



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



In the matter of:

Applicant for Public Trust Position

ADP Case No. 15-00940

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel

For Applicant: *Pro se*

06/27/2016

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the case file, eligibility for access to sensitive information is granted. Applicant mitigated security concerns for foreign influence and foreign preference.

1. On September 10, 2012, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP), as part of her employment in a position of public trust with a defense contractor. (Item 2) Applicant was interviewed by a security investigator from the Office of Personnel Management (OPM) on November 27, 2012. (Item 3) After reviewing the results of the OPM investigation, the Department of Defense (DOD) could not make the preliminary affirmative findings required to grant Applicant access to sensitive information. On September 24, 2015, DOD issued to Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns for foreign influence under Guideline B and foreign preference under Guideline C. (Item 1). The action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R,

Personnel Security Program, dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG) effective in the Department of Defense on September 1, 2006.

Applicant answered the SOR on October 9, 2015. She admitted the three allegations under foreign influence and the one allegation under foreign preference. She requested a decision on the record. (Item 1a) Department Counsel submitted the Government's written case on January 29, 2016. Applicant received a complete file of relevant material (FORM) on February 2, 2016, and was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. On March 8, 2016, Applicant responded to the FORM providing additional information. (Item 5) The case was assigned to me on March 29, 2016.

Procedural Issues

Applicant was advised in the FORM that the summary of the Personal Subject Interview with an OPM investigator (Item 3) was not authenticated and could not be considered over her objection. She was further advised that she could make any corrections, additions, or deletions to the summary to make it clear and accurate, and could object to the admission of the summary as not authenticated by a Government witness. She was additionally advised that if no objection was raised to the summary, the Administrative Judge could determine that she waived any objection to the admissibility of the Personnel Subject Interview summary. Applicant, in her response to the FORM, did not raise any objection to consideration of the Personal Subject Interview. Since there is no objection by Applicant, I will consider information in the Personal Subject Interview in my decision.

Department Counsel requested that I take administrative notice of certain facts concerning Taiwan. Department Counsel provided U.S. Department of State documents, court decisions, reports to Congress, and U.S. Department of Commerce documents concerning Taiwan. (Item 4) I will take administrative notice of facts concerning Taiwan as noted in my Findings of Fact.

Findings of Fact

After a thorough review of the case file pleadings, I make the following essential findings of fact.

Applicant is 56 years old and has been a computer data systems administrator for a Department of Defense Health Care contractor since December 1990. She was born in Taiwan and came to the United States on April 14, 1984. She became a United States citizen on October 2, 1994. She married another native of Taiwan in December 1986. Her husband is a church assistant pastor and has been a United States citizen since 1994. Applicant has two adult children. She received a bachelor's degree from a Taiwan university in 1982, and a master's degree from a United States university in 1986.

Applicant possesses a Taiwanese passport issued on April 7, 2008, that expires on April 7, 2018. She uses the Taiwanese passport to ease her entry into Taiwan. She also possesses a current United States passport that she used for travel to and from Taiwan. (Item 2, e-QIP, dated September 20 2015; Item 3, OPM, Personal Subject Interview, date November 27, 2012)

The SOR alleges, and Applicant admits, three security concerns under foreign influence based on her sister, brother, and father-in-law being citizens and residents of Taiwan. Her mother and another sister are citizens and residents of the United States and pose no security concern. Her father has been deceased for over 20 years but was a former government employee.

SOR allegation 1.c raises a security concern for Applicant's father-in-law who was a citizen and resident of Taiwan. Applicant's father-in-law was 93 years old and resided in a nursing home when Applicant submitted her application for a position of trust. When he was working, he owned a tire store. Applicant had limited occasional contact with him when he was alive. She last saw him in November 2011. In her response to the FORM, Applicant reported that her father-in-law passed away on October 28, 2015. Applicant's father-in-law is no longer a security concern since he is deceased. SOR allegation 1.c is decided for Applicant. (Item 2, e-QIP, dated September 10, 2012; Item 3, Personal Subject Interview, dated November 27, 2012; Item 5, Response to FORM, dated March 8, 2016)

Applicant's brother is a service manager for an elevator company in Taiwan. Applicant's eldest sister is a contract employee working as a clerk for a government agricultural agency. Applicant's has contact with both of them a few times a year by telephone. She sees them when she visits Taiwan. Her last visit was November 2011.

Applicant, in response to a question on the e-QIP concerning foreign travel, listed foreign travel with her family for return trips to Taiwan for a month in 2008 and again in 2011. These are the only trips mentioned in the case file for Applicant's return to Taiwan since her emigration in 1984.

Applicant used her original Taiwan passport to come to the United States in 1984. She last renewed the passport on April 7, 2008, and it expires on April 7, 2018. Applicant has maintained the Taiwan passport to ease her travels to and from Taiwan. She used both her United States and Taiwan passports when traveling to Taiwan in 2008 and 2011. She does not intend to relinquish the passport because it makes it easier for her to travel to and from Taiwan.

Applicant is also a dual citizen of the United States and Taiwan. She has maintained her Taiwan citizenship to ease her travels to Taiwan. She still has family in Taiwan that she wants to visit periodically. Her allegiance is to the United States and she feels no conflict between Taiwan and the United States. She does not know of any rights, privileges, benefits, or obligations she has to Taiwan because of her dual citizenship. She does not maintain Taiwan citizenship to protect financial or property

interests or receive benefits from Taiwan. (Item 3, Personal Subject Interview, dated November 27, 2011, at 2)

During World War II and after, a civil war was fought on the mainland of China between the Chinese Communist Party and the Nationalist Chinese. In 1949, the Chinese Communist party was victorious and established a government on the mainland. The Nationalist Chinese fled to the island that is now Taiwan and established a government. Taiwan has developed steadily since then and is now the world's 17th largest economy. Taiwan became a member of the World Trade organization in 2002, further expanding its trade opportunities and further strengthening its standing in the global economy. This prosperity established economic and social stability.

Until 1968, Taiwan's political system was effectively controlled by one party, the Kuomintang. Since ending martial law in 1987, Taiwan has taken dramatic steps to improve respect for human rights and created a democratic political system. The United States has been committed to maintaining cultural, commercial, and other nonofficial relations with Taiwan since January 1979, when it formally recognized the government of the People's Republic of China (PRC) as the sole legal government of China. By formal act of Congress (Taiwan Relations Act of 1979), the United States is committed to provide Taiwan with military defensive arms in support of Taiwan's security and stability in the region. The United States also stated it would maintain cultural, commercial, and other unofficial relations with the people of Taiwan. Despite the United States clear and consistent position that Taiwan and the mainland are part of one China, the United States expanded commercial ties with Taiwan and is supportive of Taiwan's membership in international organizations, such as the World Trade Organization and the Asian Development Bank. (See, United States Department of State Background Notes: Taiwan, dated November 3, 2010)

The Government claims in its request for Administrative Notice that Taiwan poses a threat to national security because in the past, it was one of the countries most actively engaged in industrial espionage and the collection of foreign economic information. The request cites to the annual Report to Congress on Foreign Economic Collection and Industrial Espionage of 2000. The report lists Taiwan as one of the most active collectors of industrial and economic intelligence. However, the Government also noted the more recent Annual report from 2008. That report does not list Taiwan as being one of the biggest collectors of economic and industrial espionage. It does list the PRC and Russia as the most active collectors. The report states the United States is targeted by a large number of foreign countries for economic and industrial espionage. The report notes that the foreign private sector is the most active collector of this type of economic and industrial intelligence, but there is ample evidence that foreign intelligence services and other government organizations remain aggressive in collecting information by using the private sector to collect information for them and by their own continued direct intelligence gathering operations.

The report lists a number of factors that could cause concern for the United States. Among the concerns are the numbers of foreign visitors from any country to United States sensitive sites, the numbers of non-immigrant persons from a country that

are admitted as visitors to the United States, and the number of requests from a country for visits to military and defense industry sites. There are a large number of visitors from Taiwan to the United States for business, pleasure, or other purposes. Taiwan does not appear to be any more active in the collection of economic and industrial intelligence than many other allied countries.

The Government noted information concerning individuals in the United States convicted of engaging in espionage practices on behalf of Taiwanese companies or officials, as well as companies that violated export control requirements in sending items to Taiwan. Some of these cases involve individuals in the United States, both native born and foreign born and both citizens and non-citizens of the United States, that formed friendships with Taiwan intelligence agents and then provided the agents with classified information. While the Government presented information only on Taiwan cases, it is not difficult to assume that there are cases that pertain to other countries as well. The fact that there are cases of Taiwan intelligence agents accepting intelligence information from sources in the United States, no matter how obtained, does raise security concerns.

The relationship between the United States and Taiwan is defined in the Taiwan Relations Act which recognizes Taiwan. (Public Law 96-8) Taiwan has a long history of friendly relations with the United States, including substantial levels of foreign trade. Taiwan is an ally and friend but can also pose a security threat because of its activities and efforts to obtain economic, industrial, and national security information.

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” The standard that must be met for assignment to sensitive duties is that, based on all available information, the person’s loyalty, reliability, and trustworthiness are such that “assigning the person to sensitive duties is clearly consistent with the interests of national security.” Trustworthiness adjudications will apply to these cases. DOD contractor personnel are afforded trustworthiness rights and procedures before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1)

When evaluating an applicant’s suitability for a public trust or a sensitive position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing 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 decision. (AG ¶ 2(c))

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 [sensitive] 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 contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

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

Analysis

Foreign Influence

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 the U.S. interest, 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 consideration as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism. (AG ¶ 6)

Guideline B is not limited to countries hostile to the United States. The United States has a compelling interest in protecting and safeguarding sensitive 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. Even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. The nature of a nation’s government and its relationship with the United States 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 foreign government or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue.

The SOR alleges, and Applicant admits, that at present she has two siblings who are citizens and residents of Taiwan. Applicant's Taiwan-based siblings are a foreign influence trustworthiness concern for Applicant. Applicant's relationships with her two siblings raise the following disqualifying conditions 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; and

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

The mere existence of foreign relationships and contacts is not sufficient to raise the above disqualifying conditions. AG ¶¶ 7(a) requires substantial evidence of a "heightened risk." The "heightened risk" required to raise one of these disqualifying conditions is a relatively low standard. "Heightened risk" denotes a risk greater than the normal risk inherent in having a family member or contacts living under a foreign government. The nature of Applicant's contacts and relationships must be examined to determine whether it creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. One factor that may heighten the risk in Applicant's case is Taiwan's collection of economic and industrial intelligence and the potential use of Taiwanese citizens to obtain such information. The Government has established that Applicant may be under a "heightened risk" of security concern because of the intelligence activities of the Taiwanese government and Taiwanese businesses to obtain industrial and commercial information. An applicant with foreign family or friendship ties to a country that presents a heightened risk has a heavy burden of persuasion to show that neither she nor her siblings are subject to influence by that country. The totality of an applicant's family member ties to a foreign country as well as the tie to the country for each individual person must be considered. There is a risk presented because Applicant's sister and brother are citizens and residents of Taiwan and Taiwan is a known collector of intelligence information from foreigners.

Applicant raised facts to mitigate the trustworthiness concerns arising from her siblings' connections to Taiwan. I considered the following Foreign Influence Mitigating Conditions under AG ¶ 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 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 or infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

I have considered Applicant's relationship with her brother and sister who are citizens or residents of Taiwan. I have also considered the Taiwanese Government's significant intelligence and security actions. Taiwan is a known collector of security information, but they are not known to coerce their own citizens to gain security information. They conduct a significant security apparatus because of the threats from mainland China.

There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. Factors such as an applicant's relatives' obscurity or the failure of foreign authorities to contact them in the past do not provide a meaningful measure of whether an applicant's family circumstances pose a trustworthiness concern. Applicant talks to her siblings only infrequently. She last saw them almost four years ago. The communications between Applicant and her siblings are casual and infrequent and do not create a heightened risk for foreign influence or exploitation. In spite of Taiwan's significant intelligence and trustworthiness concerns and functions, it is unlikely Applicant will be placed in a position to choose between her siblings and the U.S. interests.

In evaluating the potential conflict of interests between Applicant's Taiwanese siblings, I considered that Taiwan is a strong ally of the United States with mutual defense and strategic interests. It is a substantial trading partner of the United States. A friendly relationship is not determinative, but it makes it less likely that a foreign government would attempt to exploit a United States citizen through relatives or associates in that country. Even friendly countries may engage in espionage against the United States' economic, scientific, or technical interest. Even though Taiwan is not a hostile country and its interests are not inimical to the United States, it is reasonable to consider that elements in Taiwan could take an action that may jeopardize their friendly position with the United States if they needed trade and defense information from sources in the United States. There are strong indications that elements in Taiwan could seek economic and sensitive information from contacts in the United States.

Applicant has strong ties to the United States. She has been a resident of the United States for over 30 years and a U.S. citizen for over 20 years. She has been employed by the same company, living in the same area of the United States, and has maintained the same U.S. life style for approximately 25 years. This is a clear indication that she has firm ties to the United States and considers it home. She has embraced the culture, history, and life style of the United States.

Applicant's loyalty to the United States is unquestioned. Applicant has established through her actions that it is unlikely that she could be placed in a position to choose between any sense of loyalty or obligation to her siblings in Taiwan and her sense of loyalty or obligation to the United States. In balancing all of the factors mentioned and considered above, I am satisfied Applicant's loyalty to the United States is such that she can be expected to resolve any conflict of interest in favor of the United States interest. There is no risk to the national interest if Applicant has access to sensitive information. Mitigating conditions AG ¶¶ 8(b), 8(b), and 8(c) apply. Applicant has met her heavy burden to show that her siblings in Taiwan do not cause a trustworthiness concern. I conclude that Applicant has mitigated trustworthiness concerns for foreign influence.

Guideline C, Foreign Preference

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he may be prone to provide information or make decisions that are harmful to the interests of the United States. (AG ¶ 9) The principal goal of the foreign preference assessment is to determine the risk, based on foreign associations, that information may be compromised if access to sensitive information is granted. It is not a measure of Applicant's loyalty to the United States.

Applicant was born in Taiwan and is a dual citizen of Taiwan and the United States. She has both a United States and a Taiwan passport. She uses her Taiwanese passport to ease her infrequent travels to Taiwan. The possession of a current foreign passport raises foreign preference disqualifying condition AG ¶ 10(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport. . .

I considered the following foreign preference mitigating conditions under AG ¶ 11:

- (a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;
- (b) the individual has expressed a willingness to renounce dual citizenship;
- (c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor; and
- (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

These mitigating conditions do not directly apply. Applicant is considered a dual citizen of Taiwan and the United States because she was born in Taiwan. She has

possession of a valid current Taiwan passport. The only reason for the Taiwan passport is to ease her entry into Taiwan when she visits that country. Her trips to Taiwan are infrequent. The record shows trips in 2008 and 2011.

Applicant does not possess a Taiwan passport because she has a preference for that country. Normally, possession of a current foreign passport creates eligibility for access to sensitive information concern. However, Applicant has been a resident and citizen of the United States for so long that she is fully integrated into the citizenry of the United States so that she is no longer an immigrant. She maintains the foreign passport only as a travel convenience. Her possession of the foreign passport under the circumstances does not create an access to sensitive information concern. Applicant presented sufficient information to establish that she has a stronger preference for the United States than for Taiwan. Applicant mitigated security concerns based on foreign preference.

Whole-Person Concept

Under the whole person concept, the administrative judge must evaluate an Applicant's eligibility for an access to sensitive information 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 access to sensitive information 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. The whole-person concept requires consideration of all available information about Applicant, not single items in isolation, to reach a determination concerning Applicant's eligibility for access to sensitive information.

Applicant has infrequent and casual contact with his siblings in Taiwan. Applicant established that she has such deep and longstanding relationships and loyalties in the United States that she can be expected to resolve any conflict of interest in favor of the United States. While access to sensitive information is not based on a finding of loyalty in the United States, Applicant has a deep and abiding commitment to the protection of United States interests. Applicant is a United States citizen and a dual citizen of Taiwan. She has established her preference for the United States over any preference for Taiwan. These facts leave me without questions and doubts about Applicant's eligibility and suitability for access to sensitive information. For all these reasons, I conclude

Applicant has met the heavy burden of mitigating potential trustworthiness concerns arising from her siblings in Taiwan.

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 B: FOR APPLICANT

Subparagraphs 1.a – 1.c: For Applicant

Paragraph 2, Guideline C: FOR APPLICANT

Subparagraph 2.a: 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 access to sensitive information. Eligibility for access to sensitive information is granted.

THOMAS M. CREAN
Administrative Judge