



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



In the matter of:)	
)	
[NAME REDACTED])	ADP Case No. 15-04632
)	
Applicant for Public Trust Position)	

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: Alexander Collins, Jr., Esq.

02/23/2017

Decision

BORGSTROM, Eric H., Administrative Judge:

This case involves trustworthiness concerns under Guideline C (foreign preference) and Guideline B (foreign influence). Eligibility for access to sensitive information is denied.

Statement of the Case

On February 12, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR), citing trustworthiness concerns under Guideline B, foreign influence, and Guideline C, foreign preference. DOD acted pursuant to DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006. The AG are codified in 32 C.F.R. § 154, Appendix H (2006), and they replace the guidelines in Appendix 8 of the Regulation.

Applicant responded to the SOR on March 7, 2016, and she elected to have her case decided on the written record in lieu of a hearing. On April 5, 2016, the Government submitted its file of relevant material (FORM) and provided a complete copy to Applicant. Applicant received the FORM on April 12, 2016. She was afforded an opportunity to respond to the FORM within 30 days of its receipt and to file objections and submit

material to refute, extenuate, or mitigate the security concerns. On May 9, 2016, Applicant, through legal counsel, responded to the FORM. The case was assigned to me on December 15, 2016.

Procedural Issues

In the FORM, Department Counsel references FORM Items 1-3. FORM Items 2 and 3 are admitted into evidence as Government Exhibits 2 and 3, without objection.¹ Department Counsel requested that I take administrative notice of relevant facts about Taiwan.² The request and the 12 documents attached as enclosures were not admitted into evidence but are attached to the record as Administrative Exhibit (AX) I. I took administrative notice as requested by Department Counsel, without objection. The facts administratively noticed are set out below in my findings of fact. In her FORM response, Applicant included a representation letter, a brief, and an excerpt from the U.S. Department of State website. These three documents are admitted into evidence as Applicant Exhibits (AE) A-C, without objection.

Findings of Fact

In her response to the SOR, Applicant admitted all of the SOR allegations. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact:

Applicant is 54 years old. She was married in Taiwan in December 1986. In 1998, Applicant, her husband, and their son moved to Canada. Taiwanese citizens by birth, all three obtained Canadian citizenship while living in Canada. In August 2002, all three moved to the United States. In October 2010, Applicant became a naturalized U.S. citizen. Applicant, her spouse, and their 28-year-old son are citizens of Taiwan, Canada, and the United States, and they reside in the United States.³

Applicant's father-in-law, two brothers, sister, and brother-in-law are citizens of and reside in Taiwan.⁴ Applicant is bound by affection to these Taiwanese relatives. Her father-in-law is a retired Taiwanese police officer. Her brother-in-law is an environmentalist employed by the Taiwanese government. There is no evidence about the occupations of her siblings or whether they have any government or military contacts. She visited her relatives when she traveled to Taiwan; however, there is no information as to how frequently she otherwise has contact with her foreign relatives.⁵

¹ FORM Item 1 consists of the SOR and Applicant's response to the SOR. These items are pleadings and are included in the record.

² FORM Item 4.

³ GE 2; Response to FORM.

⁴ Applicant's parents were Taiwanese citizens living in Taiwan. They are deceased.

⁵ GE 2; GE 3; Response to FORM.

Applicant traveled to Taiwan in 2010, 2011, 2012, 2013, and 2015. She was issued a U.S. passport in January 2011. She used her Taiwanese passport for her travel to Taiwan and for an April 2013 trip to South Korea. She has not expressed a willingness to renounce her Taiwanese and Canadian citizenships, nor has she taken any steps to do so. She renewed her Taiwanese passport in March 2013, and it remains valid until March 2023. She has expressed a willingness to surrender or destroy her valid Taiwanese passport; however, she has not yet done so.⁶

I have taken administrative notice of the following adjudicative facts about Taiwan: Taiwan is a multi-party democracy, established as a separate, independent government by refugees from mainland China in 1949. The People's Republic of China (PRC) does not recognize Taiwan's independence and insists there is only one China. The United States recognized Taiwan as an independent government until January 1979, when it formally recognized the PRC government as the sole legal government of China. Taiwan maintains a large military establishment to protect itself from the PRC. Taiwan has developed significant economic ties with both the United States and the PRC. There is evidence that Taiwanese intelligence officials have specifically targeted U.S. citizens to obtain protected and classified information. There have been numerous instances of U.S. and Taiwanese citizens involved in the illegal export, or attempted export, of sensitive, dual-use technology to Taiwan.⁷

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions."⁸ The standard that must be met for assignment to sensitive duties is that 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."⁹ DOD contractor personnel are entitled to the procedural protections in the Directive before any final unfavorable access determination may be made.¹⁰

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. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard sensitive information.

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG.

⁶ Applicant's Canadian passport has expired.

⁷ AX I.

⁸ Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

⁹ Regulation ¶ C6.1.1.1.

¹⁰ Regulation ¶ C8.2.1.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. The 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 protection of the national security is the paramount consideration. Under AG ¶ 2(b), "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." The Government must present substantial evidence to establish controverted facts alleged in the SOR.¹¹ Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.¹² An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.¹³ An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for access to sensitive information.

Analysis

Guideline C, Foreign Preference

The concern under this guideline is set out in 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." Under AG ¶ 10, the following disqualifying conditions potentially apply:

(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; and

(3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country.

Dual citizenship standing alone is not sufficient to warrant an adverse trustworthiness decision. Under Guideline C, "the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions."¹⁴

¹¹ Directive ¶ E3.1.14.

¹² Directive ¶ E3.1.15.

¹³ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹⁴ ISCR Case No. 98-0252 at 5 (App. Bd. Sep. 15, 1999).

In March 2013, Applicant was issued a Taiwanese passport that expires in March 2023. She continues to possess this valid foreign passport. AG ¶ 10(a)(1) applies.

After Applicant became a naturalized U.S. citizen in 2010, she renewed her Taiwanese passport and repeatedly used her Taiwanese passport in lieu of her U.S. passport to travel to Taiwan and South Korea. She argued that her use of her Taiwanese passport is permitted under U.S. law; however, it is well-settled that a lawful course of action may still be significant conduct.¹⁵ Applicant's reliance on the U.S. Department of State notice that dual citizens will not endanger their U.S. citizenship by their use of a foreign passport is misplaced:

Nothing in Executive Order 12968, Executive Order 10865, or the Directive requires that DOD policies, practices, and procedures in security clearance adjudications must be consistent with State Department policies, practices, and procedures, explicitly ones that on their face do not deal with security clearance adjudications.¹⁶

An applicant's legal use of his or her foreign passport still constitutes "an exercise of foreign citizenship" within the context of ¶ 10(a). Whether she used her Taiwanese passport for personal convenience or as required by Taiwanese law, such actions constituted significant conduct.¹⁷ Applicant's use of the Taiwanese passport to travel to and from Taiwan and South Korea is a benefit based on the exercise of her Taiwanese citizenship. AG ¶ 10(a)(3) applies.

The following mitigating conditions are potentially relevant:

AG ¶ 11(a): dual citizenship is based solely on parents' citizenship or birth in a foreign country;

AG ¶ 11(b): the individual has expressed a willingness to renounce dual citizenship;

AG ¶ 11(d) use of a foreign passport is approved by the cognizant security authority; and

AG ¶ 11(e): the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

¹⁵ See ISCR Case No. 14-06440 at 4 (App. Bd. Jan. 8, 2016).

¹⁶ ISCR Case No. 99-0424 at 6 (App. Bd. Feb. 8, 2001).

¹⁷ See *id.* at 13.

Applicant was a Taiwanese citizen by birth. Although she repeatedly exercised her Taiwanese passport, even after becoming a U.S. citizen in 2010, AG ¶ 11(a) applies.¹⁸

Applicant expressed a willingness to surrender or destroy her Taiwanese passport; however, she never expressed a willingness to renounce her Taiwanese or Canadian citizenships. AG ¶ 11(b) does not apply.

To the extent Applicant argues that the U.S. Department of State's notice about the legality of using one's foreign passport mitigates the use of her Taiwanese passport, this argument is contrary to Appeal Board case law. The Appeal Board has held that merely because conduct is legal does not mean that the federal government has affirmatively authorized or approved such conduct.¹⁹ The State Department's dual nationality notice does not constitute approval by a "cognizant security authority" in the context of AG ¶ 11(d). AG ¶ 11(d) does not apply.

Although Applicant expressed a willingness to destroy or surrender her Taiwanese passport, she has taken no steps to do so. AG ¶ 11(e) requires that this action has been completed by the close of the record. AG ¶ 11(e) does not apply.

Notwithstanding my conclusion that AG ¶ 11(a) applies, Applicant has not mitigated the foreign preference concerns resulting from her continued possession and repeated use of her Taiwanese passport.²⁰

Guideline B, Foreign Influence

The security concern under this guideline is set out in AG ¶ 6 as follows:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

¹⁸ See ISCR Case No. 12-06885 at 6 (App. Bd. Sep. 12, 2013) ("The Board has concluded that AG 11(a) can be applied when an applicant's dual citizenship falls within the literal language of that mitigating condition, regardless of whether the applicant exercised the rights or privileges of foreign citizenship."). See also ISCR Case No. 03-23806 at 5-6 (App. Bd. Apr. 28, 2005).

¹⁹ See ISCR Case No. 98-0252 at 4 (App. Bd. Sep. 15, 1999).

²⁰ See ISCR Case No. 12-06885 at 6 (App. Bd. Sep. 12, 2013) ("The mere presence or absence of any given Adjudicative Guideline disqualifying or mitigating condition is not solely dispositive of a case"). See also ISCR Case No. 99-0109 at 5 (App. Bd. Mar. 1, 2000).

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.”²¹ 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.”²² Finally, we know 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 United States, and its human rights record are relevant in assessing the likelihood that an applicant’s family members are vulnerable to government coercion.

One disqualifying condition under this guideline is relevant to this case:

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.

To establish AG ¶ 7(a) the Government must demonstrate a “heightened risk” due to Applicant’s contacts with her Taiwanese relatives. Here, the facts for administrative notice, outlining Taiwan’s geopolitical security profile and intelligence-gathering activities, establish the “heightened risk” element under AG ¶ 7(a). Applicant’s spouse, son, brothers, sister, father-in-law, and brother-in-law hold Taiwanese citizenship, with all but her spouse and son residing in Taiwan. Applicant is bound by affection to these Taiwanese relatives and maintains contact with them. AG ¶ 7(a) applies.

The following mitigating conditions under this guideline are potentially relevant:

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;

AG ¶ 8(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

²¹ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

²² ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002).

AG ¶ 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 or exploitation.

Applicant is bound by affection to her Taiwanese family members. Her brother-in-law is employed by the Taiwanese government. There is no evidence about her siblings' occupations and contacts with the Taiwanese government and military. Applicant bears the burdens of production and persuasion in mitigation.²³ As a result, AG ¶ 8(a) does not apply as to these relatives (SOR ¶ 1.b.). AG ¶ 8(a) does apply as to Applicant, her spouse, and her son, who are citizens of and reside in the United States (SOR ¶ 1.a.).

Applicant's familial obligation caused her to renew her passport and travel to Taiwan several times in the last six years. Her strong ties with her Taiwanese family members, evidenced by her own statements and her regular travel to Taiwan, prevent me from concluding that her obligation is "so minimal" within the context of AG ¶ 8(b). Similarly, she has strong ties with her son and spouse, who hold triple citizenship and reside in the United States. Mindful of my obligation to decide close questions in favor of national security, Applicant's strong ties in both Taiwan and the United States present an unmitigated conflict of interest. AG ¶ 8(b) does not apply.

Applicant explicitly stated that she is bound by affection to her Taiwanese relatives, and she frequently has visited them. These facts buttress the presumption that one's relationship with her immediate family members is not casual.²⁴ AG ¶ 8(c) does not apply.

Based on their U.S. citizenship and residence, the foreign influence security concerns as to Applicant's son and spouse have been mitigated (SOR ¶ 2.a.). Absent evidence as to her siblings' contacts with the Taiwanese government and given her strong ties of affection and her brother-in-law's government employment, there is insufficient evidence to conclude that Applicant has mitigated the foreign influence security concerns associated with the remaining foreign relatives (SOR ¶ 2.b.).

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

²³ See ISCR Case No. 08-04488 at 6 (App. Bd. Apr. 23, 2009) ("[G]iven Applicant's burden of production in mitigation, the Board is not able to conclude that the evidence of record is sufficient to overcome the government's security concerns.").

²⁴ See ISCR Case No. 02-11570 at 7 (App. Bd. May 19, 2004).

(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.

I have incorporated my comments under Guidelines B and C in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under these guidelines, but some warrant additional comment.

Applicant has strong ties with her Taiwanese relatives. Her brother-in-law is employed by the Taiwanese government, and there is no evidence about her siblings' contacts with the Taiwanese government or military. Taken with her repeated exercises of Taiwanese citizenship through her renewal, possession, and use of her Taiwanese passport, she has provided insufficient evidence to mitigate the foreign influence and foreign preference security concerns. After evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with national security to grant her eligibility for a public trust position.

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:	Against Applicant
Subparagraphs 1.a.-1.b.:	Against Applicant
Paragraph 2, Guideline B:	Against Applicant
Subparagraph 2.a.:	For Applicant
Subparagraph 2.b.:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is denied.

Eric H. Borgstrom
Administrative Judge