

DATE: August 6, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-10987

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Matthew F. Alivernini, Esq.

SYNOPSIS

Twenty-five-year-old software engineer used his passport from the People's Republic of China on two occasions after he became a U.S. citizen and acquired a U.S. passport. Applicant deliberately falsified his security clearance application by claiming that, in the previous seven years, he had not had an active foreign passport. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. In accordance with the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) on 7 March 2003 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the foreign preference, (Guideline C), personal conduct (Guideline E), and foreign influence (Guideline B) personnel security guidelines of the Directive.

Applicant answered the SOR in writing on 29 March 2003. The case was assigned to me on 2 May 2003. A hearing was originally scheduled for 19 June 2003, but was delayed when Applicant sought legal counsel. On 11 July 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government's case consisted of four exhibits and two documents of which I took official notice. Applicant testified on his own behalf and submitted a total of 28 exhibits. DOHA received the transcript (Tr.) of the proceeding on 21 July 2003.

FINDINGS OF FACT

Applicant was born in Hong Kong in 1977. Ex. 1 at 1. In 1991, at the age of 13, Applicant emigrated from Hong Kong to the U.S., on a British passport, with his mother. Ex. C; Tr. 50, 65. He attended high school in a major U.S. city from 1991-1995. He started university in 1995 and graduated in 2000. He is currently working on a graduate degree.

When Applicant immigrated to the U.S., Hong Kong was British territory. Between June and July 1996, Applicant visited Hong Kong, presumably on his British passport. On 1 July 1997, the People's Republic of China (PRC) took control of Hong Kong and established it as a Special Administrative Region. In 1998, Applicant applied for and received a passport for Hong Kong as a Special Administrative Region of the PRC with an expiration date of 2008. On 14 January 1999, Applicant became a naturalized U.S. citizen. Ex. 1 at 1; Answer. His U.S. passport was issued on 19 August 1999. Ex. 1 at 1.

After receiving his U.S. passport, Applicant returned to Hong Kong on two occasions, December 1999 and June 2000. On both occasions he used his Hong Kong passport. Ex. 1 at 4; *see* Ex. 2 at 1.

In February 2001, Applicant went to work for defense contractor. Ex. 1 at 2. He learned from the facility security officer that possession of a Hong Kong passport would be a problem, so Applicant delayed completing his security clearance application until he could renounce his PRC citizenship. He mailed his passport to one of his mother's friends in Hong Kong who took it to the authorities. Tr. 31.

On 19 July 2001, Applicant completed his security clearance application (SCA). Question 15 of the application asked if, "[i]n the last seven years, [Applicant] had an active passport that was issued by a foreign government?" Applicant answered, "No." Ex. 1 at 4. In answer to question 16, Applicant acknowledged visiting Hong Kong in 1996, 1999, and 2000. Ex. 1 at 4.

On 1 August 2001, the Immigration Department of the PRC Hong Kong Nationality Section issued a declaration acknowledging Applicant's change to U.S. nationality. Ex. B. It appears the PRC authorities canceled his Hong Kong passport (Ex. A), but the evidence does not clearly demonstrate whether it occurred on the same date the PRC acknowledged his change of nationality.

On 22 January 2002, Applicant provided a signed, sworn statement to a special agent of the Defense Security Service (DSS). Ex. 2. In it, Applicant claimed that he obtained his PRC passport before becoming a U.S. citizen, and he used it only twice to ease his access in and out of Hong Kong. Ex. 2 at 1. He also stated that he was willing to "renounce any foreign citizenship and/or foreign passports." He did not mention his passport had been canceled and his PRC citizenship had been revoked.

Applicant married in December 2002. His wife is a citizen of Hong Kong but a permanent resident of the U.S. She intends to apply for U.S. citizenship as soon as she is eligible. Tr. 43. Members of her immediate family reside in the U.S., but her grandparents, aunts and uncles are residents and citizens of Hong Kong. Tr. 62. Applicant's parents and brother are citizens of Hong Kong living in the U.S. Applicant helped his parents apply for U.S. citizenship on 8 June 2003. Tr. 64. His brother is in high school and is not yet eligible to apply for U.S. citizenship, although he intends to do so as soon as possible. Tr. 42-43. Applicant's grandparents, two aunts, and two uncles are citizens and residents of Hong Kong. None of his relatives work for the government.

Applicant stays in contact by e-mail with friends who are citizens and residents of Hong Kong. Answer; Tr. 40-41. One of the friends now lives in Paris, France, where she works as an information technology professional. Tr. 41; Ex. M.

Applicant does not belong to any foreign associations and has no financial or business interests outside the U.S. Tr. 47-49, 65. His neighbors and coworkers hold Applicant in high esteem for his honesty, work ethic, and friendliness. Exs. S-AB.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use,

handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

Guideline C-Foreign Preference

In the SOR, DOHA alleged under Guideline C that Applicant (a) maintained a PRC passport after becoming a naturalized U.S. citizen; (b) used his PRC passport for entry into Hong Kong in 1999 and 2000; (c) expressed a willingness to relinquish PRC citizenship and passport on 22 January 2002, but maintained both. 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. Directive ¶ E2.A3 .1.1.

The Government established by substantial evidence that Applicant retained and used his Hong Kong passport on two occasions after he acquired U.S. citizenship and a U.S. passport. DC 2. Although he didn't realize it at the time, Applicant automatically lost his PRC citizenship when he became a naturalized citizen of the U.S. Article 9, Nationality Law of the People's Republic of China (Ex.3). Thus, Applicant was not entitled to use his PRC passport to enter Hong Kong in 1999 and 2000.

Applicant asserts that he used his Hong Kong passport to enter Hong Kong, instead of his U.S. passport, solely for personal convenience—he was able to process through airport immigration and customs much more quickly. Ex. 2 at 1; Tr. 36. A foreign preference can be shown by an Applicant's exercise of the rights and privileges of foreign citizenship for reasons of personal convenience or expediency. ISCR Case No. 02-02052 at 4 (App. Bd. Apr. 8, 2003). That Applicant's use of his foreign passport was for personal convenience is not a mitigating condition under Guideline C. ISCR Case No. 99-0424, 2001DOHA LEXIS 59 at *47 (App. Bd. Feb. 8, 2001) (citing ISCR Case No. 99-0295 at 6 (App. Bd. Oct. 20, 2000)).

Applicant believes he renounced his foreign citizenship before making the signed, sworn statement. That may be true—Applicant made the statement more than five months after the PRC acknowledged Applicant's change of citizenship. However, it is unclear whether Applicant knew the PRC canceled his passport and acknowledged his change or nationality when he made the statement. If he did know, his statement, that he was willing to "renounce any foreign citizenship and/or foreign passports," makes no sense. Nevertheless, he has relinquished his PRC citizenship and passport. Findings are against Applicant for ¶ 1.b., and for Applicant under ¶¶ 1.a. and 1.c.

Guideline E-Personal Conduct

In the SOR, DOHA alleged under Guideline E that Applicant knowingly falsified (a) his SCA by claiming that, in the past seven years, he did not have an active passport issued by a foreign government and (b) a signed, sworn statement to a DSS agent by stating he had only used his PRC passport twice and never after becoming a U.S. citizen. Under Guideline E, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. Directive ¶ E2.A5.1.1

In his answer to the SOR, Applicant admitted knowingly falsifying his security clearance application by not reporting that he had an active foreign passport in the previous seven years. Thus, the Government established by substantial evidence that Applicant deliberately falsified relevant and material facts on his security clearance application. DC 2. At the hearing, Applicant contended that he was confused by the question. Tr. 33. But the question is straight-forward and clear. Although English is not his first language, Applicant completed high school and college and is working on a graduate degree, all at American schools. Applicant has not convinced me that he was confused by the question. Finding is against Applicant on ¶ 2.a.

In his answer to the SOR, Applicant admitted he falsified his signed, sworn statement to a DSS agent by stating he had never used his PRC passport after becoming a U.S. citizen. At the hearing, Applicant amended his answer. I permitted him to do so because the allegation in the SOR incorrectly alleged what Applicant said in his signed, sworn statement. In that statement, Applicant did not state that he had never used his PRC passport after becoming a U.S. citizen. In fact, Applicant said just the opposite. He admitted using his PRC passport twice after becoming a U.S. citizen. Finding is for Applicant.

Guideline B-Foreign Influence

In the SOR, DOHA alleged under Guideline B that (a) Applicant's parents are citizens of Hong Kong residing in the U.S.; (b) Applicant maintains contact with and visited in 1992, 1996, 1999, and 2000 his grandparents, two aunts, and two uncles who are citizens and residents of Hong Kong; (c) his sibling is a citizen of Hong Kong residing in the U.S.; and (d) Applicant maintains e-mail contact with friends who are citizens and residents of Hong Kong. A security risk may exist when an individual's immediate family 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. Directive ¶ E2.A2.1.1

The Government established by substantial evidence that members of Applicant's immediate family (parents and brother) are citizens of the PRC. DC 1. However, neither his parents nor his brother are agents of a foreign power or in a position to be exploited by a foreign power. MC 1. They are residing in the U.S. and intend to become U.S. citizens as soon as possible. Members of his wife's immediate family are also resident in the U.S. Thus, these family members do not place Applicant in a position of vulnerability to foreign influence by a foreign government. Although Applicant admits contacts with other relatives and friends from Hong Kong, these contacts are casual and infrequent. MC 3. They do not pose a security threat. Applicant has no financial or business interests abroad. MC 5. Considering all the circumstances, Applicant demonstrated that his foreign contacts do not place him in a position of vulnerability to coercion or influence. Findings on ¶ 3 are for Applicant

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline C: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: For Applicant

Paragraph 1. Guideline B: FOR APPLICANT

Subparagraph 3.a.: For Applicant

Subparagraph 3.b.: For Applicant

Subparagraph 3.c.: For Applicant

Subparagraph 3.d.: For Applicant

DECISION

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

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.