



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



In the matter of:)	
)	
XXXXXXXXXXXX, XXXXX)	ISCR Case No. 09-03568
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: *Pro se*

January 31, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns for foreign preference and foreign influence. Clearance is denied.

History of Case

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on December 15, 2008. On April 15, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines C (foreign preference) and B (foreign influence). 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 adjudicative guidelines promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant

or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On May 3, 2010, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated June 10, 2010, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. The DOHA transmittal letter is dated June 10, 2010, and Applicant received the FORM on June 16, 2010. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit additional information. Applicant did not submit any information within the 30-day period after receiving a copy of the FORM.

Procedural Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of the certain facts relating to Taiwan. The request, which contained a country summary, and accompanying documents, is contained within the FORM.

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)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice 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). Various facts pertaining to Taiwan were derived from Department Counsel's country summary and accompanying documents as indicated under subheading "Taiwan" of this Decision.

Findings of Fact

Applicant admitted all of the allegations in the SOR. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 25-year-old consultant who has been employed by his defense contractor employer since September 2008. He is a first-time applicant for a security clearance.

Applicant's parents are Taiwanese citizens.¹ In 1984, Applicant's father and mother came to the United States on an F-1 student visa and F-2 spouse visa, respectively. His father attended college and his mother did not work. Applicant was born in the United States in 1985. Applicant and his parents returned to Taiwan in 1992 where he was raised and spent his formative years.² In 2003, Applicant traveled to the United States to visit prospective colleges. In 2004, Applicant returned to the United States to attend a prestigious university.³ In May 2008, he graduated from that university with a Bachelor of Arts Degree in Economics.⁴ For summers during college as well as the summer immediately following his graduation, Applicant returned to Taiwan to live with his parents.⁵

Applicant's immediate family members consisting of his parents and two younger brothers live in Taiwan. He also listed two "Other Relative(s)" who are residents and citizens of Taiwan on his e-QIP.

Applicant possesses a current valid Taiwanese passport that he renewed in 2008 and that will not expire until 2018. He has indicated that he is willing to "surrender his Taiwanese passport if receiving a top-secret clearance was a distinct possibility."⁶ He also used his Taiwanese passport to travel to Taiwan in 2003 in lieu of his United States passport.

Taiwan⁷

In 1949, two million refugees fled from a civil war in mainland China to Taiwan. That same year, Communists in mainland China established the Peoples' Republic of China (PRC or China), and Chiang Kai-shek established a separate, provisional capital for his government in Taipei, Taiwan. The PRC does not recognize Taiwan's independence, and insists that there is only "one China." After long recognizing Taiwan, on January 1, 1979, the United States formally recognized the government of the PRC as the sole legal government of China. The United States does not support independence for Taiwan and is committed to a "one-China policy," under the Taiwan Relations Act, signed into law on April 10, 1979.

¹ Item 5 at 25-26.

² Item 5 and Item 6.

³ Item 6.

⁴ Item 5.

⁵ *Id.*

⁶ Item 4.

⁷ The contents of the Taiwan section are taken in whole or in part from Department Counsel's request for administrative notice and accompanying documents.

Taiwan is a multi-party democracy that has significant economic contacts with China, and it has developed a strong economy since its separation from the PRC in 1949. However, Taiwan's own national security remains under constant threat from the PRC and this has led to Taiwan's large military establishment. The PRC's Ministry of State Security is the "preeminent civilian intelligence collection agency in China," and maintains intelligence operations in Taiwan, through a bureau utilizing PRC nationals with Taiwan connections.

Taiwan is known to be an active collector of U.S. economic intelligence, and the National Counterintelligence Center (NACIC)'s 2000 Annual Report to Congress on Foreign Economic Collection and Industrial Espionage lists Taiwan as being among the most active collectors of U.S. economic and proprietary information. The 2000 Report highlights specific incidents wherein Taiwan engaged in attempts to acquire export-restricted products.

There have been various cases involving the illegal export, or attempted illegal export, of U.S. restricted, dual use technology to Taiwan, including: (1) laser gun aimer/sights;⁸ (2) measuring probes controlled for nuclear nonproliferation and national security reasons;⁹ (3) centrifugal pumps that are controlled for chemical and biological weapons and anti-terrorism reasons;¹⁰ (4) Metal Organic Vapor Disposition tools controlled for national security and anti-terrorism reasons;¹¹ (5) fluid control valves that are controlled for national security, foreign policy, nonproliferation, or anti-terrorism reasons;¹² (6) radio communication encryption modules;¹³ and (7) controlled nickel powder.

Additionally, in December 2005, Donald Keyser, the Principal Deputy Assistant Secretary of State for East Asian and Pacific Affairs, pled guilty to illegally removing classified materials and to providing false statements to the U.S. Government. Mr. Keyser was engaged in a relationship with, and met with, an intelligence officer

⁸ U.S. Department of Commerce, Bureau of Industry and Commerce, *California Exporter Fined in Connection with Attempted Taiwan Export*, dated September 30, 1999.

⁹ U.S. Department of Commerce, Bureau of Industry and Commerce, *Commerce Department Imposes Civil Penalty on Minnesota Firm in Settlement of Export Violations*, dated December 20, 2001.

¹⁰ U.S. Department of Commerce, Bureau of Industry and Commerce, *Connecticut Company Settles Charges Concerning Unlicensed Pump Exports to China, Taiwan, Israel, and Saudi Arabia*, dated July 28, 2003.

¹¹ U.S. Department of Commerce, Bureau of Industry and Commerce, *Emcore Corporation Settles Charges of Export Control Violations*, dated January 26, 2004.

¹² U.S. Department of Commerce, Bureau of Industry and Commerce, *Parker Hannifan Corp. Settles Charges Pertaining to Illegal Exports to Taiwan and China*, dated November 17, 2005.

¹³ U.S. Department of Commerce, Bureau of Industry and Commerce, *Defendants Indicted on Charges of Conspiracy to Export Controlled Items*, dated August 19, 2005; *United States v. Ching Kan Wang and Robin Chang*, Case No. 05-60218-CR-SEITZ (S.D. Fla.), Superseding Indictment (filed October 6, 2005) and Judgment in a Criminal Case (filed March 7, 2006).

employed by the National Intelligence Bureau, the foreign intelligence agency of the government of Taiwan.

Policies

In an evaluation of an applicant's security or trustworthiness suitability, an administrative judge must consider the "Adjudicative Guidelines for Determining Eligibility For Access to Classified Information" (AG(s)). The AGs include brief introductory explanations for each AG, and provide specific disqualifying conditions and mitigating conditions.

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

Specifically, an administrative judge should consider the nine adjudicative process factors listed at AGs ¶ 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) 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."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "[a]ny doubt concerning personnel being considered for access to classified [or sensitive] information will be resolved in favor of national security." AG ¶ 2(b). 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.

In the decision-making process, the Government has the initial burden of establishing controverted facts by "substantial evidence,"¹⁴ demonstrating, in

¹⁴ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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).

accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. 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).¹⁵

A person seeking access to classified or 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. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to such information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified or sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of such information.

The scope of an administrative judge's decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. Executive Order 10865, § 7.

Analysis

Guideline C, Foreign Preference

AG ¶ 9 explains the security concern:

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 sets out the following conditions that could raise a security concern and may be disqualifying in this case:

¹⁵The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

(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;

(d) any statement that shows allegiance to a country other than the United States

Applicant's exercise of his Taiwanese citizenship exhibits a foreign preference. Preference for a foreign country need not be motivated by political or ideological reasons to have negative implications within the meaning of Guideline C. The Appeal Board has held that the personal nature of an applicant's motivation does not negate or diminish the security significance of his or her interest in retaining foreign citizenship.¹⁶ As the U.S. Supreme Court held: "The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both."¹⁷ Dual citizenship by its very nature creates a problem of potentially conflicting national interests and national laws. Dual citizenship carries privileges and benefits as well as obligations, which require the Applicant to comply with the laws of the country in which he is located.¹⁸ Security concerns are raised not only by the fact that Applicant's exercise of his dual citizenship meets disqualifying conditions AG ¶¶ 10(a)(1) and (d), but also by the fact that the Applicant can be made subject to the control of the foreign government as one its citizens.

In the Directive, there are six conditions that could mitigate a Guideline C security concern. The only potential mitigating condition applicable here is AG ¶ 11(a): "dual citizenship is based solely on parents' citizenship or birth in a foreign country." While Applicant's foreign citizenship may have been obtained based solely on his parents' citizenship, he continues to exercise the rights of a Taiwanese citizen, especially by his possession of a current valid Taiwanese passport. Given these facts, Applicant has failed to eliminate the Guideline C security concerns.

Guideline B, Foreign Influence

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

[I]f the individual has divided loyalties or foreign financial interests, [he or she] 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

¹⁶ ISCR Case. No. 98-0476 (App. Bd. Dec. 14, 1999) at p. 5.

¹⁷ *Kawakita v. United States*, 343 U.S. 717, 723 (1952).

¹⁸ *Id.* At 734, 735.

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 sets out the following conditions that 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; and

(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.

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001). Applicant frequently travels to Taiwan to visit his immediate family members consisting of his parents and two younger brothers in Taiwan and has frequent contact with them. These close relationships create a potential risk of foreign exploitation, inducement, manipulation, pressure, or coercion meriting a close examination of all circumstances.

Applicant's relationships with his immediate Taiwanese family members raise such security concerns. "Adjudication under [Guideline B of the Directive] 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 the United States citizens to obtain protected information and/or is associated with a risk of terrorism." Heightened risk does not necessarily require that the foreign country at issue be hostile. The Appeal Board has recognized that not all countries that seek protected information do so in order to harm the United States.¹⁹ A country may seek to gain access to the United States' classified or protected information not to harm the United States, but to better its own position.

As noted in the Administrative Notice section above, Taiwan has been one of the most active collectors of the U.S. economic and proprietary information.²⁰ Furthermore,

¹⁹ ISCR Case No. 02-26976 at 5 (App. Bd. Oct 22, 2004).

²⁰ Interagency OPSEC Support Staff (IOSS), *Intelligence*.

there have been cases involving the illegal export, or attempted illegal export, of U.S. restricted, dual use technology to Taiwan. Since Taiwan is an active collector of U.S. proprietary and dual use technology, Applicant's close Taiwanese family contacts could create a heightened risk under AG ¶ 7(a).

The Government produced substantial evidence of these two disqualifying conditions as a result of Applicant's admissions and evidence presented. The burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the Government.

AG ¶ 8 lists three potential mitigating conditions to these disqualifying conditions:

(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; and

(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.

Applying common sense and life experience, there is a rebuttable presumption that a person has ties of affection for or obligation to his immediate family. ISCR Case No. 04-07766 at 4 (App. Bd. Sept. 26, 2006); ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002). Applicant has demonstrated the indicia of ties of affection for or obligation to his immediate family by his frequent visits to Taiwan.

AG ¶ 8(a) applies if the circumstances make it unlikely that an Applicant will be required to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States. With Taiwan being an active collector, Applicant has failed to present sufficient evidence that it is unlikely he will be placed in such a position. Similarly, AG ¶ 8(b) does not apply because it cannot be said that Applicant's loyalty or obligations to his family are minimal. Applicant frequently visits his immediate family in Taiwan. Nor has Applicant presented sufficient evidence that he has such deep and longstanding relationships and loyalties in the United States that he could be expected to resolve any conflict of interest in favor of the United States. Of

note, Applicant's formative years and the majority of his life were spent in Taiwan. Based on the evidence presented, Applicant has demonstrated that he has longstanding ties to Taiwan, especially in light of his choosing to exercise his rights as a Taiwanese citizen by possessing a Taiwanese passport. Similarly, AG ¶ 8(c) does not apply. Applicant's evidence demonstrates that his contacts with his family members in Taiwan are neither casual nor infrequent.

Whole-Person Concept

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole-person concept under Directive ¶ E2.2.1. "Under the whole-person concept, the administrative judge must not consider and weigh incidents in an applicant's life separately, in a piecemeal manner. Rather, the judge must evaluate an applicant's security eligibility by considering the totality of an applicant's conduct and circumstances."²¹ The directive lists nine adjudicative process factors (APF) which are used for "whole person" analysis. Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation and behavior changes, etc., the eighth APF, "the potential for pressure, coercion, exploitation, or duress," Directive ¶ E2.2.1.8, is the most relevant of the nine APFs to this adjudication.²² In addition to the eighth APF, other "[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." Directive ¶ E2.2.1. Ultimately, the clearance decision is "an overall commonsense determination." Directive ¶ E2.2.3.

The Appeal Board requires the whole-person analysis address "evidence of an applicant's personal loyalties; the nature and extent of an applicant's family's ties to the U.S. relative to his [or her] ties to a foreign country; his or her social ties within the U.S.; and many others raised by the facts of a given case." ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

I have carefully considered Applicant's family connections and personal connections to Taiwan. First, and most importantly for security purposes, Taiwan actively seeks classified and industrial and economic information. Taiwan may attempt to use Applicant's family members who live in Taiwan to obtain such information. Also, Applicant spent his formative years in Taiwan. Applicant has visited Taiwan numerous

²¹ ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)); ISCR Case No. 05-02833 at 2 (App. Bd. Mar. 19, 2007) (citing *Raffone v. Adams*, 468 F.2d 860 (2nd Cir. 1972) (taken together, separate events may have a significance that is missing when each event is viewed in isolation).

²² See ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006) (stating that an analysis under the eighth APF apparently without discussion of the other APFs was sustainable); ISCR Case No. 03-10954 at 5 (App. Bd. Mar. 8, 2006) (sole APF mentioned is eighth APF); ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (remanding grant of clearance because Judge did not assess "the realistic potential for exploitation"), *but see* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 5, 2007) (rejecting contention that eighth APF is exclusive circumstance in whole person analysis in foreign influence cases).

times. Applicant also maintains frequent contact with his parents and two younger brothers in Taiwan. These contacts and visits are manifestations of strong affection and regard Applicant has for family members in Taiwan.

This case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. This analysis must answer the question whether there is a legitimate concern under the facts presented that the Taiwanese government or its agents might exploit or attempt to exploit Applicant's family members in such a way that this U.S. citizen would have to choose between his pledged loyalty to the United States and those family members. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has not mitigated the security concerns for foreign influence and preference.

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"²³ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline C:	AGAINST APPLICANT
Subparagraphs 1a:	Against Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraphs 2a – 2d:	Against 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 eligibility for a security clearance for Applicant. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge

²³See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).