DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 12-04135
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: *Pro se*

02/04/2013

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Decision

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LAZZARO, Henry, Administrative Judge

Applicant is a dual citizen of the United States and the United Kingdom. His wife is a naturalized citizen of the United States from Taiwan. They both have minimal contact with their foreign relatives. Applicant surrendered his United Kingdom passport. Clearance is granted.

On September 19, 2012, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.[1] The SOR alleges security concerns under Guidelines B (foreign influence) and C (foreign preference). Applicant submitted a response to the SOR, dated November 14, 2012, in which he admitted all SOR allegations except subparagraph 2.d, and requested a hearing.[2]

[1] This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as modified (Directive), and adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

[2] Department Counsel withdrew subparagraph 2.d at the hearing.

The case was assigned to me on December 20, 2012. A notice of hearing was issued on December 21, 2012, scheduling the hearing for January 8, 2013. The hearing was conducted as scheduled. The government submitted 18 documentary exhibits that were marked as Government Exhibits (GE) 1-18. GE 1 and 18 were admitted without objection. Administrative notice was taken of GE 2, 3, 15, and 16 without objection. I refused to take administrative notice of GE 4, 5-11, 13, 14, and 17. Department Counsel withdrew GE 12. Department Counsel submitted a document containing written comments on the contents of the administrative notice documents which was marked as Appellate Exhibit (App. Ex.) I and made part of the record without objection.

Applicant testified but did not submit any documentary evidence. The record was held open to provide him the opportunity to submit proof that he surrendered the passport issued to him by the United Kingdom. A chain of e-mails was timely received verifying he had surrendered that passport to his employer's facility security officer and that Department Counsel did not object to admission of the e-mails into the record. Those e-mails were marked as Applicant Exhibit 1 and admitted into the record. The transcript was received on January 16, 2013.

Procedural Matters

Department Counsel moved to amend the SOR by adding three additional Guideline B allegations. Handwritten amendments to the SOR were added to the SOR without objection.

At the hearing, I refused to admit a number of administrative notice documents on the basis that they were merely unofficial press releases containing extraneous information that was not the proper subject of administrative notice. Upon review of App. Ex. 1, it is clear that Department Counsel was seeking to have administrative notice taken merely of the fact that certain individuals and companies had been successfully prosecuted or fined for engaging in criminal or prohibited activities with Taiwan. Those matters are the proper subject of administrative notice, and most of the proffered exhibits provide adequate support for those matters that are properly the subject of administrative notice. Accordingly, I reverse my ruling at the hearing in part and admit into the record GE 4-10, 13 and 14. I maintain my ruling at the hearing as to GE 11 and 17 on the basis that those documents contain mere accusations that have not been substantiated.

Findings of Fact

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is a 58-year-old man who has been employed as a field test supervisor by a defense contractor and its predecessor on the contract since November 1996. He attended the equivalent of a community college in Great Britain and obtained the

equivalent of an associate's degree in business in 1973. Applicant has never held a security clearance.

Applicant was born in Great Britain. He left home at the age of 16 and traveled through Europe and the United States until he immigrated to the United States in 1980. He has resided in the United States since 1980, and he became a naturalized United States citizen on May 30, 2000. Applicant is a dual citizen of the United States and the United Kingdom. He has a U. S. passport that was last issued on June 2010. Applicant maintained his United Kingdom passport, with a possible brief interruption, that was last issued on March 2010.

Applicant's employment requires him to engage in frequent foreign travel to job sites. He is only paid by his employer while he is actually working at those job sites. Applicant questioned his employer as to why it was hiring outside contractors to work at certain job sites while he was at home and not being paid. In response, he was told that those jobs required a citizen of the United Kingdom who, as he understood, possessed a United Kingdom passport. Applicant used his United Kingdom passport on several occasions to travel to foreign countries to work on behalf of his employer. Applicant has now surrendered his United Kingdom passport to his employer's facility security officer.

Applicant's mother is 87 years old and a citizen and resident of the United Kingdom. Applicant has visited the United Kingdom four or five times since he immigrated to the United States. The last time he visited with his mother in the United Kingdom was in 2010. His mother disapproves of his current wife, and, as a result, Applicant has, at most, spoken with her only occasionally since his 2010 visit. Applicant has two brothers who are citizens and residents of the United Kingdom. The last time he spoke with his older brother was about 20 years ago. He visited with his younger brother during his returns to the United Kingdom. He has, at most, only spoken with his younger brother about once a year since they visited in 2010. He has e-mail exchanges with that brother that may occur as frequently as once a week.

Applicant was first married in 1980. That marriage ended by divorce in either 1982 or 1983. Applicant married a second time in April 1995, and that marriage ended by divorce in December 1996. Applicant has been married to his current wife since September 2001.

Applicant's wife is a dual citizen of Taiwan and the United States. She became a naturalized United States citizen in either 2003 or 2004. Applicant met his wife in Taiwan when he was working there in 1997. Applicant last went to Taiwan in 2009, when his wife became ill there while he was working in Australia. His wife last visited Taiwan in 2012.

Applicant's mother-in-law is 80 years old and a citizen and resident of Taiwan. Applicant testified his wife does not get along with her mother and she told Applicant after her 2012 visit to Taiwan that she will not return to that country. Applicant's wife has a sister who resides in Taiwan and is a dual citizen of Taiwan and Canada. She is engaged in the steel import/export business. Applicant's wife has a second sister who is a resident of Taiwan and a dual citizen of Taiwan and the United States. That sister's

husband is a citizen of the United States who now resides in Taiwan. They are engaged in the interior design business in Taiwan. The second sister previously lived in the United States with her husband, and they visited and stayed with Applicant and his wife for a couple of days in either 2007 or 2008. They also visited on a few other occasions. Applicant testified his wife and her siblings are not close and fight when they do speak with each other.

The administrative notice documents substantiate that there have been a number of incidents of the illegal export, or attempted illegal export, of restricted technology to Taiwan. Taiwan is considered to be one of the most active countries engaged in economic espionage against the United States.

Policies

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Guideline B (foreign influence) and Guideline C (foreign preference), with their disqualifying and mitigating conditions, are most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[3] The Government has the burden of proving controverted facts.[4] The burden of proof in a security clearance case is something less than a preponderance of evidence,[5] although the Government is required to present substantial evidence to meet its burden of proof.[6] "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."[7] Once the Government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.[8] Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[9]

No one has a right to a security clearance[10] and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of

[3] ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
[4] ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
[5] *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
[6] ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
[7] ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
[8] ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
[9] ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
[10] *Egan*, 484 U.S. at 528, 531.

denials."[11] Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.[12]

Analysis

Guideline B, Foreign Influence

> Foreign contacts and interests may be a security concern if the individual has divided loyalties or 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.

Applicant's mother and two brothers are citizens of the United Kingdom. Applicant last visited with his mother and one of his brothers in the United Kingdom in 2010. He maintains e-mail contact with one of his brothers. Applicant's wife is a dual citizen of the United States and Taiwan. Applicant's mother-in-law, two sisters-in-law, and brother-in-law are citizens and residents of Taiwan. Applicant last visited Taiwan in 2009. His wife last visited Taiwan and her Taiwanese relatives in 2012. Disqualifying Condition (DC) 7(a): *contact with a foreign family member . . . 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 DC 7(d): *sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion* apply.

Applicant has only visited the United Kingdom four or fives times since he immigrated to the United States. He has not had any contact with one of his brothers for about 20 years. His mother disapproves of his wife, and he has limited continuing contact with his mother. He seldom speaks with his brother by telephone, although he does have somewhat regular e-mail exchanges with him. Considering the limited contact Applicant has with his relatives in the United Kingdom and the long standing friendly relations between the United States and the United Kingdom, Applicant's relationship with his mother and brothers does not create a security concern.

Applicant's wife maintains irregular contact with her mother and sisters. Applicant testified his wife does not get along well with her relatives in Taiwan, and, following her last trip to Taiwan, she expressed her intent to never return to Taiwan. While Applicant and his wife visited with her one sister on a few occasions when that sister resided in the United States, there is no evidence of any continuing direct relationship between

[11] *Id* at 531.
[12] *Egan*, Executive Order 10865, and the Directive.

Applicant and his Taiwanese in-laws. Applicant last visited Taiwan in 2009, and that visit only occurred because his wife became ill while she was in Taiwan.

Taiwan is known to engage in economic espionage against the United States and a number of individuals and companies have been convicted of criminal offenses or fined for engaging in prohibited activities with Taiwan or Taiwanese companies. However, Applicant's one sister-in-law and her husband are engaged in the interior design business and not in business activities that are likely to involve them in prohibited activities directed at the United States. Applicant's second sister-in-law is a dual citizen of Taiwan and Canada who is engaged in the steel import/export business. There is no indication that her business interests are in anyway connected to or directed at the United States.

Considering the strained relationships Applicant testified exist between his wife and her relatives in Taiwan, the little personal contact Applicant has with anyone in Taiwan, the nature and location of the business activities of Applicant's relatives, and the nature of the activities directed against the United States by persons in Taiwan and the United States, there is virtually no likelihood that Applicant will be placed in a position to put the interest of any person or country ahead of his loyalty to the United States.

The following Mitigating Conditions (MC) apply: (MC) 8(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 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.*; MC 8(b): *there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person . . . 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 MC 8 (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 of exploitation*.

Guideline C, Foreign Preference

> Foreign preference is a concern because 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.

Applicant is a dual citizen of the United States and the United Kingdom. He renewed his United Kingdom passport in 2010, and he used that passport on occasion to engage in foreign travel on behalf of his employer. The use of a foreign passport is the exercise of the right of foreign citizenship. Disqualifying Condition (DC) 10(a): *exercise of any right, privilege or obligation or foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member* applies.

Applicant has not previously held a security clearance. He likely did not consider the potential security concern that might arise from his possession and use of a foreign passport. He testified his primary motivation in retaining a United Kingdom passport was to enable him to receive assignments that were designated only for United Kingdom citizens. When he became aware of the potential security concern caused by the use of a passport issued by the strongest ally of the United States, he surrendered that passport to his employers facility security officer. MC 11(e): *the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated* applies.

Considering all relevant and material facts and circumstances present in this case, the whole-person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, Applicant mitigated the foreign influence and foreign preference security concerns. He overcame the case against him and satisfied his ultimate burden of persuasion. Guideline B and Guideline C are decided for Applicant. It is clearly consistent with the national interest to grant Applicant a security clearance.

Formal Findings

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

Paragraph 1, Guideline C:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 2.a-c:	For Applicant
Subparagraph 2.d:	Withdrawn
Subparagraphs 2.e-g:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

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Henry Lazzaro
Administrative Judge