

DATE: August 21, 2001

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 00-0674

## **DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Marc E. Curry, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Possession of a British passport obtained prior to naturalization of a Hong Kong citizen is mitigated by surrender of the passport to the British Embassy and submission of an application to renounce British nationality; presence of the father, grandmothers, and, at times, mother in Hong Kong, now under PRC control, raises reasonable doubts as to the extent of the Applicant's vulnerability to pressure, coercion, and/or noncoercive persuasion to compromise classified information. Clearance is denied.

### **STATEMENT OF THE CASE**

On April 4, 2001, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written statement, dated May 1, 2001, the Applicant responded to the allegations set forth in the SOR and requested a hearing.

The case was assigned on May 14, 2001, to Administrative Judge Heiny and reassigned to Administrative Judge Mason on June 18, 2001, and a notice of hearing was issued by the latter on July 16, 2001. The undersigned Administrative Judge received the case assignment on July 17, 2001. The undersigned held the hearing as scheduled on August 9, 2001. The Department Counsel presented three exhibits ("exhs") and the testimony of the Applicant as a hostile witness. The Applicant's case consisted of the presentation of two exhibits, but no witnesses. The undersigned Administrative Judge received the transcript ("tr") of the hearing on August 16, 2001. A third document was submitted by the Applicant on August 14, 2001, and was admitted ("exh. C") without objection on August 20, 2001. The record in this case closed on August 20, 2001.

## FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following two guidelines: paragraph 1, Guideline C (foreign preference), and paragraph 2, Guideline B (foreign influence). The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 24-year-old member of the engineering staff of a U.S. Government contractor since July 1999. The Applicant seeks to obtain a Secret personnel security clearance. Tr pages 91-93.

The Applicant was born in Hong Kong, then a British crown colony, in June 1977. Hong Kong was handed over to the People's Republic of China (PRC) on July 1, 1997, by the United Kingdom. Exh. 1, page 8. The Applicant emigrated with his parents to the United States when he was 13 years old in August 1990. Tr page 55. He attended high school in the United States during 1991-95. He obtained a British National (Overseas) passport in October 1994 valid for ten years. He attended college in the United States during 1995-99. He was awarded a bachelor's degree in computer science by that institution in May 1999. He has never married. Exh. 1.

The Applicant and his mother were naturalized as U.S. citizens in November 1997, and his brother was naturalized as a U.S. citizen in December 1998. The Applicant obtained a United States passport in December 1997 valid for ten years. The Applicant did not use his British passport after he was naturalized. Exh. 2.

The Applicant's 51-year-old father is a citizen and resident of Hong Kong. He is also a permanent resident alien of the United States, where he vacations twice a year for about a week at a time. Because his Hong Kong employer requires him to work in Hong Kong, the Applicant's father is unable to establish a sufficient period of continuous U.S. residence to qualify for U.S. naturalization. He has no substantial property interests in Hong Kong and plans to live in the United States when he retires. SOR answer; tr pages 81-82. The Applicant's two grandmothers, ages 75 and 70 and each born in pre-World War II China, are also citizens and residents of Hong Kong. Tr pages 46-49. The Applicant's mother, a U.S. citizen and resident, spends summers in Hong Kong with his father. Tr page 84-86.

The Applicant travels to Hong Kong frequently for pleasure and, while there, sees his father and his grandmothers. He traveled there in the summers of 1996 and 1997 [\(U\)](#) and in December 1997 and December 1998. Exh. 1. He has also traveled to Hong Kong every year since, except in 2000, and was last in Hong Kong a few weeks before the hearing. Tr pages 43-44, 57-61, 79. Since the Applicant was naturalized in November 1997, he has consistently and exclusively used his U.S. passport for travel. During May 1997-September 1997, the Applicant worked as an "audit trainee assistant" for a U.S. accounting firm in Hong Kong. Exh. 1, pages 4-5. He opened an account with the local bank to facilitate the cashing and depositing of his paychecks. His account balance generally fluctuated then between HK\$2,600 and HK\$7,200. Exh. 2. At the time he closed the account in May 2001, the balance was HK\$5,239.40 (about US\$670). SOR answer; exh. A; tr pages 45, 63.

The Applicant received the ASD(C<sup>3</sup>I) memorandum (exh. 3), dated August 16, 2000, in May 2001, and promptly inquired of the British Embassy at Washington, D.C., how to renounce his British citizenship. He received an application and instructions by reply letter of June 7, 2001 (exh. B) and completed the application on June 18, 2001 (exh. C). Receipt of the application for renunciation of British citizenship was acknowledged by the British Embassy at Washington, D.C., by its letter dated July 2, 2001 (exh. B). *See* tr pages 35-38.

## POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

## 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 or she may be prone to provide information or make decisions that are harmful to the interests of the United States.**

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

[2nd] Possession and/or use of a foreign passport;

**Conditions that could mitigate security concerns include:**

[1st] Dual citizenship is based solely on parents' citizenship or birth in a foreign country;

[2nd] Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship;

[4th] Individual has expressed a willingness to renounce dual citizenship.

## GUIDELINE B - FOREIGN INFLUENCE

**A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.**

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

[1st] An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country;

**Conditions that could mitigate security concerns include:**

[1st] A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States;

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section 6.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledge-able participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

"It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations."

*Dept. of the Navy v. Egan*, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum **quantum** of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence--rather than as an indication of the Court's tolerance for error below. [\(2\)](#)

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. [\(3\)](#)

## CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of the witness who testified, the undersigned concludes that the Applicant successfully rebutted and overcame the Government's case with regard to Guideline C.

The Applicant obtained a British National (Overseas) passport in October 1994 when he was not a dual national but simply a citizen of Hong Kong resident in the United States. He retained possession of that passport after he became a naturalized U.S. citizen in November 1997 and after he also was issued a U.S. passport. This falls within the scope of DC #2, which is identified on page 4 *supra*, notwithstanding that he did not use the British passport after November 1997. In mitigation, the Applicant's dual nationality is based solely on his birth in Hong Kong (MC #1), and his alleged foreign preference is premised upon his obtaining the British passport before he was naturalized (MC #2). He has mitigated and overcome the Government's concern that retention of a foreign passport is incompatible with a U.S. personnel security clearance (exh. 3) by surrendering the foreign passport and taking concrete steps to renounce his foreign citizenship. *See* MC #4,

which is also identified on page 4 *supra*. Therefore, SOR ¶ 1 (foreign preference) is concluded favorably to the Applicant.

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of the witness who testified, the undersigned concludes that the Government established its case with regard to Guideline B.

The Applicant's father, who was born in, lives in, and remains a citizen of Hong Kong, now under the control--as well as sovereignty--of the People's Republic of China (PRC) is an immediate family member whom he sees frequently and corresponds with monthly. The Applicant's grandmothers, citizens and residents of Hong Kong, are likewise family members, notwithstanding that the Applicant himself testified that he is "not attached" to them. Tr pages 78-80. Moreover, his mother, though a U.S. citizen and resident, usually stays in Hong Kong every summer. All this evidence falls within the scope of DC #1 under Guideline B, which is identified on page 5 *supra*. The vulnerability of the Applicant to coercion and/or noncoercive persuasion by the PRC through pressure or other threats, express or implied, upon his family members in Hong Kong is not merely speculative or an abstract possibility given the totality of the Applicant's conduct and circumstances. <sup>(4)</sup> The Applicant testified that he would report to the U.S. Government any such pressure or threats rather than compromise U.S. classified information and run the risk of incarceration. Tr pages 73-79, 87-95. However, such evidence cannot be taken a face value, for example, in absence of evidence that the Applicant has acted consistently in comparable situations. ISCR Case No. 99-0511 (Dec. 30, 1999) at 10-11. The burden of proof is on the Applicant to demonstrate the applicability of MC #1 under Guideline B, which is identified on page 5 *supra*. ISCR Case No. 99-0597 (Dec. 13, 2000) at 6-7. The Applicant has not met that burden and does not persuade that the risk of compromise is minimal. Therefore, SOR ¶ 2 (foreign influence) is concluded adversely to the Applicant.

Each clearance decision is required to take into consideration pertinent factors set forth in Section 6.3 of the Directive and in the adjudicative process discussion at enclosure 2 to the Directive. These factors are identified on page 5 *supra*. The nature and extent of the Applicant's vulnerability to foreign influence is serious, and the likelihood of its continuation is highly probable. His lack of expressed concern with the actions of the PRC in national security matters and corresponding expressed faith in the invulnerability of Hong Kong to pressures from the central government are troubling, raising reasonable doubts about his eligibility of a security clearance.

### **FORMAL FINDINGS**

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline C: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Paragraph 2. Guideline B: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: For Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

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Jerome H. Silber

Administrative Judge

1. The Applicant wished he had been present in Hong Kong "to witness the historic hand over" of the crown colony to the PRC in July 1997, but was on a brief vacation in Hawaii with his parents at the time. Tr pages 66-69.

2. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DOHA Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DOHA] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

3. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

4. The Applicant has removed the leverage that could have been exercised upon his Hong Kong bank account. Therefore, SOR ¶ 2.d is resolved favorably to the Applicant.