



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 15-03874

Appearances

For Government:

Andrew Henderson, Esquire, Department Counsel

For Applicant:

Skyler D. Samp, Esquire

Athena Hwant, Esquire

Claery & Green

February 28, 2017

Decision

ROSS, Wilford H., Administrative Judge:

On June 30, 2014, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). (Government Exhibit 1.) On January 26, 2016, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guidelines C (Foreign Preference) and B (Foreign Influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD for SORs issued after September 1, 2006.

Applicant submitted an answer to the SOR (Answer) on February 16, 2016, and requested a hearing before an administrative judge. Applicant admitted all the allegations in the SOR. He also submitted additional information to support his request for a finding of trustworthiness.

Department Counsel was prepared to proceed on March 28, 2016. The case was assigned to another administrative judge on April 4, 2016. On April 19, 2016, the Defense Office of Hearings and Appeals (DOHA) reassigned the case to me. On May 4, 2016, DOHA issued a Notice of Hearing setting the case for hearing on June 30, 2016. The case was heard as scheduled. Department Counsel offered Government Exhibits 1 through 3 into evidence without objection. Applicant testified on his own behalf, called two additional witnesses, and submitted 13 exhibits (Applicant Exhibits A through M), which were admitted without objection. DOHA received the hearing transcript (TR) on July 11, 2016. Applicant requested the record remain open for receipt of additional exhibits. Applicant Exhibits N and O were received in a timely fashion. Department Counsel indicated he had no objection, the exhibits were admitted into evidence, and the record closed.

Procedural Ruling

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the Republic of China (Taiwan). (Government Exhibit 3; Tr. 11-12, 34.) The request and the attached documents were admitted into the record. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

Applicant is 65 years old, married, and has two adult children. He has a master's degree, and has been employed in the defense industry by the same company since 1987.

Applicant was born in Taiwan in 1952. He immigrated to the United States in 1981 to attend graduate school. He received his master's degree in 1983 and was married the same year. His wife is an American citizen, as are his two children. Applicant received his American citizenship in 1987. (Government Exhibit 1 at Sections 1-4, 9, 12, 17, and 18; Applicant Exhibit E.)

Paragraph 1 (Guideline C – Foreign Preference)

The Government alleges in this paragraph that Applicant has acted in a way that indicates a preference for a foreign country over the United States.

In 2007 Applicant obtained a Taiwan passport. He obtained the passport in order to travel to Taiwan to attend a college reunion without having to obtain a visa for use with his American passport. The passport was used for that trip and not used again.¹ Applicant's passport was destroyed, as witnessed by Department Counsel. Evidence of the destruction was submitted by Applicant and is part of the record in this case. Applicant credibly stated that he has no intention of obtaining another Taiwanese passport in the future. (Applicant Exhibit N at 1-9, Exhibit O; Tr. 33, 41-46.)

Applicant has a valid and current United States passport issued in 2010, which shows that he traveled outside the country using it in 2011. (Applicant Exhibit N at 10-13; Tr. 42-43.)

Paragraph 2 (Guideline B – Foreign Influence)

The Government alleges in this paragraph that Applicant is ineligible for a public trust position because he has foreign contacts and interests that could lead to the exercise of poor judgment, unreliability or untrustworthiness on his part, or make him vulnerable to pressure or coercion.

Applicant's parents are deceased. He has three siblings, two sisters and a brother. One of his sisters is an American citizen and resides in the United States. His other sister and brother are Taiwanese citizens and reside there. Applicant last saw them in 2007, during his last trip to Taiwan. Applicant last talked to his brother and the sister who lives in Taiwan in approximately 2014. He speaks with them every two years or so. (Applicant Exhibit M; Tr. 26-27, 38-41.)

Applicant made the following statement about his citizenship:

I am extremely proud of all my accomplishments and overjoyed with the opportunity to have witnessed my son getting married in April 2015. I am excited to watch my family grow in America and to one day have grandchildren who will be born and raised in the U.S. I have always been and always will be honest and loyal to the U.S., as it has been my home for nearly thirty-five (35) years. I have always and continue to hold myself to highest moral standards and adhere strictly to the laws. I would never do anything to jeopardize my loyalty to the U.S. (Applicant Exhibit M.) (See Applicant Exhibit F.)

Administrative Notice

Applicant has contacts with Taiwan. Accordingly, it is appropriate to look at the current situation concerning Taiwan. Taiwan is a multiparty democracy, whose authorities generally respect the human rights of its citizens. Taiwan is an active

¹ Visas are no longer required for United States citizens traveling to Taiwan for a period of less than 90 days. (Tr. 45-46.) (U.S. Dept. of State, <https://travel.state.gov/content/passports/en/country/taiwan.html> (last updated Dec. 23, 2016).)

collector of industrial information and engages in industrial espionage, as shown by the administrative notice documents in the record. However, the record does not demonstrate that the government of Taiwan targets U.S. intelligence information. Further, the record does not demonstrate that it seeks to exert pressure on U.S. citizens to collect information from family members residing in country or abroad. Finally, it is worth noting that the U.S. Government, and the Defense Department in particular, have a close and continuing relationship with Taiwan and its military, in accordance with the Taiwan Relations Act of 1979, which has governed policy in the absence of diplomatic relations or a defense treaty with Taiwan. In 2011 the principal assistant secretary of defense for Asian and Pacific security affairs testified to Congress, "Today, the United States has a deep security relationship with Taiwan, as indicated by the administration's strong record on arms sales. . . . We will continue to make available to Taiwan defense articles and services to enable it to maintain a sufficient self-defense capability." (Tyrone C. Marshall Jr. American Forces Press Service, *Official Cites Importance of Stability in Taiwan Strait*, <http://www.defense.gov/news/newsarticle.aspx?id=65543> (October 4, 2011).)

Mitigation

Applicant has been dealing with sensitive information for many years without an issue. He is highly trained in various aspects of his job that deal with protecting sensitive information. (Applicant Exhibits G, H, and I.)

Applicant's supervisor testified on Applicant's behalf. The witness has known Applicant for over 25 years, and has been his supervisor since 2004. He testified that Applicant is knowledgeable of his responsibilities to secure sensitive information, and that he has never mishandled information. The witness strongly recommended Applicant for a position of trust. (Applicant Exhibit L at 9; Tr. 15-22.)

Applicant submitted documentation showing that he has been a highly successful employee throughout his more than 25 years of service to his employer. (Applicant Exhibits A through D.) In addition, relatives, friends, and coworkers of Applicant submitted letters on his behalf. He is described as a "hard-working, honest, responsible, thoughtful, sincere and kind individual." (Applicant Exhibit L at 1-8.)

Policies

Positions designated as ADP I, II, and III are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "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." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to the DoD and DOHA by the Defense

Security Service and Office of Personnel Management. DoD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the Adjudicative Guidelines (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 AG ¶ 2(a), describing 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 [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.

According to 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 as to obtaining a favorable trustworthiness decision.

A person who applies for access to sensitive information seeks to enter 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 protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order 10865 provides that "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline C - Foreign Preference)

In this case the Government has met its initial burden of proving by substantial evidence that Applicant had a valid Taiwan passport. Applicant has mitigated the Government's concerns about that conduct. The concern is stated thus under this Guideline at AG ¶ 9:

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.

Disqualifying Condition AG ¶ 10 applies to the facts of this case:

Conditions that could raise a security concern and may be disqualifying include:

(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.

In 2007 Applicant obtained a Taiwanese passport in order to travel to Taiwan for a reunion. That was the only occasion when the passport was used. Applicant willingly and voluntarily destroyed this passport, thereby establishing mitigation under AG ¶ 11(d). Guideline C is found for Applicant.

Paragraph 2 (Guideline B - Foreign Influence)

The concern under Guideline B is styled as follows at 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.

The following Disqualifying Condition applies to this case under AG ¶ 7, based on the fact that Applicant has family connections to Taiwan:

(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.

Applicant has provided compelling evidence to show that the following Mitigating Conditions under AG ¶ 8 also apply to this particular case, given his particular situation:

(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.; and

(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.

Applicant has lived in the United States for more than half of his life. His wife is an American citizen, as are his children. Applicant convincingly states that he is only an American citizen, and has shown that his loyalties are to the United States. Based on my analysis of the available information, Applicant has overcome the adverse inference arising from his familial contacts with Taiwan. Guideline B is found for Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all relevant 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a trustworthiness determination 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 relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines B and C in my whole-person analysis. Applicant's contacts with his remaining family members in Taiwan are minimal. He has destroyed his Taiwanese passport. I have specifically considered the intelligence activities of Taiwan. Overall, the record evidence leaves me without questions as to Applicant's eligibility and suitability for a public trust position. For these reasons, I conclude Applicant did sufficiently mitigate the trustworthiness concerns arising from his alleged foreign influence and foreign preference.

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
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

Wilford H. Ross
Administrative Judge