

DATE: October 26, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-18581

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has successfully mitigated the security concerns of foreign preference and foreign influence raised by his connections to Hong Kong. Clearance is granted.

STATEMENT OF THE CASE

On June 10, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B for foreign influence and Guideline C for foreign preference. Under Guideline B, the SOR alleges Applicant possessed a valid Hong Kong passport, and under Guideline C the SOR alleges Applicant's mother, sister, and brother are citizens of and residents in Hong Kong. In his answer to the SOR, dated July 19, 2003, Applicant admitted the SOR allegations; he also requested a clearance decision based on a written record in lieu of a hearing.

On January 6, 2004, Department Counsel prepared and submitted her written case. The File of Relevant Material (FORM)⁽²⁾ was mailed to Applicant on or about January 7, 2004, and it was received by Applicant on February 3, 2004. Applicant's initial response to the FORM is dated February 24, 2004, in which Applicant requested additional time to surrender his foreign passport. On March 24, 2004, Applicant submitted another response to the FORM, and this response included information on his change of nationality and his foreign passport. The case was assigned to me April 26, 2004.

FINDINGS OF FACT

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

Born in 1953 in Hong Kong, Applicant is a 51-year-old married man. He became a naturalized U.S. citizen in February

2000, and he obtained a U.S. passport the following month. Since March 1999, Applicant works as a developer/analyst for a management firm.

In 1982, Applicant married his wife in Hong Kong. She obtained U.S. citizenship in June 2000. The couple have three children, born in Hong Kong in 1983, 1986, and 1991.

Before coming to the U.S., Applicant worked for many years as a branch manager for a bank in Hong Kong. His wife worked for the same bank as a department manager. Shortly after the marriage in 1982, his wife's family immigrated to the U.S. Receiving much encouragement and advice from his in-laws, Applicant and his wife eventually decided to immigrate to the U.S. They liquidated all assets, closed all financial accounts, sold much of their personal property, and immigrated to the U.S. in 1993. Applicant's wife's family served as their sponsors for immigration purposes.

Since coming to the U.S., Applicant has taken advantage of higher education opportunities. In May 1997, he was awarded a B.S. from a state university's school of business. He earned an associate's degree in May 1998. Most recently, in May 2000, Applicant was awarded a master of science degree from a prestigious university.

As a first-generation immigrant, Applicant has several family members who are citizens of and residents in Hong Kong. The facts and circumstances about them are detailed below:

- Applicant's father passed away in 1995. Applicant's father worked as a civil servant in the public works department for the Hong Kong government. He retired a number of years before his death. times per month. Of course, he visits her when he travels to Hong Kong. In April 2002, his mother and sister visited Applicant in the U.S. for three weeks. her during his trips there. driver for an office supply company. He is married and has a child. Applicant's only contact with this brother is during trips to Hong Kong. Another brother works as a laborer in a printing company. This brother is divorced and has two children. Applicant has bimonthly to quarterly telephone contact with this brother, and visits him during his trips there.

Aside from these family members, Applicant has no other immediate or extended family members in Hong Kong with whom he has contact. As Applicant's in-laws immigrated to the U.S. in the early 1980s, those family members are now U.S. citizens and residents.

Since immigrating to the U.S., Applicant has traveled to Hong Kong three times. In December 1994 he traveled there for a two-week vacation to visit family. In November 1995, he returned to attend his father's funeral. And in August 1999, he traveled there for a two-week vacation to visit family. All travel was made using his Hong Kong passport, as Applicant was not yet a U.S. citizen. The Hong Kong passport was issued to Applicant in July 1998 with an expiration date of July 2008. Applicant intends to use his U.S. passport, obtained in 2000, for all future foreign travel, including travel to Hong Kong. During his trips to Hong Kong, Applicant did not experience any problems or difficulties with Hong Kong officials or authorities.

In response to this process, Applicant decided to change his nationality and surrender his Hong Kong passport. On February 20, 2004, he submitted a declaration of change of nationality request to the Hong Kong Immigration Department. On March 6, 2004, he mailed his Hong Kong passport to his sister. She received the passport and submitted it to the immigration department on March 24, 2004. Applicant's request for change of nationality was approved, and in doing so, Hong Kong immigration officials cancelled Applicant's Hong Kong passport and cut off the upper left-hand corner of the passport. Applicant received a copy of his cancelled passport and submitted it and a copy of the approved change of nationality request in response to the FORM.

Since July 1, 1997, Hong Kong has been a Special Administrative Region of China (Item 6). Previously, including the time Applicant's father worked for the Hong Kong government, Hong Kong was governed by the United Kingdom. Hong Kong continues to enjoy a high degree of autonomy, except in the areas of defense and foreign policy, and it retains its own currency, laws, and border controls.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility,

including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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.

In August 2000, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I), issued a memorandum clarifying the application of the foreign preference security guideline for cases involving possession and/or use of a foreign passport--the so-called Money Memorandum, because it is signed by Assistant Secretary Arthur L. Money. In pertinent part, the Money Memorandum "requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains approval for its use from the appropriate agency of the United States Government."

BURDEN OF PROOF

The only 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.⁽³⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Guideline C-Foreign Preference

Under Guideline C,⁽¹²⁾ a security concern may exist when a person acts in such a way as to indicate a preference for a foreign country over the U.S. In particular, the exercise of dual citizenship raises a security concern because the active exercise of foreign citizenship may indicate a preference for that foreign country over the U.S. Dual citizenship by itself, however, is not automatically a security concern. Absent the exercise of dual citizenship or indicia of some affirmative action demonstrating foreign preference, mere possession of foreign citizenship by virtue of birth does not fall within the scope of Guideline C.

Here, based on the record evidence as a whole, the government has established its case under Guideline C. By his actions--possessing a Hong Kong passport while a U.S. citizen--Applicant demonstrated a preference for Hong Kong. These circumstances raise a security concern under both DC 1⁽¹³⁾ and DC 2.⁽¹⁴⁾

Turning to the mitigating conditions under Guideline C, MC 1⁽¹⁵⁾ applies because his dual citizenship is based on his birth in a foreign country.⁽¹⁶⁾ MC 2⁽¹⁷⁾ applies because Applicant obtained and used his Hong Kong passport for his three trips to Hong Kong before obtaining U.S. citizenship. And MC 4⁽¹⁸⁾ applies because Applicant changed his nationality and turned in his foreign passport to Hong Kong immigration authorities. By doing so, Applicant has also complied with the oney Memorandum's requirements concerning surrendering a foreign passport.

Other than continuing to possess the Hong Kong passport after becoming a U.S. citizen, it's clear Applicant's preference

is for the U.S. He and his family immigrated to the U.S. in 1993, while Hong Kong was ruled by the UK, at the suggestion of family members who had previously immigrated to the U.S. Applicant severed all ties to Hong Kong, except family, when moving to the U.S. He has earned college degrees in the U.S., established himself professionally and financially in the U.S., and his most immediate family members (his wife and children) are all living their lives in the U.S. Under Guideline C, the SOR was only concerned about Applicant's possession of the foreign passport. Given that Applicant has surrendered the passport and changed his nationality--coupled with the other evidence of his clear preference for the U.S.--I conclude he has successfully mitigated this security concern. Accordingly, Guideline C is decided for Applicant.

2. Guideline B-Foreign Influence

Under Guideline B for foreign influence,⁽¹⁹⁾ a security concern 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 U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. In addition, common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service.

Here, based on the record evidence as a whole, the government has established its case under Guideline B. Applicant has ties to immediate family members (mother, sister, and two brothers) who are citizens of and residents in Hong Kong. These circumstances raise a security concern under DC 1.⁽²⁰⁾

I have reviewed the mitigating conditions under Guideline B and conclude that MC 1⁽²¹⁾ applies for the following reasons. First, none of Applicant's immediate family members are agents of the Hong Kong government or any other foreign power.⁽²²⁾ Second, the information we have about Applicant's immediate family members in Hong Kong is quite benign. Applicant's 83-year-old mother is a lifelong homemaker, his sister works for a private company, and his two brothers have blue-collar jobs for small companies. None of these family members are employed by or connected with the Hong Kong government, military, or a law enforcement agency. Nor are they involved in political, scientific, commercial, or other activities where they might have an interest in obtaining U.S. national security information. Third, Applicant has experienced no problems or difficulties with Hong Kong officials during his trips there. Fourth, Applicant has zero financial interests in Hong Kong. Fifth, Applicant's contact with his family members in Hong Kong is somewhat limited. Cumulatively, these circumstances establish his immediate family members in Hong Kong are not in a position to be exploited in a way that could force him to choose between loyalty to his family and the interests of the U.S. Accordingly, Guideline B is decided for Applicant.

FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline C: For the Applicant

Subparagraph 1.a: For the Applicant

SOR ¶ 2-Guideline B: For the Applicant

Subparagraph 2.a: For the Applicant

Subparagraph 2.b: 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. Clearance is granted.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. The FORM contains several documents identified as Items 1 - 6 for consideration.
 3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
 4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
 6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
 8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
 11. *Egan*, 484 U.S. at 528, 531.
 12. Directive, Enclosure 2, Attachment 3.
 13. E2.A3.1.2.1. The exercise of dual citizenship.
 14. E2.A3.1.2.2. Possession and/or use of a foreign passport.
15. E2.A3.1.3.1. Dual citizenship is based solely on parents' citizenship or birth in a foreign country.
16. ISCR Case No. 99-0452 (March 21, 2000) at pp. 2-3 (Modifying its earlier rulings, the DOHA Appeal Board, in an expansive reading of MC 1, concluded the literal language of MC 1 allows it to be applied even when an applicant exercises foreign citizenship after becoming a U.S. citizen).
17. E2.A3.1.3.2. Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship.
18. E2.A3.1.4. Individual has expressed a willingness to renounce dual citizenship.
 19. Directive, Enclosure 2, Attachment 2.
20. 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 or present in, a foreign country.
21. E2.A2.1.3.1. 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.
22. *See* 50 U.S.C. § 1801(b).