Bureau in Taiwan include agent operations and recruitment of Chinese nationals with Taiwan connections. (GE 17)

The United States is a primary intelligence target of China. (GE 19) China has obtained access to restricted foreign technologies through industrial espionage and it operates an aggressive clandestine effort to acquire additional technologies. This has become such a problem in the United States that U.S. Immigration and Customs Enforcement officials have rated China's espionage and industrial theft activities as the leading threat to the security of U.S. technology. (GE 20) The U.S.-China Economic and Security Review Commission's 2007 Report to Congress concluded that Chinese espionage activities in the United States are so extensive that they comprise the single greatest risk to the security of American technologies. (GE 20)

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 and mitigating conditions 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. Guideline B (foreign influence) and Guideline C (foreign preference), with their disqualifying and mitigating conditions, are most relevant in this case.

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.² The government has the burden of proving controverted facts.³ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁴ although the government is required to present substantial evidence to meet its burden of proof.⁵ “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”⁶ 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.⁷ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁸

No one has a right to a security clearance⁹ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁰ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹¹

Analysis

Guideline B, Foreign Influence

Foreign contacts and interests may be a security concern if the individual has divided loyalties or 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.

² ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

³ ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

⁴ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁵ ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

⁶ ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

⁷ ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

⁸ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

⁹ *Egan*, 484 U.S. at 528, 531.

¹⁰ *Id* at 531.

¹¹ *Egan*, Executive Order 10865, and the Directive.

Applicant's mother and sister are dual citizens of the United States and Taiwan. Other than Applicant's testimony indicating his mother has regular phone contact with her husband, there is no record evidence to indicate his mother and/or sister have any continuing ties to Taiwan. Their dual citizenship, in and of itself, does not create a foreign influence security concern.

Applicant's father returned to Taiwan shortly after the family immigrated to the United States. He has remained in Taiwan and worked there and in China since. He currently spends over half of each year working and residing in China. Applicant's father resides with his parents when he is in Taiwan. Applicant's mother maintains contact with her husband and the entire family anticipates that he will eventually retire and return to reside in the United States. Applicant had telephonic contact with his father two to three times a month until relatively recently and now still speaks with him by telephone about once a month. During his visits to Taiwan, Applicant stayed at his grandparents home which is also his father's residence when he is not working and living in China.

The United States is a primary intelligence target of China and China operates an aggressive clandestine effort to acquire additional technologies. U.S. Immigration and Customs Enforcement officials have rated China's espionage and industrial theft activities as the leading threat to the security of U.S. technology. Chinese espionage activities in the United States are so extensive that they comprise the single greatest risk to the security of American technologies. Additionally, China's MSS conducts intelligence activities against Taiwan in every intelligence and covert political action arena. The Third Bureau of the MSS activities in Taiwan include agent operations and recruitment of Chinese nationals with Taiwan connections.

There is nothing in the record to suggest that Applicant's father has ever acted in any way that might harm any interest of the United States. However, his divided residence and employment in Taiwan and China places him in a position where there is a heightened risk that he and/or Applicant could be targeted and/or exploited by foreign collection activities directed against the United States. Applicant's personal relationship with his father and through his mother, with whom he resides part-time, create security concerns under Disqualifying Condition (DC) 7(a): *contact with a foreign family member . . . 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;* and DC 7(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.*

I have considered the possible application of Mitigating Condition (MC) 8(a): *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 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 MC 8 (c): *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 of exploitation.* Having done so, I conclude the continuing relationship Applicant and his mother have with his father, including regular phone contact and an expectancy that his father will retire and

join them in the United States, and the father's divided residence and work between Taiwan and China preclude application of these mitigating conditions.

I have also considered the possible application of MC 8(b): *there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person . . . 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.* Applicant, his mother and his sister retain their dual citizenship with Taiwan. Each has been a United States citizen for less than four years. Applicant has just begun to pursue a professional career in the United States and his mother just relatively recently began to work outside the home. Their anticipation that Applicant's father within a few years will retire and join them in the United States exhibits the continuing father-son and husband-wife relationship they feel toward Applicant's father despite the years of separation. There is no to reason to question or doubt Applicant's professed allegiance and loyalty to the United States to the exclusion of all other countries. However, there is insufficient evidence from which to conclude how Applicant would resolve any conflict of interest were it to arise. Accordingly, I conclude this mitigating condition does not apply. The remaining mitigating conditions have no applicability to the facts of this case.

Guideline C, Foreign Preference

Foreign preference is a 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.

Applicant's vacations to Taiwan in 2000, 2001, 2002 and 2006 were strictly for pleasure and to visit with his father and grandparents. They do not indicate a preference for Taiwan over the United States and do not create a foreign preference security concern. No disqualifying condition applies to Applicant's travel to Taiwan.

Applicant became a naturalized United States citizen in December 2005, and he obtained a United States passport in January 2006. Still, he used the Taiwanese passport he had obtained before he became a United States citizen to enter and exit Taiwan in 2006. The use of a foreign passport is the exercise of the right of foreign citizenship. Disqualifying Condition (DC) 10(a): *exercise of any right, privilege or obligation or foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member applies.*

Applicant acquired his Taiwanese citizenship through his parents. He moved to the United States when he was a teenager and, with the exception of the use of the Taiwanese passport, has done nothing to indicate a preference for Taiwan over the United States. Indeed, he registered with the United States Selective Service System while he was still solely a Taiwanese citizen, he has voted in United States elections but not Taiwanese elections, he applied for and became a United States citizen almost as soon as he was eligible, he destroyed and surrendered the Taiwanese passport when he learned its possession created a security concern, and he has expressed his willingness to renounce his Taiwanese citizenship.

MC 11(a): *dual citizenship is based solely on parents' citizenship or birth in a foreign country*; MC 11(b): *the individual has expressed a willingness to renounce dual citizenship*; and MC 11(e): *the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated* all apply. Application of these mitigating conditions to Applicant's isolated exercise of the right of his Taiwanese citizenship is sufficient to find he has mitigated the foreign preference concern that existed.

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." In this case, there is no reason to doubt that Applicant is a loyal American citizen or suspect he would consider doing harm to the interests of the United States. Still, his father's divided residence and work between Taiwan and China create a security concern that has not been overcome.

The objective of the security clearance process is the fair-minded, common sense 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.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, Applicant has failed to mitigate the foreign influence security concern that exists in this case. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. Guideline C is decided for Applicant. Guideline B is decided against Applicant. It is not clearly consistent with the national interest to grant Applicant a security clearance.

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

Conclusion

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

Henry Lazzaro
Administrative Judge

