



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



In the matter of:)
)
-----) ADP Case No. 09-02907
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro Se*

February 4, 2010

Decision

HARVEY, Mark, Administrative Judge:

Applicant failed to mitigate trustworthiness concerns regarding her connections to her sister who lives in Taiwan under Guideline B (foreign influence) and the whole person concept. Guideline C (foreign preference) concerns are mitigated despite her ownership share in a condominium located in Taiwan. She also obtained a Taiwan Identification Card after receipt of her statement of reasons (SOR). Applicant's eligibility to occupy a public trust position is denied.

Statement of the Case

On October 19, 2008, Applicant completed a Questionnaire for Public Trust Positions (SF 85P) (Government Exhibit (GE) 1). On August 24, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to her (hearing exhibit (HE) 3), pursuant to Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised; Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleges trustworthiness concerns under Guidelines C (foreign preference) and B (foreign influence) (HE 3). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Regulation that it is clearly consistent with the national interest to grant or continue Applicant's eligibility to occupy a public trust position, which entails access to sensitive information (HE 3). DOHA recommended referral to an administrative judge to determine whether such access to sensitive information should be granted, continued, denied, or revoked.

On August 31, 2009, Applicant responded to the SOR allegations (HE 4). On October 1, 2009, Department Counsel indicated he was ready to proceed. On November 13, 2009, DOHA issued a hearing notice (HE 1). Applicant's hearing was held as scheduled on December 16, 2009. At the hearing, Department Counsel offered three exhibits (GE 1-3) (Transcript (Tr.) 18-19), and Applicant offered one exhibit (Tr. 32-33; AE A). There were no objections, and I admitted GE 1-3 (Tr. 19), and AE A (Tr. 32-33). Additionally, I admitted the SOR, response to the SOR, and hearing notice (HE 1-3). On December 28, 2009, I received the transcript. On January 5, 2010, Department Counsel forwarded AE B to me without objection, and I admitted AE B into evidence. I closed the record on January 15, 2010 (Tr. 82).

Procedural Ruling

Department Counsel requested administrative notice of facts concerning Taiwan (Tr. 18-19). Department Counsel provided supporting documents to show detail and context for these facts in the Administrative Notice request. Applicant and Department Counsel did not object to me taking administrative notice of all of the facts in all of the documents (Tr. 19). See the Taiwan section of the Findings of Fact of this decision, *infra*, for the material facts from Department Counsel's submissions on Taiwan.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). Usually administrative notice in ISCR proceedings is accorded to facts that are either well known or from government reports. See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

Findings of Fact¹

Applicant admitted all of the allegations in the SOR subparagraphs (HE 3). However, she denied that she had a preference for Taiwan. She also denied that she was at risk for being influenced because of her relatives living in Taiwan, or due to a preference for Taiwan (HE 3). Applicant's admissions are accepted as findings of fact.

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Applicant is a 60-year-old employee of a defense contractor (Tr. 7). In 1990, she earned a bachelor's degree in information systems management from a U.S. college (Tr. 7-8). Her employment involves development of software used for medical records (Tr. 21). She also manages support personnel, who are involved with processing medical records (Tr. 21).

Applicant was born in Taiwan (Tr. 23). She moved to the United States in 1985 or 1986 to join her husband, who had moved to the United States two or three years earlier (Tr. 23; GE 3 at 3). She became a U.S. citizen in about 1999 or 2000 (Tr. 23). She obtained a U.S. passport in 2002, and it is still active (Tr. 24).

Applicant is married, and she has two children (Tr. 22; GE 3 at 3). Her husband and two children were born in Taiwan (Tr. 22). Her two children were born in 1973 and 1974 (GE 3 at 3). Her husband is employed in the United States, and provides software used for national defense (Tr. 22). He does not hold a security clearance (Tr. 22). Her husband and two children are U.S. citizens (GE 1).

Applicant's mother, three sisters, and two brothers are citizens and residents of Taiwan (Tr. 30; HE 3; SOR ¶¶ 2.a and 2.b). In September 2009, her father died. He did not have a will (Tr. 52). Applicant and her relatives living in Taiwan disputed with each other the amount of property each should receive from Applicant's father's estate.

Applicant applied for a Taiwanese passport on October 16, 2008, and possessed this Taiwan passport for the next 12 months (Tr. 24; HE 3; AE A; SOR ¶ 1.a). It had an expiration date of October 16, 2018 (GE 3 at 7; HE 3; SOR ¶ 1.a). In June 2009, when she received DOHA interrogatories, she was advised that she should provide her Taiwan passport to her security officer; however, she declined the request because she needed it to help her obtain her share of her father's estate (Tr. 25, 33-34; GE 3 at 12; HE 3; SOR ¶ 1.a). She used her Taiwan passport to apply for a Taiwan Identification Card (TIC) (GE 3 at 12). She wanted to retain her Taiwan passport until she secured an inheritance she estimated (in June 2009) at about \$300,000 (GE 3 at 12). She promised after she received her inheritance that she would destroy her Taiwan passport (GE 3 at 12). On November 6, 2009, Applicant provided her Taiwanese passport to her security officer because she did not need it anymore (Tr. 32-34; AE A).

In October 2009, after Applicant responded to the SOR, she obtained a TIC and opened a Taiwanese bank account (Tr. 26-27). She needed the TIC so she could obtain and deposit her \$600,000 share of her father's estate into a Taiwan bank (Tr. 26, 28; GE 3 at 12). On December 10, 2009, she transferred almost all of the money from the Taiwan bank into a U.S. bank (Tr. 26-27). She has about 1,000 Taiwanese dollars in her Taiwan bank account (Tr. 27).

Applicant gave a limited power of attorney to a relative in Taiwan, which specified a requirement that Applicant receive a one seventh share of her father's estate (Tr. 31). To settle the estate, Applicant received one seventh of her father's estate (Tr. 29-30, 60-64). Some of her siblings and her mother in Taiwan were very unhappy that she received so much of her father's estate (Tr. 29-30). They thought she should have

received at most seven or eight percent, and instead she received 14.3 percent (Tr. 31). However, the division of the estate for her mother and siblings ranged from nothing to more than 30% (Tr. 64-65). For example, her mother only received .3% (Tr. 64). Her siblings sometimes called her more than ten times a day in an attempt to get Applicant to give up her share of the estate (Tr. 29).

Applicant calls her mother less than ten times per year, and she communicated with most of her siblings on an irregular basis (Tr. 31, 49; GE 3 at 4). She has not communicated with some of her siblings over the telephone for years. Recently, she has been screening her incoming telephone calls. Sometimes when a call came in from her siblings, Applicant did not talk to them (Tr. 49). Her brother (B) left a voice message threatening to kill Applicant and her husband (Tr. 51-52, 55). Applicant promised that she would not give in to this coercion, which was designed to convince her to relinquish her share of her father's estate (Tr. 51). Applicant saved the recording; however, she did not report the threat to the police (Tr. 52, 57).

B has a history of financial problems. B was able to get Applicant's mother's inheritance from Applicant's mother (Tr. 53-54). One of her sisters is also very angry about Applicant receiving so much of their father's estate, and she threatened Applicant (Tr. 56). Applicant thought these threats might be a true cause for concern (Tr. 57). Another of Applicant's sisters (S) surrendered her share of the estate because she was worried about the threats and coercion (Tr. 65). Applicant did not consider B to be an ethical, responsible person (Tr. 53, 57). Her siblings considered a lawsuit against Applicant over the inheritance (Tr. 61). Applicant emphasized that she would not give in to this pressure or coercion (Tr. 61). Applicant was able to ignore the threats of physical harm because she was not in Taiwan (Tr. 62).

Applicant has owned a condominium in Taiwan since the 1970s, which is currently valued at about \$150,000 (Tr. 36; HE 3; SOR ¶ 2.d). Her brother-in-law, his spouse, and his son reside in the condominium (Tr. 36-37; HE 3; SOR ¶ 2.d). They do not pay Applicant any rent (Tr. 37). Applicant does not have a mortgage on her condominium (Tr. 38). She has a conflict with her husband over disposition of the condominium (Tr. 38). Applicant wants to sell the condominium (Tr. 38). Her husband has a one-half interest in the condominium because it was purchased during their marriage (Tr. 59). Applicant and her husband argued as recently as two weeks before her hearing about retention of the condominium in Taiwan (Tr. 59).

Another reason Applicant needed the TIC was for Applicant to "pretend to move back to the home" to avoid some of Taiwan's taxes on the condominium (Tr. 69). She planned to pay the family to move out. After the condominium was vacant, she would use the TIC to establish her residency, without actually moving into the condominium (Tr. 70-71). She did not plan to sell the condominium in the near future; however, she also planned to use the TIC when the condominium is sold (Tr. 69-70).²

² On December 29, 2009, Applicant provided her TIC to her security manager with the stipulation that it will be returned to her when she leaves employment with the contractor (AE B).

Applicant's husband is considering retirement in Taiwan because he believes health insurance is better in Taiwan (Tr. 38, 39). She does not plan to retire in Taiwan (Tr. 39).³ Instead of moving to Taiwan for her retirement, she would prefer to move in with her son, who lives in the United States (Tr. 39).

Applicant traveled to Taiwan once between 1990 and 1994, once in 2006, and once in 2008 (Tr. 43, 44, 45, 49; GE 3 at 3; HE 3; SOR ¶ 2.c). Her U.S. passport shows Taiwan stamps in October 2006 and September 2008 (GE 3 at 146-147). Although she did not disclose another visit to Taiwan after September 2008, she did not specifically deny a visit to Taiwan after September 2008 at her hearing. See n. 3, *supra*. Applicant's and her husband's families living in Taiwan have not visited the United States (Tr. 49). During her 2006 and 2008 visits to Taiwan, she stayed with her mother, and her siblings visited her (GE 3 at 3). Applicant told the OPM investigator that she:

. . . traveled to Taiwan in mid-September 2008 to visit her father [] who was sick and in the hospital []. Subject used her U.S. passport to travel there and back. She stayed in Taipei at her mother's home the entire time. Subject stayed with her mother [] and visited her father twice each day in the hospital. She traveled nowhere else and saw her siblings in her mother's home.

At her hearing, however, Applicant said for her most recent visit she stayed in a hotel (Tr. 42). She denied that she even visited her mother, asserting her "mother doesn't like me anymore" (Tr. 43). The basis of her mother's angst is Applicant "want[s] too much money" (Tr. 43).⁴

Applicant frequently communicated with one of her sisters (S) because S was on her side during the dispute over their father's estate (Tr. 46). Applicant communicates with S every couple of days or maybe once a week (Tr. 46, 47; GE 3 at 3).

Applicant has about \$250,000 in her 401(k) account, and her husband has about \$500,000 in his 401(k) account (Tr. 73). She owns two properties in the United States, which she values at a total of about \$850,000 (Tr. 22, 73). The two properties were purchased with cash and do not have mortgages (Tr. 73-74). In September 2009, she purchased a home for her son's residence (Tr. 39). Applicant's son has part ownership

³ On February 23, 2009, an Office of Personnel Management (OPM) investigator interviewed Applicant (GE 3 at 3-7). On June 15, 2009, Applicant indicated that the OPM investigator's summary of the interview was accurate (GE 3 at 8-9). Applicant's OPM interview states, "[Applicant] is not yet sure if they will retire in Taiwan or in the U.S." (GE 3 at 5). At her hearing, she initially denied that she had read the OPM investigator's summary of interview before adopting it in June 2009 (Tr. 41). Then she said she did not remember adopting it (Tr. 41). Later, she said she did not read it closely (Tr. 60). She disagreed with the contention that she might retire in Taiwan (Tr. 42, 60, 79).

⁴Although there is no specific reference to a visit by Applicant to Taiwan after September 2008, Applicant's reference to staying in a hotel may be referring to a visit to Taiwan after September 2008. Another possibility is that Applicant provided incorrect information at her hearing about not staying with her mother in September 2008 in order to understate her connections to her mother.

of this house (Tr. 22). She also maintains a substantial balance in a U.S. bank account (Tr. 73-74).

There is no derogatory information in Applicant's security file concerning Applicant's police or financial records. She has never been fired from a job. There is no evidence of record showing any U.S. arrests, illegal drug possession or use, or alcohol-related incidents.

Taiwan⁵

Taiwan is a multi-party democracy. The United States does not support Taiwan independence, in keeping with the "one China" policy. The United States supports Taiwan's membership in appropriate international organizations where statehood is not a requirement for membership and encourages its meaningful participation in appropriate international organizations where its membership is not possible.

There are significant economic ties between Taiwan and the People's Republic of China (PRC), which are attributable to their physical proximity and history. Because of its location, Taiwan has a particular interest in information from the United States that could aid it in its own defense. Taiwan's primary defense goal is to deter invasion from the PRC. The PRC maintains intelligence operations in Taiwan through a bureau utilizing PRC nationals with Taiwanese connections. Unlike the PRC, however, the constitutional basis of the Taiwanese government suggests that resort to coercive measures against its citizens to collect economic intelligence is unlikely.

The record references various cases involving the illegal export or attempted illegal export of U.S. restricted, dual-use technology to and/or through Taiwan. One report to the U.S. Congress concerning foreign economic collection and industrial describes espionage occurring in the 1990s. That report notes that Taiwan was then known to be an active collector of U.S. economic intelligence. The report ranked Taiwan after China, Japan, Israel, France, and Korea as an active collector of such information. Although most of the record information about Taiwan's intelligence activities targeting U.S. classified or sensitive information is more than 10 years old, Appendices X to XV outline more recent espionage by Taiwan's National Intelligence Bureau (NSB). There is some evidence that Taiwan has specifically targeted U.S. citizens in the last five to seven years to obtain protected and classified information. See *e.g.*, Appendices XIV and XV.

Taiwan is a modern democracy with vibrant public participation during which demonstrations may become confrontational. The U.S. State Department urges caution within the vicinity of any political demonstrations. Overall crime is noted as low.

⁵The facts in the section concerning Taiwan are from the Department Counsel's documents submitted for Administrative Notice.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The government’s authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

Positions designated as ADP I and ADP II are classified as “sensitive positions.” Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. “The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person’s loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security.” Regulation ¶ C6.1.1.1. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. See Regulation ¶ C8.2.1.

When evaluating an applicant’s suitability for a public trust position, an administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

A person who seeks access to sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security and trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance [or access to sensitive information].” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

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 [sensitive] information will be resolved in favor of national security.” Section 7 of Executive Order (EO) 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.”

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant trustworthiness concerns are under Guidelines C (foreign preference) and B (foreign influence) with respect to the allegations set forth in the SOR.

Foreign Preference

AG ¶ 9 describes the foreign preference trustworthiness concern stating, “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.”

AG ¶ 10 describes conditions that could raise a trustworthiness concern and may be disqualifying in Applicant’s case:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

- (1) possession of a current foreign passport;
- (2) military service or a willingness to bear arms for a foreign country;
- (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
- (4) residence in a foreign country to meet citizenship requirements;

(5) using foreign citizenship to protect financial or business interests in another country;

(6) seeking or holding political office in a foreign country; and

(7) voting in a foreign election;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;

(c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest; and

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

In 1999 or 2000, Applicant became a U.S. citizen. In September 2008, she went to Taiwan to visit her father, who was dying. Later in September 2008, her father died. On October 16, 2008, she obtained a Taiwan passport because it would help her obtain a Taiwan Identification Card (TIC). On August 31, 2009, she responded to the SOR, which contained an allegation that she intended to apply for a TIC. In October 2009, she obtained a TIC because she wanted to obtain her share of her inheritance, and possibly to avoid some Taiwanese taxes. She retained her Taiwan citizenship to protect her interest in her inheritance of her portion of her father's estate in Taiwan. After she secured her share of his estate, she continued to retain her Taiwan citizenship and TIC because she hopes to receive a lesser tax on her Taiwan condominium when it is sold. Her TIC shows her residence as her Taiwan condominium, rather than her address in the United States. AG ¶ 10(a)(5) applies.

AG ¶ 11 provides conditions that could mitigate trustworthiness concerns:

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

(d) use of a foreign passport is approved by the cognizant security authority;

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and

(f) the vote in a foreign election was encouraged by the United States Government.

AG ¶ 11(e) applies and mitigates the concern about Applicant's past possession of her Taiwan passport, and her possession of her TIC. She provided both of these documents to her security manager. None of the other mitigating conditions fully apply to SOR ¶ 1.a(1) to 1.a(3). However, her retention of Taiwan citizenship as manifested by obtaining a Taiwan passport and TIC, in 2008 and 2009, respectively, as well as her continued retention of an ownership interest in a condominium located in Taiwan do raise some whole person concerns, which are addressed beginning at page 14, *infra*.

Foreign Influence

AG ¶ 6 explains the trustworthiness concern about "foreign contacts and interests" stating:

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.

AG ¶ 7 indicates four conditions that could raise a trustworthiness 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;

(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; and

(e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). Applicant, her two children, her husband, her mother, her brothers, and her sisters were born in Taiwan. Applicant's siblings and mother are residents of Taiwan. Applicant has particularly close connections to her sister (S) with whom Applicant has frequent communications (SOR ¶ 2.b). Applicant and her husband have an interest in a condominium in Taiwan with an estimated value of about \$150,000 (SOR ¶ 1.d).

After Applicant's father died in September 2008, Applicant's communications with most of her siblings and mother living in Taiwan became infrequent because of the familial conflict over Applicant's inheritance from her father. However, she does communicate frequently with S. Applicant's relationship with S is sufficient to create "a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." This relationship creates a potential conflict of interest between Applicant's "obligation to protect sensitive information or technology and [her] desire to help" S, who lives in Taiwan. For example, if criminals or her siblings in Taiwan wanted to expose Applicant to coercion, they could exert pressure on S or offer inducements to S.

The mere possession of close family ties with a family member living in a foreign country, is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one relative, living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See *Generally* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). The nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion or inducement. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence collection operations against the United States.

The relationship of Taiwan with the United States places a moderate, but not insurmountable, burden of persuasion on Applicant to demonstrate that her relationships with her family members living in Taiwan do not pose a trustworthiness risk. Taiwan is a democracy with a long history of friendship and cooperation with the United States. However, Taiwan has a history of conducting intelligence operations against the United States. Applicant should not be placed in a position where she might be forced to choose between loyalty to the United States and a desire to assist a family member living in Taiwan.

AG ¶¶ 7(a), 7(d), and 7(e) all require substantial evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in having a family member living under a foreign government.

A “heightened risk” is not raised by the nature of the government of Taiwan, because of its history as an ally of the United States, its positive human rights record, and its democratic traditions. However, Taiwan’s industries have been known to target sensitive information and technology in the United States and many other industrialized countries. Taiwan intelligence agencies have engaged in espionage against the United States as recently as five to seven years ago. Taiwan intelligence agencies have specifically targeted U.S. citizens, including government employees, in the past for sensitive and classified information.

In the last 12 months, two Appeal Board decisions reversed administrative judge decisions granting security clearances for applicants with Taiwan connections. In ISCR Case No. 08-04488 at 5 (App. Bd. Apr. 23, 2009), the Appeal Board emphasized that Taiwan is “an active collector of industrial information and a user of industrial espionage techniques.” The Appeal Board determined In ISCR Case No. 08-04488 that the applicant’s frequent communications with two relatives living in Taiwan raised AG ¶ 7(a). Similarly, in ISCR Case No. 08-09211 at 3-4 (App. Bd. Jan. 21, 2010), the Appeal Board held that the connections between the applicant and relatives in Taiwan were sufficient to establish AG ¶ 7(a) as a concern.

While there is no evidence that intelligence operatives from Taiwan seek or have sought sensitive or economic information from or through Applicant, her spouse, or their family members living in Taiwan, it is not possible to rule out such a possibility in the future. Applicant’s relationship with family members living in Taiwan, and the possibility that she or most likely her husband will return to Taiwan, create a potential conflict of interest. Her relationship with her husband is sufficiently close to raise a trustworthiness concern about her desire to assist her spouse (who plans to move to Taiwan), or S (who now lives in Taiwan) should they be endangered or induced by criminals or other family members into providing sensitive or classified information. Department Counsel produced substantial evidence of Applicant’s contacts with S, who is living in Taiwan, and Applicant’s spouse’s plan to retire in Taiwan. This evidence raises the issue of potential foreign pressure or inducements, increasing the possibility of attempted exploitation. Applicant has a substantial interest in a condominium in Taiwan that she purchased in the 1970s. She values her interest at about \$75,000, and her husband’s

interest in the condominium at about \$75,000. AG ¶¶ 7(a), 7(b), and 7(e) apply, and further inquiry is necessary about potential application of any mitigating conditions.

AG ¶ 8 lists six conditions that could mitigate foreign influence trustworthiness concerns including:

(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 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.;

(b) 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;

(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 or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

AG ¶¶ 8(a) and 8(c) have limited applicability. Applicant traveled to Taiwan three times between 1990 and the end of September 2008. Although she may have traveled to Taiwan after September 2008, I do not hold this possibility against her because there is insufficient evidence of a fourth trip to Taiwan. See n. 3, *supra*. Applicant continues to have frequent contact with S, who lives in Taiwan. However, she does not have frequent contacts with her other siblings or her mother, who are living in Taiwan. Her relationships with her other siblings and mother who are living in Taiwan are mitigated under AG ¶ 8(c) because her contacts and communications with them are so casual and infrequent that there is little likelihood that they could create a risk for foreign influence or exploitation. However, because of her connections to Taiwan, and to S, Applicant is not able to fully meet her burden of showing there is "little likelihood that [her relationships with her relatives who are Taiwan citizens] could create a risk for foreign influence or exploitation."

AG ¶ 8(b) partially applies. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S." Applicant has strong family connections to the United States. Her spouse and two children live in the United States and are all U.S. citizens. Applicant owns two houses in the United States. She has substantial investments and bank accounts in the United States.

Applicant's relationship with the United States must be weighed against the potential conflict of interest created by her relationship to S, who lives in Taiwan. She frequently communicates with S. There is no evidence, however, that terrorists, criminals, the Taiwan Government, or those conducting espionage have approached or threatened Applicant or her family to coerce them to obtain sensitive information from Applicant. There is strong evidence that two of her siblings living in Taiwan have made death threats against Applicant and her husband. She has not informed law enforcement of the threats. Nevertheless, there is a reduced possibility that Applicant or Applicant's family would be specifically selected as targets for improper coercion or exploitation by the Taiwan government. While the government does not have any burden to prove the presence of such evidence, if such record evidence were present, Applicant would have a heavy evidentiary burden to overcome to mitigate foreign influence trustworthiness concerns.

AG ¶¶ 8(d), and 8(e) do not apply. The U.S. Government has not encouraged Applicant's involvement with family members living in Taiwan. Applicant is not required to report her contacts with family members living in Taiwan.

AG ¶ 8(f) applies to mitigate the trustworthiness concern raised by her property interest in Taiwan. In comparison to her property interests in the United States, and her employment in the United States, the value of her property in Taiwan is such that it is unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure her. However, this mitigating condition can only fully mitigate trustworthiness concerns raised under AG ¶ 7(e).

The SOR does not list a trustworthiness concern relating to Applicant's husband's plan to retire in Taiwan, or her plan to use her TIC to avoid Taiwan's taxes when she sells her condominium. These non-SOR listed elements are not considered in the analysis of Guideline B, but will be addressed in the Whole Person Concept section, *infra*.

In sum, the primary foreign influence trustworthiness concern is Applicant's close relationship with S as shown by their frequent communications with each other. S lives in Taiwan and could be used to subject Applicant to coercion or inducements.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for assignment to a public trust position 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 assignment to a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guidelines C and B in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

There are some facts supporting mitigation of trustworthiness concerns. Applicant immigrated to the United States in 1985 or 1986. She received her bachelor's degree in the United States. In 1999 or 2000, she became a U.S. citizen. Applicant's spouse also became a U.S. citizen. Her two children were born in the Taiwan, have lived in the United States for most of their lives, and are now U.S. citizens.

Applicant has substantial property and employment connections to the United States. She owns U.S. real estate valued at about \$800,000. Her 401(k) is valued at about \$250,000. She has several hundred thousand dollars in U.S. bank accounts. She intends to remain in the United States, even if her husband retires in Taiwan. She is strong willed and able to resist pressure as shown by her determined refusal to succumb to the pressure of some of her siblings to relinquish her share of her father's estate.

Applicant does not have frequent contacts with most of her siblings, who live in Taiwan. She no longer has frequent contacts with her mother. There is no derogatory information concerning her police or financial records. She has never been fired from a job. There is no evidence of record showing any U.S. arrests, illegal drug possession or use, or alcohol-related incidents.

The circumstances tending to support denial of Applicant's access to sensitive information are more significant than the factors weighing towards grant of her clearance at this time. In September 2008, she went to Taiwan to visit her father, who was dying. Later in September 2008 after she left Taiwan, her father died. On October 16, 2008, she obtained a Taiwan passport because it would help her obtain a Taiwan Identification Card (TIC). On August 31, 2009, she responded to the SOR, which contained an allegation that she intended to apply for a TIC. In October 2009, she obtained a TIC because she wanted to obtain her share of her inheritance, and possibly to avoid some Taiwanese taxes. She retained her Taiwan citizenship to protect her interests in her Taiwan property. Her TIC shows her residence as her Taiwan condominium, rather than her address in the United States. Although she continues to

retain a substantial interest in a condominium in Taiwan, this interest is clearly outweighed by her investments in the United States. There is no established preference for Taiwan over the United States.

Applicant's sister, S, lives in Taiwan, and Applicant has frequent communications with S. Applicant's spouse intends to retire in Taiwan, and Applicant has a close relationship with her spouse. She traveled to Taiwan most recently in 2006 and September 2008. She has an interest valued at about \$75,000 in a condominium in Taiwan. She intends to sell her interest in the Taiwan condominium and use her TIC to mislead Taiwan tax officials into believing she is a resident of Taiwan.

A Guideline B decision concerning Taiwan must take into consideration the geopolitical situation in Taiwan, as well as the dangers existing in Taiwan.⁶ The danger of violence or coercion from terrorists in Taiwan and the threat of coercion from the Taiwan government are relatively low. There is a greater risk that Taiwan intelligence agencies would induce cooperation, as opposed to the use of threats and coercion, to obtain sensitive information.

After weighing all the facts and circumstances in this decision, including Applicant's demeanor, sincerity, and honesty at her hearing, I conclude she has mitigated the foreign preference concern; however, she has not mitigated the foreign influence trustworthiness concern.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"⁷ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, all the evidence in this decision, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude Applicant is not eligible for access to a public trust position.

⁶ See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).

⁷ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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(1) to 1.a(3): For Applicant

Paragraph 2, Guideline B: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: Against Applicant

Subparagraphs 2.c and 2.d: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant or continue Applicant eligibility for a public trust position. Eligibility for a public trust position is denied.

Mark Harvey
Administrative Judge