



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



In the matter of:)
)
) ISCR Case No. 10-07580
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

November 10, 2011

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to deny her eligibility for a security clearance to work in the defense industry. Applicant is a naturalized citizen of the United States who exercises dual citizenship with her native Taiwan. She possesses and uses a Taiwanese passport to facilitate her relationships with her parents and two brothers who are citizens and residents of Taiwan. She failed to mitigate the foreign influence and foreign preference concerns raised in this case. Clearance is denied.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on March 14, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of

¹ This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

Reasons (SOR) explaining that it was not clearly consistent with the national interest to grant Applicant access to classified information. The SOR detailed the factual bases for the action under the security guidelines known as Guideline B for foreign influence and Guideline C foreign preference.

Applicant timely answered the SOR and requested a decision without a hearing. Department Counsel submitted the Government's written case on May 12, 2011. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on May 25, 2011. She did not object to the items appended to the Government's brief. These items are admitted as Government's Exhibits (GE) 1 through 7. Applicant did not submit a response. The case was assigned to me on August 8, 2011.

Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a written request that I take administrative notice of certain facts about Taiwan. Applicant did not object to the request, and it was approved. The request is attached to the record as Hearing Exhibit (HE) 1. The facts administratively noticed are set out in the Findings of Fact, below. Department Counsel did not submit a similar request for facts related to Hong Kong.

Findings of Fact

Applicant is a 48-year-old employee of a government contractor. She has held a security clearance since at least March 1998, when she began working for her present employer.²

Applicant immigrated to the United States from Taiwan in 1989 and became a naturalized citizen in 1996. Applicant's husband of 17 years is also a naturalized citizen of the U.S. from Taiwan. The couple has two children, who are U.S. citizens by birth. Applicant maintains dual citizenship with Taiwan. She has held a valid Taiwanese passport since 1987. The passport, which she most recently renewed in 2002, expires in 2012. In addition to the Taiwanese passport, Applicant and her husband hold an investment account in Hong Kong worth between \$15,000 and \$22,000 U.S. dollars.³

With the exception of 2003, Applicant has traveled to Taiwan annually between 2002 and 2010. The purpose of these trips, which are three to four weeks long, is to visit her family members who are citizens and residents of Taiwan: her father, stepmother, and two brothers. Her father, who is retired, has Parkinson's disease. Because he is ill Applicant tries to see him every year. Her stepmother is a homemaker. One of Applicant's brothers is a computer engineer for a U.S. company. She did not

² GE 4.

³ GE 3 – 6.

provide any current information about her other brother's profession. She does, however, state that none of her relatives are employed by the Taiwanese government. Outside of her visits to Taiwan, Applicant talks to each of her family members once a month by telephone.⁴

Applicant states that she is willing to renounce her dual citizenship, claiming that she feels no allegiance to her native country. Her purpose in maintaining dual citizenship is to facilitate her visits to Taiwan. Using the Taiwanese passport to enter the country allows her to stay longer than if she used her U.S. passport. When she returns to the U.S., she enters using her U.S. passport. In 1999, when she was interviewed during her first security clearance background investigation, she echoed similar sentiments about her Taiwanese citizenship. During that interview she reported that she considered herself only a citizen of the United States. Although she had a Taiwanese passport at the time, she had no intention of renewing it when it expired in 2000. In her Answer, she also expressed a willingness to divest herself of the investment account in Hong Kong, if it created a security concern. However, she has not provided any documentation showing that she has closed the account.⁵

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 Peoples Republic of China (PRC) in 1949. 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. The PRC's Ministry of State Security is the "preeminent civilian intelligence collection agency in China," and it maintains intelligence operations in Taiwan through a bureau utilizing PRC nationals with Taiwan connections.⁶

Taiwan is known to be an active collector of U.S. economic intelligence, and the National Counterintelligence Center's 2000 annual report to Congress on foreign economic collection and industrial espionage lists Taiwan as being among the most active collector of U.S. economic and proprietary information. Since this report, there have been various cases involving the illegal export, or attempted illegal export, of U.S. restricted, dual use technology to Taiwan. The 2008 Annual Report to Congress on Foreign Economic Collection and Industrial Espionage notes Taiwan, along with seven other countries, was involved in criminal espionage and export controls enforcement cases in 2008.⁷

⁴ GE 3-5.

⁵ GE 3, GE 5, GE 7.

⁶ HE 1.

⁷ HE 1.

Policies

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

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

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The security concern for Foreign Influence is set out in AG ¶ 7 as follows:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. Department Counsel raised two that are potentially applicable 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
- (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 a heightened risk of foreign influence or exploitation.

Only AG ¶ 7(a) applies.

Applicant's parents and two brothers are citizens and residents of Taiwan. The mere possession of close ties with family members living in Taiwan 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. Given the frequency of her communication with her Taiwanese relatives and her annual visits, the evidence supports a finding that Applicant has maintained close relationships with these relatives. Although the United States and Taiwan maintain a politically friendly relationship, it is well known that Taiwan is an active collector U.S economic intelligence and that the country's collection efforts concentrate on individuals with connections to Taiwan, thus creating the heightened risk contemplated under AG ¶ 7(a).

Department Counsel argues that AG ¶ 7(e) applies because Applicant holds a sizeable investment account in Hong Kong. This disqualifying condition also requires a

country specific “heightened risk” determination. The record does not contain any information about Hong Kong. As such, I am unable to determine whether Applicant is subject to a heightened risk by holding an investment account in that country.

The following mitigating conditions under AG ¶ 8 are potentially applicable:

(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.

None of these mitigating conditions apply. Applicant’s assertions that her family is not involved with the Taiwanese government are not sufficient to mitigate the foreign influence concerns under AG ¶8(a). An applicant’s relatives’ obscurity does not provide a meaningful measure of whether an applicant’s circumstances pose a risk; this is particularly true where the country at issue, Taiwan, actively tries to exploit individuals with connections to citizens and residents of that country. Because Applicant’s ties to the U.S. are just as significant and longstanding as her relationships with her Taiwanese relatives, a potential conflict of interests exists and cannot be mitigated under AG ¶ 8(b). Furthermore, Applicant’s relationships with her relatives in Taiwan cannot be classified as casual or infrequent under AG ¶ 8(c). In light of the record, Applicant has failed to mitigate the foreign influence concerns in this case.

Guideline C, Foreign Preference

The security concern for Foreign Influence is set out in AG ¶ 9 as follows:

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.

Only one disqualifying condition under AG ¶ 10 is raised in this 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.

Applicant possesses and uses a valid Taiwanese passport, which does not expire until 2012. Her contention that she only maintains her Taiwanese passport to enable longer visits with her family has little probative value. As the Appeal Board noted, “[t]he negative security significance of acts indicative of foreign preference is not negated or diminished merely because an applicant engages in those acts for personal reasons or for personal convenience.”⁸

None of the mitigating conditions available under AG ¶ 11 apply. She has not surrendered her foreign passport. Although Applicant has said she would be willing to renounce her Taiwanese citizenship, her actions are inconsistent with this statement.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. In doing so, I have also considered the whole-person concept. Applicant has established significant ties to the U.S. She has resided in the U.S. for 22 years, 15 of those as a naturalized citizen. She has held a security clearance since at least 1998. However, her ties to family members in Taiwan remain strong and pose a security risk.

This decision does not detract from Applicant’s good character or integrity. The Government need not prove an applicant is a bad person before it can deny or revoke access to classified information. Even good people can pose a security risk because of facts and circumstances not under their control, such as having family members who are citizens and residents of countries with economic interest hostile to that of the U.S.⁹ The adverse decision in this case is an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved-one, such as a family member.¹⁰ I conclude that Applicant failed to mitigate the foreign influence and foreign preference concerns.

⁸ ISCR Case No. 99-0254 at 3 (Feb. 6, 2000).

⁹ See, ISCR Case No.01-26893 at .8 (App. Bd. Oct. 16, 2002); See also *Department of Navy v. Egan*, 484 U.S. 518, 527-28 (1988).

¹⁰ ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).

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:

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|---------------------------|-------------------|
| Paragraph 1, Guideline C: | AGAINST APPLICANT |
| Subparagraphs 1.a-1.b: | Against Applicant |
| Paragraph 2, Guideline B: | AGAINST APPLICANT |
| Subparagraphs 2.a-2.c.: | Against Applicant |
| Subparagraph 2.d.: | For Applicant |

Conclusion

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

Nichole L. Noel
Administrative Judge