

KEYWORD: Foreign Influence; Foreign Preference

DIGEST: Applicant's sister, who is a citizen and resident of Hong Kong, works for the Chinese government. His mother-in-law and father-in-law are also citizens and residents of Hong Kong. Applicant, a naturalized United States citizen since September 2001, receives a \$4,000.00 monthly pension from the Hong Kong government that is deposited directly into a Hong Kong bank. He also maintains approximately \$1,050,000.00 in assets in Hong Kong. He surrendered his foreign passport after becoming a U.S. citizen. He has failed to mitigate the security concerns that result from his relatives' presence in Hong Kong and his substantial foreign assets. Clearance is denied.

CASE NO: 02-27396.h1

DATE: 05/06/2004

DATE: May 6, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-27396

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Marc E. Curry, Esq., Department Counsel

**FOR APPLICANT***Pro Se***SYNOPSIS**

Applicant's sister, who is a citizen and resident of Hong Kong, works for the Chinese government. His mother-in-law and father-in-law are also citizens and residents of Honk Kong. Applicant, a naturalized United States citizen since September 2001, receives a \$4,000.00 monthly pension from the Hong Kong government that is deposited directly into a Hong Kong bank. He also maintains approximately \$1,050,000.00 in assets in Hong Kong. He surrendered his foreign passport after becoming a U.S. citizen. He has failed to mitigate the security concerns that result from his relatives' presence in Hong Kong and his substantial foreign assets. Clearance is denied.

**STATEMENT OF THE CASE**

On September 16, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B (foreign influence) and Guideline C (foreign preference). Applicant submitted a response to the SOR, received by DOHA on October 8, 2003, and requested a clearance decision based on the written record without a hearing. Applicant admitted all allegations contained in the SOR, although he claimed he had surrendered his foreign passport.

Department Counsel prepared a File of Relevant Material (FORM) on January 12, 2004, that was mailed to Applicant January 13, 2004. Applicant responded to the FORM by submission of a statement sworn to on February 7, 2004. Department Counsel did not object to the admissibility of the information and supporting documents submitted by Applicant. The case was assigned to another administrative judge on March 4, 2004, and reassigned to me on March 5, 2004, based on administrative concerns.

## FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 56 years old, married, and the father of two daughters, ages twenty-two and eighteen. He, his wife, and daughters, all of Chinese ancestry, immigrated to the United States from Hong Kong in 1995, and became naturalized U.S. citizens on September 14, 2001. They have resided in the same residence since December 1995. Applicant's mother, who is eighty-two years old, and a citizen of Hong Kong, also resides with him. Applicant was employed as an audit technician from September 1996 to December 1997, and has been employed as a network engineer for a defense contractor since January 1998. Applicant's home, value not listed, is paid-in-full. He has about \$460,000.00 deposited in U.S. banks, and \$650,000.00 invested in U.S. mutual funds.

Applicant worked in the computer field for the tax department of the British Hong Kong government in Hong Kong for approximately twenty years. He retired in 1995, and receives a pension of \$4,000.00 per month from the Hong Kong government that is deposited directly into a bank in Hong Kong. The balance in the Hong Kong account is approximately \$50,000.00. Applicant's pension payments are still deposited into the Hong Kong account, but are now automatically transferred bimonthly to a U.S. bank. Applicant provided a statement on May 30, 2002, in which he stated he could transfer the money in this account to the U.S. whenever he wants. He has not done so because interest rates are higher in Hong Kong than in the U.S.

Applicant inherited a family home and around five acres of land in Hong Kong from his father. He estimated the value of the property at approximately \$1,000,000.00 in his May 2002 statement. He stated he could sell the property if he wanted, although the Chinese government considers him only a tenant, and reserved the right to seize the property whenever it wanted. In his SOR answer, Applicant claimed the valuation provided in that statement was an "optimistic guesstimate." In his response to the FORM he claimed the land had no realizable value to him.

Applicant has two sisters who are citizens and residents of the U.S. He has a third sister, 40 years old, who is a citizen and resident of Hong Kong, and employed by the Chinese government as an accountant in the treasury department. His mother-in-law and father-in-law are both 81 years old, and are also citizens and residents of Hong Kong. Applicant and his family visited their relatives in Hong Kong while vacationing there between July 1, 1996 and August 8, 1996.

Applicant was issued a Hong Kong passport by the British on March 18, 1994 that did not expire until March 18, 2004. However, he renounced his British National Overseas status on September 27, 2003, and simultaneously surrendered his foreign passport. He was issued a U.S. passport on November 28, 2001.

Hong Kong has been a Special Administrative Region (SAR) of the People's Republic of China since July 1, 1997, but enjoys a high degree of autonomy, except in areas of defense and foreign policy, and retains its own currency, laws, and border controls. Under Chinese nationality law, persons of Chinese descent who were born in the mainland of China or Hong Kong are Chinese citizens. However, under an agreement between the United States and the People's Republic of China, all U.S. citizens entering Hong Kong on their U.S. passports, including such persons as may be

considered Chinese nationals by the Chinese authorities, are considered U.S. citizens by the Hong Kong SAR authorities for purposes of ensuring consular access and protection. <sup>(2)</sup>

Neither Applicant nor any of his relatives have been contacted by agents of the Chinese government since he immigrated to the United States. He avers he would notify the security officer for his employer and the FBI if any action were taken to place pressure on him through his foreign resident relatives or assets.

### **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline B, pertaining to foreign influence, and Guideline C, pertaining to foreign preference, with their respective DC and MC, are most relevant in this case.

### **BURDEN OF PROOF**

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. <sup>(3)</sup> The government has the burden of proving controverted facts. <sup>(4)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence, <sup>(5)</sup> although the government is required to present substantial evidence to meet its burden of proof. <sup>(6)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence." <sup>(7)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. <sup>(8)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. <sup>(9)</sup>

No one has a right to a security clearance <sup>(10)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." <sup>(11)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security. <sup>(12)</sup>

## CONCLUSIONS

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.

Applicant obtained and used a Hong Kong passport before he became a United States citizen on September 14, 2001, and receives a \$4,000.00 monthly pension from the Hong Kong government. DC 2: *Possession and/or use of a foreign passport* and DC 4: *Accepting . . . benefits, such as retirement and social welfare, from a foreign country* apply.

However, Applicant not only obtained a U.S. passport on November 28, 2001, and surrendered his foreign passport on September 27, 2003, he also renounced his British National Overseas status. He became entitled to his foreign pension before immigrating to the United States, and, under the circumstances present herein, his continued receipt of that pension is not an indication of a foreign preference. MC 2: *Indicators of possible foreign preference . . . occurred before obtaining United States citizenship*; and MC 4: *Individual has expressed a willingness to renounce dual citizenship* apply. Guideline C is decided for Applicant.

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.

Based upon the allegations in the SOR, the following Disqualifying Conditions (DC) must be evaluated in determining whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant:

DC 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 or present in, a foreign country;*

DC 2: *Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists;*

DC 3: *Relatives, cohabitants, or associates who are connected with any foreign government; and*

DC 8: *A substantial financial interest in a country, or in any foreign-owned or -operated business that could make the individual vulnerable to foreign influence.*

DC 1 applies in this case because Applicant's sister, mother-in-law, and father-in-law are citizens and residents of Hong Kong;<sup>(13)</sup> DC 2 because of the possibility of adverse foreign influence or duress being placed on Applicant through his wife or mother based upon the Hong Kong relatives; DC 3 because Applicant's sister is employed by the Chinese government, albeit as an accountant in the treasury department; and DC 8 based upon the more than \$1,000,000.00 in assets he retains in Hong Kong.<sup>(14)</sup>

Applicant has not provided any information, other than the assertion of what he would do if pressure were brought on him by the Chinese government, upon which to base a finding that any mitigating condition applies to his relatives in Hong Kong. Specifically, there is no evidence supporting application of Mitigating Conditions (MC) 1: *A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, . . . are not . . . 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* or MC 3: *Contact and correspondence with foreign citizens are casual and infrequent.*

Applicant has substantial financial holdings in the United States. Still, the real estate and bank deposit he maintains in Hong Kong represent a large part of his total net worth. He acknowledged the risk he takes by not selling the real estate, but has chosen to maintain his ownership of the property. He has chosen to maintain a large deposit in a Hong Kong bank as an investment decision based upon the higher interest rates available to him there. Applicant cannot avail himself of MC 5: *Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.* Guideline B is decided against Applicant.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline C: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

SOR ¶ 2-Guideline B: Against the Applicant

Subparagraph a: For the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

Subparagraph g: Against the Applicant

### **DECISION**

In light of all 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. U.S. Department of State, Consular Information Sheet, Hong Kong (Special Administrative Region of China), current as of May 6, 2004.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.
13. Department Counsel conceded in the FORM there was no continuing security concern caused by Applicant's mother's foreign citizenship.



14. I have accepted the valuation he initially placed upon the real estate located in Hong Kong as being accurate based upon his increased efforts to diminish the value as its security significance apparently became more clear to him.