DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 09-03831
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

October 29, 2010

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding foreign influence and personal conduct. Eligibility for a security clearance or access to classified information is granted.

Statement of the Case

On August 15, 2002, Applicant applied for a security clearance and submitted an Electronic Personnel Security Questionnaire (EPSQ) version of a Security Clearance Application (SF 86).[1] On subsequent unspecified dates in 2009, the Defense Office of Hearings and Appeals (DOHA) furnished him two separate sets of interrogatories. He responded to the first set of interrogatories on August 4, 2009,[2] and to the second set on September 4, 2009.[3] On November 20, 2009, DOHA issued a Statement of Reasons

[1] Item 4 (SF 86), dated August 15, 2002.

[2] Item 6 (Applicant's Answers to Interrogatories, dated August 4, 2009).

[3] Item 7 (Applicant's Answers to Interrogatories, dated September 4, 2009).

(SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) for all adjudications and other determinations made under the Directive. The SOR alleged security concerns under Guidelines E (Personal Conduct) and B (Foreign Influence), and detailed reasons why DOHA could not make a 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.

Applicant acknowledged receipt of the SOR on November 25, 2009. In a sworn, written statement, dated December 7, 2009, 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) was provided to Applicant on March 2, 2010, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on March 11, 2010, and submitted a letter to Department Counsel on April 7, 2010. The case was assigned to me on April 23, 2010.

Rulings on Procedure

Department Counsel requested that I take Administrative Notice of certain enumerated facts pertaining to the Republic of China (Taiwan), appearing in a written request. Facts are proper for Administrative Notice when they are easily verifiable by an authorized source and relevant and material to the case. In this instance, the source information relied upon by the Government was publications of the Department of State;[4] the Congressional Research Service;[5] the Centre for Counterintelligence and Security Studies;[6] the National Counterintelligence Center, now known as the Office of the National Counterintelligence Executive;[7] six press releases from the U.S. Department of Commerce, Bureau of Industry and Security;[8] court documents

[4] U.S. Department of State, Bureau of East Asian and Pacific Affairs, *Background Note: Taiwan*, dated October 2009; U.S. Department of State, *Taiwan: Specific Information*, dated November 9, 2009.

[5] Congressional Research Service, Library of Congress, *Taiwan-U.S. Relations: Developments and Policy Implications*, dated August 21, 2009.

[6] Interagency OPSEC Support Staff, Center for Counterintelligence and Security Studies, *Intelligence Threat Handbook*, excerpts, dated June 2004.

[7] National Counterintelligence Center, *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage,* dated 2000; National Counterintelligence Center, *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage,* dated 2007.

[8] U.S. Department of Commerce, Bureau of Industry and Security, Press Release, *California Exporter Fined in Connection with Attempted Taiwan Export*, dated September 30, 1999; U.S. Department of Commerce, Bureau of Industry and Security, Press Release, *Commerce Department Imposes Civil Penalty on Minnesota Firm in Settlement*

pertaining to a case in the U.S. District Court, Southern District of Florida;[9] a press release from the U.S. Department of Justice, U.S. Attorney, Eastern District of Virginia;[10] and records of the U.S. District Court for the Eastern District of Virginia.[11]

With regard to the 2000 National Counterintelligence Center Report, I note that it is 10 years old, and the cited facts are based upon a "private survey" of "nearly a dozen selected Fortune 500 companies." The report does not indicate how the companies were selected, what companies were selected, or how they decided upon their input to the survey. The survey results do not indicate whether the collection of economic information was accomplished through "open" methods, such as reading a newspaper, that raise no security issues under the relevant criteria, or more covert methods that might raise security concerns. Furthermore, as the selected companies are unidentified, it is impossible to assess possible bias or determine if there is an existing anti-Taiwan economic or political agenda. For these reasons, I conclude the factual matters asserted by Department Counsel, as demonstrated by the proffered report, should be given less weight than information from a more authoritative source.

The six press releases of the U.S. Department of Commerce were presented apparently to substantiate that Taiwan actively pursues collection of U.S. economic and propriety information, and therefore, Applicant's relationship with family members in Taiwan raises suspicion of him. None of the cases involves Applicant personally or involved espionage through any familial relationship. There is no indication of any government sponsorship, approval, or involvement encouraging the Taiwanese company's attempt to acquire sensitive commercial information for competitive advantage. Likewise, there is no evidence that Taiwan's government was involved in, or sanctioned, the criminal activity.

The Eastern District of Virginia press release and the court records set forth the facts and sentencing of a former U.S. State Department official for unauthorized possession of classified information, making false statements to the government concerning his relationship with a female Taiwanese intelligence officer, and by not reporting that he had traveled to Taiwan where he met with the foreign intelligence

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of Export Violations, dated December 20, 2001; U.S. Department of Commerce, Bureau of Industry and Security, Press Release, *Connecticut Company Settles Charges Concerning Unlicensed Pump Exports to China, Taiwan, Israel, and Saudi Arabia*, dated July 28, 2003; U.S. Department of Commerce, Bureau of Industry and Security, Press Release, *Emcore Corporation Settles Charges of Export Control Violations*, dated January 26, 2004; U.S. Department of Commerce, Bureau of Industry and Security, Press Release, *Parker Hannifin Corp. Settles Charges Pertaining To Illegal Exports To Taiwan And China*, dated November 17, 2005; U.S. Department of Commerce, Bureau of Industry and Security, Press Release, *Defendants Indicted On Charges Of Conspiracy To Export Controlled Items*, dated August 19, 2005.

[9] U.S. District Court Southern District of Florida, Criminal Case No. 05-60218-CR-Seitz, *U.S. v. Ching Kan Wang and Robin Chang*, Superseding Indictment, filed October 6, 2005; Certificate of Trial Attorney, undated; Penalty Sheet, undated; Judgment in a Criminal Case, dated March 7, 2006.

[10] U.S. Department of Justice, U.S. Attorney, Eastern District of Virginia, *Press Release: Former State Department Official Sentenced for Mishandling Classified Material*, dated Jan. 22, 2007.

[11] U.S. District Court Eastern District of Virginia, Criminal Case No. 1:05CR43, *U.S. v. Donald W. Keyser*, Statement of Facts, dated Dec. 12, 2005.

officer. The criminal wrongdoing of other U.S. citizens is of decreased relevance to an assessment of Applicant's security suitability, especially where there is no evidence that Applicant, nor any member of his family, was ever involved in any aspect of the case or ever targeted by any Taiwanese intelligence official.

After weighing the reliability of the source documentation and assessing the relevancy and materiality of the facts proposed by the Government, pursuant to Rule 201, *Federal Rules of Evidence*, I take administrative notice of certain facts,[12] as set forth below under the Taiwan subsection. However, the inference that somehow Applicant and/or his family participated in criminal activity was not argued and is not accepted.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.c., and 2.a. through 2.g. of the SOR. He denied the factual allegations under ¶¶ 1.a., 1.b., and 1.d. of the SOR.

Applicant is a 66-year-old employee of a defense contractor, currently serving as chief scientist.[13] He was previously granted a SECRET security clearance in 1993,[14] but his continued access to classified information was "disapproved" by another government agency in 2006.[15] It is unclear if Applicant was offered an opportunity to appeal that decision under Executive Order 10865 and the Directive, as the "disapproval" letter only advised him of an opportunity to "review" the determination.[16] In March 2008, his security clearance was suspended by the Defense Security Service (DSS), based upon the notification provided by the other government agency that his access to classified information had been denied.[17]

[12] 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). Requests for administrative notice may utilize authoritative information or sources from the internet. *See, e.g*. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (citing internet sources for numerous documents).

[13] Item 4, *supra* note 1, at 2.

[14] *Id.* at 8.

[15] Letter from another government agency senior adjudication officer, dated May 24, 2006, attached to Item 6, *supra* note 2.

[16] *Id.* at 2.

[17] Letter from DSS, dated March 28, 2008, attached to Item 6, *supra* note 2.

Foreign Influence

Applicant was born in mainland China in 1944, and resided there with his family until they fled to Taiwan in 1948, during the Communist revolution.[18] His father was a retired bank clerk and his mother, a housewife and homemaker. Both are now deceased.[19] Applicant had four older brothers (two are deceased) and two older sisters (one is deceased).[20] Two of his siblings are retired (one an accountant and the other, a chemist), naturalized U.S. citizens, now residing in the United States.[21] One brother, a retired hotel manager, who attended a military accounting school, is a Taiwanese citizen, residing in Taiwan.[22] Applicant attended primary and secondary schools in Taiwan, and received a B.S. degree in Physics from a Taiwanese university in 1968.[23] In order to complete his military commitment, he served as a reserve second lieutenant in the Taiwanese Army Signal Corps during 1968-1969.[24] He came to the United States in January 1970 on a student visa, and attended a major U.S. university on a full scholarship and later as a student assistant, while earning a M.S. degree in Physics, in 1971, and a Ph.D. in Physics, in 1976.[25] Applicant was married in 1972,[26] and became a U.S. resident alien in about 1974.[27] He and his wife have one child, a son born in 1981.[28] Applicant became a naturalized U.S. citizen in November 1985.[29]

Applicant's wife was born in mainland China in 1948, and subsequently raised and educated in Taiwan.[30] She received a degree in Chinese Literature from a Taiwanese university.[31] She came to the United States in 1970, worked for a U.S. airline, and became a naturalized U.S. citizen in 1975.[32]

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[18] Item 4, *supra* note 1, at 1; Item 5 (Statement of Subject, dated May 2, 2003), at 10.

[19] *Id.* Item 5, at 3.

[20] *Id.* at 4-6.

[21] *Id.* at 4-5.

[22] *Id.* at 6-7, 13; Item 3 (Applicant's Answer to the SOR, dated December 7, 2009), at 1. It should be noted that two items were erroneously marked as item 2, although the FORM properly identified them. I have remarked this item to comport to the numbering set forth in the FORM.

[23] Item 5, *supra* note 18, at 11.

[24] *Id.* at 12.

[25] *Id.* at 13.

[26] *Id.* at 7, 14.

[27] *Id.* at 13.

[28] *Id.* at 14.

[29] Item 4, *supra* note 1, at 1.

[30] Item 5, supra note 18, at 7, 14.

[31] *Id.* at 16.

[32] *Id.* at 7, 14-16.

Applicant's father-in-law was born and raised in mainland China, attended Chinese schools where he received a degree in Education, and received a Ph.D. from a major U.S. university.[33] He served as a high school principal in Taiwan,[34] and after completing his studies in the United States, decided to remain here. He became a U.S. resident alien in 1968, brought his family to the United States in 1970, and became a naturalized U.S. citizen in about 1972.[35] He retired in the early 1980s, after working as an assistant to the Cultural Attaché at the Taiwanese Embassy.[36] He returned to Taiwan in 1992, and currently resides in a nursing home in Taiwan.[37] He is approximately 95 years old.[38]

Applicant's mother-in-law (deceased) was born, raised, and educated in mainland China. She was a writer.[39]

Applicant's wife had two older brothers (one is a deceased engineer) who were born and raised in mainland China. Her surviving brother is a Taiwanese citizen and resident of Taiwan who is a professor at a private Taiwanese college.[40]

Personal Conduct

In April 2003, Applicant was interviewed by a special agent of DSS who prepared a "rough draft" of a statement regarding Applicant's family background, the background of his wife and in-laws, his foreign travel, and foreign connections.[41] Applicant made a few insignificant changes to the draft and, on May 2, 2003, signed the lengthy sworn, written statement.[42] In his statement, Applicant discussed his family's military involvement in Taiwan. He acknowledged serving as a reserve second lieutenant in the Taiwanese Army Signal Corps for one year, and indicated he believed it to be the equivalent of an ROTC program in the United States. He also stated that one of his brothers had "attended a military accounting school in Taiwan, but was never actually in the infantry."[43] That statement is at odds with his subsequent admission that his

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[33] *Id.* at 15-16.

[34] *Id.* at 15.

[35] *Id.* at 17.

[36] *Id.*

[37] *Id.* at 7-8, 17.

[38] *Id.* at 7.

[39] *Id.* at 15-16.

[40] *Id.* at 8-9.

[41] Item 3 (Draft Statement of Subject, undated), attached to Applicant's Answer to the SOR.

[42] Item 5, *supra* note 18.

"brother is retired from the Taiwanese Army."[44] It is also at odds with an admission purportedly made during his "security testing sessions in October 2003,"[45] after supposedly denying the allegation. In his Answer to the SOR, Applicant further confused the situation by denying that his brother is retired from the Taiwanese Army and explaining that the brother had "retired from the military (he attended a military accounting school as [previously reported]) 20-30 years ago."[46]

Based on the totality of the evidence before me, I conclude that the confusion was caused by miscommunication and misinterpretation, and that Applicant's brother attended a military school, and may have briefly served in the Taiwanese Army, but did not actually retire from such military service. There is no evidence that Applicant deliberately provided false information regarding his brother's relationship with the Taiwanese military.

It is alleged that during a June 2003 interview with a security representative, not further identified, Applicant falsified material facts pertaining to foreign contacts and foreign connections. He purportedly failed to disclose that he had nine foreign contacts, including four former classmates and a brother-in-law, all of whom were citizens and residents of Taiwan.[47] Applicant denied the allegation.[48] In his May 2003 statement, Applicant listed his brother as his sole personal foreign connection, and his wife's father and brother as her foreign connections.[49] He also referred to foreign business travel where he attended technical conferences.[50] He contends that during the interview in question, four people in his contact list were people he met at conferences and one had visited his company. The other four individuals were former classmates in Taiwan. They occasionally visited the United States and he would join them for small reunion dinners. Since he never initiated the contacts, and business was never discussed, he was not aware that they should have been reported as foreign contacts.[51]

Based on the totality of the evidence before me, I conclude that the confusion was caused by a combination of insufficient security training, miscommunication, or misinterpretation, and that Applicant's listing of individuals and circumstances which

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[43] *Id.* at 12.

[44] Item 3, *supra* note 22, at 1; *see* SOR ¶ 2.e.

[45] Letter from another government agency senior adjudication officer, *supra* note 15, at 1. It should ne noted that there is nothing in evidence to support the conclusion that Applicant ever actually made that statement.

[46] Item 3, *supra* note 22, at 1.

[47] *See* SOR ¶ 1.a. It should be noted that there is nothing in evidence to support the conclusion that Applicant ever actually made that statement.

[48] Item 3, *supra* note 22, at 1.

[49] Item 5, *supra* note 18, at 21.

[50] *Id.* at 18-19.

[51] Item 3, *supra* note 22, at 1.

predated the interviews, supports his contentions. There is no evidence that Applicant deliberately provided false information or deliberately omitted or concealed relevant information regarding his foreign contacts.

It is also alleged that during what was characterized as his "security testing sessions" in October 2003, Applicant deliberately failed to disclose that his brother-in-law is a "former Taiwanese Government employee."[52] Applicant has admitted that his brother-in-law is a former Taiwanese Government employee,[53] but steadfastly denied that the omission was deliberate.[54] While there may be an allegation regarding the brother-in-law, there is no evidence that Applicant deliberately omitted or concealed relevant information regarding his brother-in-law's former employment.

It is also alleged that during a July 2007 interview with an OPM investigator, Applicant falsified material facts when he stated that his last contact with his Taiwanese brother occurred 15 years ago when Applicant visited Taiwan, and that he deliberately failed to disclose his contact with his brother in at least 2005.[55] In his May 2003 statement, Applicant stated that he maintained yearly telephone contact with his brother from 1970 to the date of the statement, and that they had personal contact during his brother's visit to the United States in approximately 1994 or 1995.[56] Applicant confused the situation in his Answer to the SOR when he reversed the facts to indicate the personal contact occurred in Taiwan when he visited his brother.[57]

The July 2007 unsworn declaration, prepared by the OPM investigator, with Applicant's corrections, contained two separate references to Applicant's brother. In one section, it states that they last had an "in person" contact about 15 years earlier,[58] and in another section it states they had contact "1 time per 15 years to include when [Applicant] last had an in person visit."[59] In his Answer to the SOR, Applicant contended that the issue was "probably a miscommunication." He noted that he had listed his brother as a foreign connection in his May 2003 statement, and indicated he spoke with him on an annual basis at around the New Year.[60]

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[52] *See* SOR ¶ 1.b.

[53] Item 3, *supra* note 22, at 1.

[54] *Id.*

[55] *See* SOR ¶ 1.d.; Personal Subject Interview, at 1, attached to Item 7, *supra* note 3.

[56] Item 5, *supra* note 18, at 21.

[57] Item 3, *supra* note 22, at 2.

[58] Personal Subject Interview, at 1, attached to Item 7, *supra* note 3.

[59] *Id.* at 5.

[60] Item 3, *supra* note 22, at 2.

Based on the totality of the evidence before me, I conclude that the confusion was caused by a combination of miscommunication or erroneous interpretation, and that Applicant's references to his brother and the circumstances of their contacts, some of which predated the interview, supports his contentions. There is no evidence that Applicant deliberately provided false information or deliberately omitted or concealed relevant information regarding his relationship with his brother. During the Fall of 2007, after Applicant's interview, his brother and sister-in-law visited him in the United States.[61]

Neither Applicant nor his wife is a dual citizen.[62] They have only loyalty, allegiance, and preference for the United States.[63] He and his family would bear arms against any enemy of the United States.[64] They have no interests in foreign businesses, bank accounts, foreign stocks, or foreign property, and have no foreign inheritance rights.[65] Other than his brief period with the Taiwanese Army, neither he nor his family has ever worked for or been associated with any foreign government or intelligence agency.[66]

Taiwan

In 1949, a large number of Chinese refugees fled from the civil war in mainland China and immigrated to the off-shore Island of Formosa. The Communists in mainland China established the Peoples Republic of China (PRC), and Chiang Kai-shek, the leader of the Kuomintang on mainland China, established a provisional government and capital in Taipei, Taiwan. The PRC refuses to recognize Taiwan's independence, and insists that there is only "one China." After recognizing Taiwan for nearly 30 years, on January 1, 1979, the United States formally recognized the government of the PRC as the sole legitimate government of China. The United States does not support independence for Taiwan and, under the Taiwan Relations Act, signed into law on April 10, 1979, is committed to a "one-China policy." Nevertheless, the United States has been also been committed to maintaining cultural, commercial and other nonofficial relations with Taiwan, and continues to provide arms in support of Taiwan's security and region stability.

Taiwan is a multi-party democracy with a strong economy, with significant economic contacts with both the PRC and the United States. Taiwan's own national security remains under constant threat from the PRC since PRC has not renounced the

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[61] *Id.* at 1.

[62] Item 4, *supra* note 1, at 1-2; Item 5, *supra* note 18, at 17.

[63] *Id.* Item 5, at 21.

[64] *Id.*

[65] *Id.* at 22.

[66] *Id.*

use of force against Taiwan, and this has led to Taiwan's large military establishment. Taiwan's armed forces are equipped with weapons obtained primarily from the United States, but Taiwan has stressed military self-reliance in recent years that has resulted in the growth of indigenous military production.

Taiwan is believed to be an active collector of U.S. economic intelligence and proprietary information. There is no evidence that Taiwan uses coercive measures to gain access to such information. While there have been a number of incidents involving individuals, companies, and Taiwanese intelligence officers improperly acquiring U.S. economic intelligence and proprietary information, there is no direct or indirect connection to, or involvement with, Applicant.

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."[67] As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[68]

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

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."[69] The Government initially has the burden of producing evidence to establish

[67] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[68] Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

[69] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4,

a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.[70]

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials."[71]

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."[72] Thus, 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. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

Analysis

Guideline B, Foreign Influence

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

> Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a

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2006) (citing Directive ¶ E3.1.32.1). "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).

[70] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

[71] *Egan*, 484 U.S. at 531

[72] *See* Exec. Or. 10865 § 7.

> 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.

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.[73]

The guideline notes several conditions that could raise security concerns. Under AG ¶ 7(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" is potentially disqualifying. Similarly, under AG ¶ 7(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" may raise security concerns. AG ¶¶ 7(a) and 7(b) apply in this case. However, the security significance of these identified conditions requires further examination of Applicant's respective relationships with his family members (a brother) and extended family members (a brother-in-law) who remain Taiwanese citizen-residents to determine the degree of "heightened risk" or potential conflict of interest.

The guideline also includes examples of conditions that could mitigate security concerns arising from foreign influence. Under AG ¶ 8(a), the disqualifying condition may be mitigated where "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." Similarly, AG ¶ 8(b) may apply where the evidence shows "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." Also, AG ¶ 8(c) may apply where "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."

[73] *See* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 at 12 (App. Bd. Feb. 8, 2001).

Applicant's relationship with his brother and brother-in-law is diverse. His relationship with his brother was, for the most part, extremely limited since Applicant left Taiwan in 1970. The annual telephone call between them and two visits in the period of 40 years does not drastically alter this minimal relationship. Likewise, he has had an even lesser relationship with his brother-in-law. While his wife's relationship with her brother is much closer, involving several visits and routine telephone calls, Applicant's one visit and rare telephone contacts during a period of nearly 35 years, renders the contact and relationship with his brother-in-law as casual and infrequent.

In assessing whether there is a heightened risk because of an applicant's relatives or associates in a foreign country, it is necessary to consider all relevant factors, including the totality of an applicant's conduct and circumstances, and the realistic potential for exploitation. One such factor is the potential for pressure, coercion, exploitation, or duress. In that regard, it is important to consider the character of the foreign power in question, including the government and entities controlled by the government, within the relevant foreign country. Nothing in Guideline B suggests it is limited to countries that are hostile to the United States.[74] In fact, the Appeal Board has cautioned against "reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B."[75] Nevertheless, the relationship between a foreign government and the U.S. may be relevant in determining whether a foreign government or an entity it controls is likely to attempt to exploit a resident or citizen to take action against the U.S. through the Applicant. It is reasonable to presume that a friendly relationship, or the existence of a democratic government, is not determinative, but it may make it less likely that a foreign government would attempt to exploit a U.S. citizen through relatives or associates in that foreign country.

As noted above, the United States and Taiwan have a history of friendly relations making it less likely that the Taiwanese Government would attempt coercive means to obtain sensitive information. However, it does not eliminate the possibility that a foreign power would employ some non-coercive measures in an attempt to exploit his relatives. While Applicant has a brother and brother-in-law still residing in Taiwan, there may be speculation as to "some risk," but that speculation, in the abstract, does not, without substantially more, establish evidence of a "heightened risk" of foreign exploitation, inducement, manipulation, pressure, or coercion.

As to Applicant's relationship with his brother and brother-in-law, there is a very low potential of forcing him to choose between the interests of United States and those of either Taiwan or those two family members. He has met his burden of showing there is little likelihood that those relationships could create a risk for foreign influence of exploitation. I find AG ¶¶ 8(a) and 8(c) partially apply in this case and 8(b) fully applies. Applicant has been a resident of the United States since 1970, and a naturalized U.S. citizen since 1985. He attended two U.S. universities for his higher education. His wife came to the United States in 1970, and became a naturalized U.S. citizen in 1975. Their

[74] *See* ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002); ISCR Case No. 00-0489 at 12 (App. Bd. Jan. 10, 2002).

[75] ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002).

child is a native-born U.S. citizen. Two of his three surviving siblings are U.S. citizens, residing in the United States. His 95-year old father-in-law is a U.S. citizen, currently residing in a nursing home in Taiwan. Applicant and his wife have no foreign financial interests, and their relationships and loyalties in the United States are of such depth and longstanding nature that Applicant can be expected to resolve any conflict of interest in favor of the United States.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(b), "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative," may raise security concerns.

During interviews and security testing sessions in 2003 and 2007, Applicant was questioned about his family background, the background of his wife and in-laws, his foreign travel, and foreign connections. He furnished extensive information for each of the topics covered, and it appears that some of his responses were either garbled or misconstrued. The Government contends that his responses constituted deliberately providing false information, or omitting and concealing relevant information, during the security clearance process. While Applicant may have given garbled or inconsistent responses, there is no evidence that his responses were deliberate attempts to provide false or misleading information. From an extensive review of the evidence, it looks as though Applicant was attempting to be thorough, even though inconsistencies did appear, sometimes within the same document(s). However, I can find no evidence of a deliberate falsification or concealment. There is only some confusion over the meanings of some words such as "retired" and "contacts." I find Applicant's explanations are credible in his denial of deliberate falsification.[76] AG ¶ 16(b) has not been established.

[76] The Appeal Board has explained the process for analyzing falsification cases, stating:

> (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

Whole-Person Concept

Under the whole-person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has resided in the United States since 1970, and became a U.S. citizen in 1985. He married in the United States, and his closest family members are his wife and child, both of whom are U.S. citizens, and reside in the United States. Two of his three surviving siblings are U.S. citizens and they too reside in the United States. As such, they are not vulnerable to direct coercion or exploitation, and the realistic possibility of pressure, coercion, exploitation, or duress with regard to them is low. He has one brother and brother-in-law who are both citizens and residents of Taiwan, but his relationship with them is minimal. His 95-year old father-in-law is a naturalized U.S. citizen, residing in a Taiwanese nursing home.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude Applicant has mitigated the foreign influence and personal conduct security concerns. (*See* AG ¶¶ 2(a)(1) through 2(a)(9).)

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his foreign influence and personal conduct.

Formal Findings

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

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	For Applicant
Subparagraph 2.f:	For Applicant
Subparagraph 2.g:	For Applicant

Conclusion

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

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ROBERT ROBINSON GALES
Administrative Judge