DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 11-04886
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Christopher Graham, Esq.

02/29/2012

Decision

LYNCH, Noreen A., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted his latest security clearance application on January 30, 2010. On October 21, 2011, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline B. DOHA acted 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 (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR and requested a hearing before an administrative judge. The case was assigned to me on December 21, 2011. DOHA issued a notice of hearing on January 6, 2012, scheduling the hearing for February 2, 2012. Government

Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified, and submitted Applicant's Exhibit (AX) A which was admitted without objection. DOHA received the transcript (Tr.) on February 9, 2012.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about Taiwan. The request and supporting documents are attached to the record as HX. Applicant objected to attachments III through X11. (Tr. 15) I took administrative notice as requested by Department Counsel. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In his answer to the SOR, Applicant denied the factual allegations in the SOR under Guideline B (Foreign Influence) and offered explanations. He provided additional information to support his case.

Applicant is a native of Taiwan. He received his undergraduate degree in Taiwan. He served a mandatory service of two years in the military in Taiwan. He came to the United States in August 1975 on a student visa and obtained a degree from an American university in 1978. He has been with his current employer since November 2005. Applicant held an interim security clearance, but that security clearance was suspended in September 2009. (GX 6) He has worked with sensitive information in the linguistics field. He became a naturalized U.S. citizen in 1985. (GX 1)

Applicant's wife is also a native of Taiwan. They met in the United States and were married in October 1977. They have two adult sons who are U.S. citizens. His wife is also a naturalized U.S. citizen. Applicant's parents are both deceased. (GX 1)

Applicant's twin brothers are citizens and residents of Taiwan. They are both younger than Applicant. One brother works for a travel agency and the other brother works for an insurance company. His brothers applied for permanent residency in the United States a few years ago, but chose not pursue the opportunity because they believed they could not support their families properly in the United States due to the high standard of living. They are not aware of Applicant's work or his application for a security clearance. (Tr. 44) They have no affiliation with the Taiwan government or Taiwanese military. Applicant has curtailed his occasional phone calls to them since 2005, when he accepted his current employment. He understood that he was in a sensitive position and did not want to jeopardize his career. (GX 7) He believes he calls them now once or twice a year, but he has not spoken to them on the phone in two years. (Tr. 44) Applicant last saw his brothers at his mother's funeral in March 2006 in Taiwan. (Tr. 36)

Applicant's sister-in-law and brother-in-law are permanent residents of the United States who have two properties in the United States. They travel between the

United States and Taiwan. They have an import business. Applicant speaks to them perhaps once or twice a year by phone. He believes he last saw them about four years ago. (Tr. 46)

Applicant and his wife started an import/export business in 1980 to help support their family. They imported gift items and holiday merchandise, including toys from Taiwan. (Tr. 24) The business expanded and Applicant used lines of credit from private businessmen in Taiwan. (Tr. 26) He believes his lines of credit were approximately $140,000. Applicant explained he had no home for collateral and could not borrow money from a U.S. bank. (Tr. 27) He did not sign formal promissory notes. The shipment invoice sheets were the written documentation for the transactions. The business ceased in 1993 because the profit margin was low. (Tr. 30)

Applicant testified that he received mechanical toys that were defective. He stated it was common practice to hold money until the defects were handled. Applicant stated that the $20,000 at issue was the last time that he conducted business with this particular company. Applicant explained that he tried many times to settle with the company by buying more mechanical items. He elaborated that the company never made a demand for the money. (Tr. 32) Since Applicant's business ceased in 1993, he has not been successful in contacting them. He tried calling them using their business telephone number, but it was disconnected. In 2006, when he went to Taiwan for his mother's funeral, he called the export administration but no record was found for the company. (Tr. 55)

Applicant has completed several security clearance applications over the years. In his November 2004, November 1, 2005, January 30, 2006, applications Applicant responded "No" to all questions concerning foreign business connections, or financial interests. He did not believe he had to answer "Yes" because his business ended in 1993 (out of a seven or ten-year time frame).

In 2009, Applicant took a full-scope polygraph for a clearance with another government agency. During the interview, questions were raised about Applicant's import/export business from 1980 until 1993. He was questioned about the $20,000 that he owed to one Taiwanese merchant. Applicant reports that during the interview the examiner asked him what his deepest concern was. Applicant stated that the concern was about $20,000 that had not been settled or resolved when he ceased his business in 1993. He did not want his son to have dishonor when Applicant died. Applicant was denied the clearance based on the fact that he had contact with a Taiwanese merchant that he had never reported on any security clearance applications. (GX 5)

On the January 30, 2010 security clearance application, Section 20 is entitled Foreign Activities, and the header states "Respond for the time frame of the last 7 years." (Item 20A) Applicant answered "No" to the first question that asks "do you have or have you EVER had any foreign financial businesses, foreign bank accounts, or other foreign financial interests of which you <u>have</u> direct control or direct ownership?" (emphasis added) At the hearing, Applicant stated that he forgot all about the

unresolved, potential $20,000 debt, because the creditor did not contact me, and I got busy. (Tr. 56) When asked why he had never listed any information about a past foreign business connection, he stated that it was out of the time frame of seven or ten years, as provided for in the application instructions. (Tr. 57) During another interview, Applicant stated that he did not initially disclose the indebtedness because he did not owe the money to a financial institution. (GX 6)

Applicant explained at the hearing that he never listed the creditor for the unresolved potential $20,000 debt because he forgot. (Tr. 56) He also explained that he followed the application directions and believed that since the business closed in 1993, he did not have to list anything because it was out of the scope of time. (Tr. 57) He stated that the reason he disclosed the money issue during the 2009 polygraph had to do with the fact that he did not want to leave this world with anything left on his record that would create a problem for his sons. (Tr. 62)

Applicant was adamant that there was never a promissory note involved in the business dealings. (Tr. 67) He does not believe he would be vulnerable to any coercion based on the unresolved potential $20,000 debt. (Tr. 67) He stated he did not appeal the 2009 denial because he did not believe it would affect his DoD clearance. It is noted in his affidavit that he asked the examiner about the appeal. (GX 5)

Applicant explained at the hearing that he came to the United States to receive an education. Applicant has worked his entire adult life in the United States. During his years in the United States, Applicant has attempted to contact the business partner with whom he was involved during his import business. When he was in Taiwan for his mother's funeral in 2006, he attempted to contact the gentleman to settle the issue of the unresolved potential $20,000 debt; however, Applicant could not locate him. He is a law-abiding citizen who has always adhered to rules and regulations. He has worked hard to provide his family with financial security.

I take administrative notice of the following facts. 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. Despite substantial economic ties, the PRC did not hold any official ties with Taiwan from October 1998 until June 2008. Moreover, the governments of Taiwan and PRC still do not negotiate directly. The Taiwanese military's primary mission is the defense of Taiwan against the PRC, which is seen as the predominant threat and which has not renounced the use of force against Taiwan. 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.

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 collectors of U.S. economic and proprietary information. However, this report is

dated. 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.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *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 suitability. *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The security concern under this guideline 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 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.

Four disqualifying conditions under this guideline may be relevant to this case. First, a disqualifying condition may be raised by "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." AG ¶ 7(a). Second, a disqualifying condition may be raised by "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." AG ¶ 7(b). Third, a security concern may be raised if an applicant is "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." AG ¶ 7(d). Fourth, a security concern also may be raised by "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." AG ¶ 7(e).

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, "even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security." ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. 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 operations against the U.S. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. *See generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

Applicant has lived and worked in the United States since 1975. He is a naturalized U.S. citizen. Applicant's wife, who is a U.S. citizen, resides in the United States. He has two adult sons who are U.S. citizens. His parents are deceased.

Applicant's two brothers are citizens and residents of Taiwan. His sister-in-law and brother-in-law are citizens of Taiwan, but live in the United States. "[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). Applicant has not rebutted this presumption.

After considering the totality of Applicant's family ties to Taiwan as well as each individual tie, I conclude that Applicant's family ties are sufficient to raise an issue of a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. Applicant speaks to his brothers once or twice a year on the phone. He saw his brothers in 2006 in Taiwan when he attended the funeral of his mother. Based on all these circumstances, I conclude that AG ¶¶ 7(a), (b), and (e) are raised.

Security concerns under this guideline can be mitigated by showing that "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." AG ¶ 8(a). Taiwan engages in economic and industrial espionage, and it has been involved in incidents involving illegal importation of restricted, dual-use technology from the United States. Applicant has infrequent contact with his family members who live in the United States, but they are still citizens of Taiwan. He has infrequent contact with his brothers in Taiwan. However, he unsuccessfully attempted as late as 2006 to contact his Taiwanese business contact to settle the issue of the unresolved potential $20,000 debt from his import business, which was terminated in 1993.

Security concerns under this guideline can also be mitigated by showing "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." AG ¶ 8(b).

Applicant owned an import/export business from 1980 until 1993. He had approximately $140,000 line of credit. When the business ended, there was an issue of unresolved potential $20,000 debt, which was disputed at that time because of defective materials. Applicant wanted to reach a settlement on this debt because it troubled his conscience, and he is a very honest person. As recently as 2006, he attempted to contact the Taiwanese creditor; however, he was not successful. He never disclosed the foreign connection to the creditor in his security clearance applications. He did disclose his concern about the unresolved potential $20,000 debt during a 2009 polygraph exam. However, in his January 2010 security clearance application, he answered "No" to Question 20 when it asked "do you have or have you EVER had any foreign financial businesses, foreign bank accounts, or other foreign financial interests of which you have direct control or direct ownership?" (emphasis added). Applicant does not currently "have direct control or direct ownership" of "any foreign financial businesses, foreign bank accounts, or other foreign financial interests." If this question is interpreted to ask whether anyone completing the question ever had a foreign financial businesses, foreign bank accounts, or other foreign financial interests, every person who ever lived in a foreign country for any substantial period of time would have to answer in detail about "other foreign interests." Surely this is not the purpose of this question, and it should be read literally. Nevertheless, it would have been prudent and reasonable for Applicant to have disclosed this information because when a question is ambiguous, the better course is always to disclose the information. With regard to his family members, I conclude that AG ¶ 8(a) is partially established.

I conclude that Applicant would resolve any conflict between the interests of the United States and his *family* in Taiwan in favor of the United States. He does not currently have any business interest in Taiwan. Thus, I conclude that AG ¶ 8(b) is established. In 1993, Applicant and a creditor had a dispute over a $20,000 debt. Applicant is a highly ethical person who wanted to resolve this debt through a settlement. He attempted to locate the creditor as recently as 2006, and he was not able

to do so. There is no evidence that the debt is legally enforceable. If the creditor surfaces, I am confident that Applicant will expeditiously resolve it.

Due to the status of the unresolved potential $20,000 debt, I conclude that AG 8(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" is also established.

In sum, Applicant entered the United States in August 1975, received his college education in the United States, and became a naturalized U.S. citizen in 1985. His spouse of 34 years is a naturalized U.S. citizen and their two adult sons are U.S. citizens. He has very limited contacts with siblings in Taiwan, and he has no current business interests in Taiwan. Foreign influence concerns are fully mitigated under Guideline B; however, even if they were not mitigated under Guideline B, they would be mitigated under the Whole-Person Concept, *infra*.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An 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 have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a naturalized U.S. citizen who has lived in the United States since 1975. He and his wife reside in the United States, and are both naturalized U.S. citizens. His two sons are U.S. citizens. Applicant's home is in the United States. Applicant has worked as a linguist since 2005. He wants to provide for his family in the United States.

Applicant had an import/export business from 1980 until 1993. Applicant disclosed a potential unresolved debt of about $20,000 between Applicant and a former

business connection. He raised the issue during a 2009 polygraph, as being a nagging concern to his conscience. He tried to contact the creditor when he was in Taiwan in 2006 for his mother's funeral; however, he was not successful. He has not had any contact from the creditor on the debt since his business ended in 1993, about 19 years ago. There is simply no way that Applicant could be influenced by the Taiwan creditor or by anyone else over this potential unresolved $20,000 debt. I am confident that if the debt ever surfaces as an issue, Applicant will resolve it without delay, even though there is no evidence that it is legally enforceable.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraphs 1.a to 1.d:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Noreen A. Lynch
Administrative Judge