

DATE: June 9, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-16680

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Peregrine Russell-Hunter, Esq., Chief Department Counsel

Nigyna Mills, Esq., Department Counsel

FOR APPLICANT

Jay L. Cohen, Esq.

SYNOPSIS

Applicant, a 59-year-old naturalized U.S. citizen employed as a scientist by a government contractor was born in China (PRC). His family moved to Hong Kong when he was a child and family members are still living there. He has traveled several times to Hong Kong and PRC to visit family and to hold art shows of his paintings. Although he has received some remuneration from these sales the amount is of little consequence to his total income and there is no evidence that these sales affect his ability to hold a security clearance. Clearance is granted.

STATEMENT OF THE CASE

On December 16, 2002, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, *Safeguarding Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On January 8, 2003, Applicant, in a letter from counsel and his own sworn written statement, responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to another Administrative Judge who could not hold the hearing and it was re-assigned to me on April 22, 2003. A notice of hearing was issued on April 29, 2003, and the hearing was held on May 12, 2003. The Government introduced three exhibits at the hearing. The Applicant introduced 12 exhibits. All of the exhibits were admitted into evidence. Two witnesses testified on behalf of the Applicant. Five letters of reference were introduced by the applicant. The transcript was received on May 21, 2003.

FINDINGS OF FACT

After a complete review of the evidence in the record and upon due consideration of the record the following findings of fact are made.

Applicant was born in the PRC in 1943. His father emigrated to Hong Kong in 1949 where he lives and works as a tailor. He is now 81 years old and continues to work in the same tailor shop where he began work upon arrival in Hong Kong.

Applicant, his mother and siblings could not leave with his father because of restrictions placed by the new Communist government in the PRC. His mother was able to leave first and the children stayed with other relatives until they could leave the country.

Applicant lived with his grandfather who was an artist who decorated temples during which time Applicant developed an interest in and talent for painting. Applicant left the PRC in 1956 as a teenager and joined his parents in Hong Kong.

Applicant came to the United States as a student in 1968. He used his savings to come to the U.S. where he studied in a graduate science program that was unavailable in Hong Kong. He subsequently transferred to a second university where he obtained a doctoral degree in his field of science. He then did post-doctoral studies at a third university.

Applicant has never been a citizen of Hong Kong since he was born in the PRC and citizenship was controlled by the British government until the reversion of the Crown Colony by Great Britain to the PRC on July 1, 1997.

Applicant is married and a father of two grown children who are college graduates. All of the family are U.S. citizens. His wife is employed and their combined annual income is approximately \$187,000.00. His wife's family lives in the U.S. on the same street as the Applicant's home.

Applicant has two brothers and a sister who continue to live in Hong Kong. The brothers are citizens of Hong Kong and work respectively as a graphic designer and a high school history teacher. His sister is a citizen of Australia and works for a U.S. bank in Hong Kong. None have any government positions. A third brother emigrated to the U.S. where he lives near the Applicant and works as a computer scientist in networking. He telephones his father in Hong Kong every Sunday and his siblings every two or three weeks.

Since 1995 Applicant has taken six trips to Hong Kong, Taiwan and the PRC. One was to attend the funeral of his mother, another was because of the illness of his father, another was to deliver an invitational lecture at his undergraduate university on physics and art, his two great interests. The trip was on the occasion of the 50th anniversary of the founding of his undergraduate university. Two of these trips were the typical sightseeing tours of the PRC.

On several trips Applicant showed his paintings at galleries in Taiwan, Hong Kong, and the PRC. His gross income from all sales of paintings in the past seven years has approximated two to \$12,000.00. During the past five years he has sold no paintings outside the U.S. In some years his net income from sales of paintings has been negative after material costs and travel were deducted. His paintings have been shown in 22 one person shows and 50 group shows.

Applicant advised his security officer of his proposed trips abroad prior to departure. The security officer has his office near the Applicant and is confident that he knows when he is absent for any lengthy period of time.

Applicant maintains no contact with the scientific community overseas and has no overseas bank account or financial interests abroad. Applicant's father owns an apartment in Hong Kong but Applicant has no expectation or interest in inheriting it since three of his siblings continue to live there.

Applicant is regarded by his university mentor as a person of good reputation who has little interest in politics and a very strong interest in scientific pursuits. The mentor has met Applicant's family both in the U.S. and in Hong Kong and finds them to be apolitical. The mentor attests to Applicant's trustworthiness and loyalty to the U.S. Professional and personal colleagues of Applicant also attest to his trustworthiness and loyalty.

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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b)

"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 possession of a foreign passport is a strong indicator of such a preference.

The applicable Guidelines cited in the SOR concern the following Disqualifying Conditions (DC): Foreign Influence - Guideline B

A security risk may exist when an individual's immediate family, including co-habitants, 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:

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;

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.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors and conditions above, I conclude the following with respect to all allegations set forth in the SOR.

The foreign influence alleged under Guideline B is based on Applicant's family living in Hong Kong and his trips to Hong Kong, Taiwan and the PRC. Applicant's father is not involved in governmental affairs nor are his siblings. His visits to the PRC were as a tourist as many Americans might do to visit the country of their birth regardless of political

considerations.

Applicant's visits to Hong Kong have been family related concerning the illness of his 81 year-old father and the death of his mother. These contacts reflect understandable acts of family devotion. Applicant has no family living in the PRC since the death of his grandmother. His two visits there were related to her funeral, and as a tourist as well as to show his art.

His avocation as an artist began as a child under the influence of his grandfather and many of his paintings are of scenes in China. His income from the sale of his art both here and abroad is inconsequential to his financial well being.

Applicant is a respected member of the scientific community well respected by his colleagues and has taken necessary precautions in working with his security officer at his company to advise when he was traveling abroad. Applicant's roots are in the U.S. and he manifests only the normal interest in contact with his country of origin.

The political situation in Hong Kong is dynamic and has been since the reversion of the colony to the PRC by the British on July 1, 1997. Both the government counsel and counsel for Applicant introduced background material on Hong Kong and the PRC. Since the reversion Hong Kong has been a Special Administrative Region (SAR) of the PRC. As a SAR, Hong Kong has a high degree of autonomy except in defense and foreign affairs. It has an independent judiciary and an elected legislature with more freedoms than exist in the PRC. The United States has worked with the government of Hong Kong to insure that it continues to enjoy the freedoms guaranteed in the terms of reversion.

None of Applicant's relatives are employed by the any foreign government or are in a position to exploit or coerce Applicant to choose between the United States and other countries in loyalty. Therefore Mitigating Conditions (MC) 1 applies in that immediate family members do not constitute an unacceptable security risk. Applicant has no financial interest in Hong Kong or the PRC since income from his art sales is so small that MC 5 regarding minimal financial interest in foreign income is applicable.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude it is clearly consistent with the national interest to grant a clearance to Applicant.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline B: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Subparagraph 1.j.: For Applicant

Subparagraph 1.k.: For Applicant

DECISION

In light of all the circumstances and facts presented by the record in this case, it is clearly consistent with the national interest to grant a security clearance for Applicant.

Charles D. Ablard

Administrative Judge