

DATE: December 16, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-19939

## **DECISION OF ADMINISTRATIVE JUDGE**

**JOHN G. METZ, JR**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Rita C. O'Brien, Esquire, Department Counsel

#### **FOR APPLICANT**

Richard Murray, Esquire

### **SYNOPSIS**

Applicant's possession and two-time use of her foreign passport after her naturalization as a U.S. citizen were mitigated where Applicant had complied with the "Money Memo" and formally renounced her foreign citizenship. Foreign influence issues were mitigated, despite her parents' residence in a foreign country, where the parents were citizens of a U.S. ally, and had obtained permanent legal U.S. residence status--and thus not in a position to be exploited to the detriment of U.S. interests.

### **STATEMENT OF THE CASE**

On 10 May 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding<sup>(1)</sup> that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 30 May 2002, Applicant answered the SOR and requested a hearing. The case was assigned to me on 15 October 2002, and I received the case the next day. I set the case on 18 October 2002, and issued a notice of hearing on 21 October 2002 for a hearing on 3 December 2002.

At the hearing, the Government presented two exhibits--admitted without objection--and no witnesses; Applicant presented four exhibits, and the testimony of three witnesses, including herself. DOHA received the transcript on 11 December 2002.

### **PROCEDURAL ISSUES**

At the hearing, Department Counsel asked me to take official notice of the "Money Memorandum" (Tr. 16).<sup>(2)</sup> Department Counsel also moved to amend the SOR by amending Subparagraph 1.b. to correctly reflect that the foreign passport possessed by Applicant was a British National Overseas passport (Tr. 9). I granted the motion (Tr. 10).

On my own motion, I indicated to the parties that I intended to I take official notice that on 1 July 1997 the United

Kingdom lease on the British Crown Colony of Hong Kong expired and dominion, control, and the exercise of sovereignty over Hong Kong reverted to the People's Republic of China (PRC), although Hong Kong retains a special status within the PRC and residents there do not automatically obtain citizenship in the PRC (Tr. 35-35).

## **FINDINGS OF FACT**

Applicant admitted the allegations of the SOR; <sup>(3)</sup> accordingly I incorporate those admissions as findings of fact.

Applicant--a 27-year-old employee of a defense contractor--seeks access to classified information. She has not previously held a clearance.

Applicant--an ethnic Chinese--was born in Hong Kong in 1975, making her a citizen of the United Kingdom. Although her early childhood and education was in Hong Kong, she emigrated to the U.S. in 1991, when she was 15 years old, to obtain a better education. She graduated from a U.S. high school in May 1993, attended a community college until December 1994, and graduated from a major state university in December 1997. She applied for U.S. citizenship and became a naturalized citizen in February 1998. She obtained her U.S. passport later that year.

During the summers Applicant was in university, she traveled to Hong Kong to be with her parents, and worked as a secretary for her father, a sales manager in a fabric manufacturing plant. She used her British National Overseas (BNO) passport, which she had renewed in August 1993. <sup>(4)</sup> However, she has no financial assets in Hong Kong and intends to remain in the U.S.

When Applicant became a U.S. citizen, she still possessed the BNO (U.K.) passport issued in August 1993 (when Applicant was still a citizen only of the U.K.). This passport would not expire until August 2004. In addition to the foreign travel discussed above, Applicant used her BNO (U.K.) passport to travel to Hong Kong in 1998 and 2000--on dates after her naturalization as a U.S. citizen.

On 13 March 1998, Applicant executed a Security Clearance Application (SCA)(SF 86) (G.E. 1) on which she truthfully disclosed her foreign birth, <sup>(5)</sup> dual citizenship, foreign connections, <sup>(6)</sup> and travel.

On 22 July 1998, Applicant gave a sworn statement to a Special Agent of the Defense Security Service (DSS) (G.E. 2), describing her foreign connections:

I was born in Hong Kong, on 03 November 1975. At the time, Hong Kong was under British rule. From November 75 to August 1991, I lived in Hong Kong, with my parents. In August 1991, I came, to the United States, to attend high school and obtain a college degree. From August 1991 to the present, I have lived in the United States and traveled to Hong Kong during summer breaks. In February 1998, shortly after graduating college, I became a U.S. citizen. In reality, I consider myself a citizen of the United States and I owe allegiance to no other country. I have no reservations about renouncing my former Hong Kong citizenship, to include any rights, privileges or benefits that may exist.

I do possess a Hong Kong passport. I obtained it in August 1993 so that I could travel between the United States and Hong Kong, during summer breaks, to visit my parents. My Hong Kong passport expires on 07 August 2003. I have not used my Hong Kong passport since the summer of 1997, and I have no intention of doing so in the future. I have no reservations, what so ever (sic), about relinquishing my Hong Kong passport, as a condition for access, to Department fo Defense, classified information.

As far as I know, I have no obligations to Hong Kong or the Peoples Republic of China, as it is now called. If there are any privileges or benefits available to me, I am truly not interested. I have no financial interests, in Hong Kong. I have never sought or held political office, in Hong Kong, and I have not served in the military.

However, after her subject interview, Applicant used her BNO passport to travel to Hong Kong in 1998 and 2000.

Applicant's mother and father are citizens of the U.K., and still reside in Hong Kong (G.E. 1; Tr. 26), however, both are legal permanent residents of the U.S., i.e, they have their "green cards" (Tr. 26), and they plan to emigrate to the U.S.

eventually. They originally brought the Applicant to the U.S. when she emigrated in 1991. They visit her in the U.S. every year or so. As noted above, Applicant traveled to Hong Kong during her summer breaks to visit her parents. Since graduating, she has traveled to Hong Kong on two occasions to visit them and her grandparents. Both parents are now retired; father from his job as a sales manager, mother from a job as a secretary in a law firm. Neither have been involved with the Government of Hong Kong or political groups. Applicant's only sibling is a naturalized U.S. citizen, residing in the U.S. He has no business connections or financial interests in Hong Kong, although he has one friend residing in Hong Kong with whom he has monthly telephone contact.

At the hearing, Applicant testified consistent with her sworn statement about her foreign connections, providing the additional information about her travel on her BNO passport. She has no connection with the PRC or with the U.K. beyond her growing up in Hong Kong. She testified credibly that she considers herself a citizen of the U.S. only. She testified that it was not until she received the SOR that she had any idea of the need to surrender her BNO passport. Once she did, she hired counsel and took steps, not only to surrender the passport in accordance with the "Money Memo", but to renounce her U.K. citizenship (A.E. A-D). She never voted in Hong Kong elections, has no bank accounts or other financial interests in the U.K., and never held any jobs there except for her summer employment with her father's company. She provides no financial support to her parents. She estimates that she has about 20 relatives residing in Hong Kong, including her parents and grandparents, but has little contact with any of them except her parents and grandparents. She estimates she has 10-15 relatives residing in the U.S., all of them U.S. citizens.

Applicant's supervisor has known her since March 1998, when she came to work for him, and considers her an excellent employee, who is truthful. He is aware of no reason she should not have a clearance; however, while he is aware that the hearing was related to her clearance application, he was not aware of the specific reasons for the hearing.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

### **FOREIGN PREFERENCE (GUIDELINE C)**

E2.A3.1.1 The Concern: 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.

E2.A3.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A3.1.2.1. The exercise of dual citizenship.

E2.A3.1.2.2. Possession and/or use of a foreign passport;

E2.A3.1.2.4. Accepting educational. . .benefits. . .from a foreign country;

E2.A.1.3. Conditions that could mitigate security concerns include:

E2.A3.1.3.2. Indicators of possible foreign preference. . . occurred before obtaining United States citizenship;

E2.A3.1.3.4. Individual has expressed a willingness to renounce dual citizenship.

## FOREIGN INFLUENCE (GUIDELINE B)

E2.A2.1.1. The Concern: 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 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.

E2.A2.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A2.1.2.1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident in, a foreign country;

E2.A2.1.3. Conditions that could mitigate security concerns include:

E2.A2.1.3.1. A determination that the immediate family member(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.

On 16 August 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD, C<sup>3</sup>I) issued a memorandum(the "Money emo") to clarify the application of Guideline C., Foreign Preference, to cases involving possession and/or use of a foreign passport. In pertinent part, the ASD, C<sup>3</sup>I memorandum "**requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government.**"(Emphasis added).

### Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

### CONCLUSIONS

A dual citizen of a foreign country and the United States since her naturalization in 1998, Applicant's foreign citizenship possesses little security significance if based solely on her birth in a foreign country. For Applicant's conduct to fall within the security concerns of Guideline C, Foreign Preference, she must have acted in a way to indicate a preference for a foreign nation over the United States. However, inimical intent or detrimental impact on the interests of the United States is not required before the Government can seek to deny access under Guideline C. The Government has a compelling interest in ensuring those entrusted with this Nation's secrets will make decisions free of concerns for the foreign countries of which one is also a citizen in cases of dual citizenship. Under this assessment I conclude the Government has established its case under Guideline C. Nevertheless, I conclude that Applicant has mitigated the security concerns.

Applicant's possession and use of her BNO passport after her naturalization in 1998, constitutes an exercise of dual citizenship with the U.K. However, Applicant convincingly asserts that she prefers her U.S. citizenship. The two instances of conduct to the contrary--retaining her U.K. passport after becoming a U.S. citizen, and using it to travel to Hong Kong in 1998 and 2000--are mitigated by two factors. First, she credibly asserts that she retained the passport initially because she did not know what else to do with it, and had no reason to know that she should dispose of it. (7) Second, although she used the passport traveling to Hong Kong after she became a U.S. citizen (an act with greater security significance than mere retention of the passport) when she became aware of the specifics of the "Money Memo," she sought information--through counsel--on how to surrender her U.K. passport, then not only surrendered the passport to the British Embassy, but submitted an application to renounce her U.K. citizenship, an action not strictly required by the mitigating factor.

Applicant has resided in the U.S. since she was 15 years old and completed significant portions of her education in the U.S. Her brother resides here, and Applicant's parents are legal permanent residents of the U.S. They intend to emigrate here eventually. She has no ties to the PRC and none to the U.K. beyond growing up in Hong Kong, which no longer belongs to the U.K. Her national preference seems overwhelmingly for the U.S. In addition, I found Applicant's testimony that she considers herself a citizen of the U.S. only to be credible. Accordingly, I resolve Guideline C. for Applicant.

In a similar fashion, the Government has established its case under Guideline B., but I consider the security concerns mitigated. Applicant's mother and father are U.K. citizens, living in Hong Kong, but have legal permanent resident status in the U.S. They intend to emigrate to the U.S. eventually, and presumably will have that opportunity because of the U.S. citizenship of Applicant and her sibling. Applicant is financially independent of her parents; and they of her. The parents' employment when the U.K. exercised control over Hong Kong suggests they are unlikely to have been agents of a foreign power. Now retired, they are unlikely to have become agents of the new sovereign. Further, despite the reversion of Hong Kong to the PRC--which does increase the potential for exploitation (8)--there is nothing in the record to suggest that the parents' relationship with Applicant, or their past positions in Hong Kong, is such that Applicant would be forced to chose between her duty to her parents and her duty to the U.S. Accordingly, I resolve Guideline B. for Applicant.

### **FORMAL FINDINGS**

Paragraph 1. Guideline B: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Paragraph 2. Guideline C: FOR THE APPLICANT

Subparagraph a: For the Applicant

### **DECISION**

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.

**John G. Metz, Jr.**

**Administrative Judge**

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated 2 January 1992--amended by Change 3 dated 16 February 1996 and by Change 4 dated 20 April 1999 (Directive).

2. The 16 August 2000 memorandum of the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD, C<sup>3</sup>I), so-called the "Money Memorandum" because it is signed by Assistant Secretary Arthur L. Money.
3. Although, strictly speaking, she admitted being a citizen of Hong Kong but denied being a citizen of the PRC, denied having a Hong Kong passport but admitted having a BNO passport, and admitted working for her father's fabric company but denied the length of employment (the SOR alleged the period as continuous from 1995 to 1997).
4. Although not stated in the record, I infer that Applicant traveled to the U.S. in 1991 on a BNO passport, the only travel document for which she was eligible, and that her initial BNO passport was probably not a 10-year passport because she was a minor at the time it was issued.
5. I conclude that the SCA reflects Applicant's birthplace as "Hong Kong, PRC" simply because at the time Applicant completed the SCA, Hong Kong was part of the PRC.
6. Although she overlooked her younger brother, who emigrated to the U.S. in approximately 1993 and became a U.S. citizen himself in about 1997-1998.
7. Department Counsel's argument that Applicant (or her FSO) should have anticipated the contents of the Money Memo before its issuance in August 2002 goes too far. At the time Applicant completed her SCA and traveled to Hong Kong on her BNO passport, the chief mitigating factor for exercises of dual citizenship, including possession and use of a foreign passport, was an expressed willingness to renounce the foreign citizenship. Not until the Money Memo did DoD clarify that possession or use of a foreign passport could only be mitigated by surrender of the passport (or proof of formal sanction by the U.S. government).
8. Despite Hong Kong's special status within the PRC, the change in the exercise of sovereignty from the U.K. (with its long history of democratic rule) to the PRC (with its long history of autocratic rule) does not guarantee that the parents are not subject to potential exploitation by the PRC. However, I conclude that the parents' U.K. citizenship, coupled with their permanent legal U.S. resident status, makes it less likely that the potential exploitation could cause Applicant to act contrary to U.S. interests to assist her parents.