

DATE: March 23, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23349

DECISION OF ADMINISTRATIVE JUDGE

CHRISTOPHER GRAHAM

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a dual citizen of the U. S. and Hong Kong, is employed by a federal contractor as an associate engineer. She obtained a Hong Kong passport. Subsequently, Applicant renounced her Hong Kong citizenship and surrendered her passport to the Hong Kong government.. Her actions mitigate security concerns under Guideline C. She was able to successfully mitigate the foreign influence security concerns of Guideline B raised by her immediate family members who are citizen residents of Hong Kong. Clearance is granted.

STATEMENT OF THE CASE

On December 16, 2004, the Defense Office of Hearings and Appeals (DOHA), issued a Statement of Reasons (SOR) to Applicant alleging facts which raise security concerns under Guideline C (Foreign Preference), and Guideline B (Foreign Influence). The SOR detailed reasons why DOHA could not find that it is clearly in the national interest to grant or continue a security clearance.⁽¹⁾

In a sworn written statement, dated December 22, 2004, Applicant answered the SOR (Answer) and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted a file of relevant material (FORM) in support of the government's preliminary decision, a copy of which was received by Applicant on February 4, 2005. Applicant was afforded the opportunity to file objections and submit material in refutation, extenuation, or mitigation by March 5, 2005. Applicant submitted a response to the FORM by letter dated January 29, 2005. On February 18, 2005, Department Counsel's memo stated no objection to the materials submitted by Applicant's counsel. The case was assigned to me on March 4, 2005.

FINDINGS OF FACT

Applicant has admitted to one of two factual allegations pertaining to foreign preference under Guideline C and all allegations of foreign influence under Guideline B. Her admissions are incorporated herein as findings of fact. After a thorough review of the record as a whole, I make the following additional findings of fact:

Applicant is a married, 30-year-old employee of a federal contractor.⁽²⁾ She was born in the People's Republic of China (PRC) and lived with her family until immigrating to the U. S. in 1994, to attend college. She married a natural born citizen in 1996, and became a U. S. citizen in 2002. She subsequently was issued a U. S. passport. She last used her Hong Kong passport in 1998, one of three trips to China since 1995. She believed that because Hong Kong does not recognize dual citizenship that she automatically relinquished her Chinese citizenship when she became a naturalized U. S. citizen. Likewise, she thought her passport expired in the same manner.⁽³⁾ She has subsequently cancelled her Hong Kong passport which accompanied her change of nationality form, effective February 4, 2005.⁽⁴⁾

Applicant's parents, sister, half-brother, two great-aunts and one great-uncle reside in Hong Kong. Her grandmother and two great-uncles live in the PRC. She maintains a close relationship with her parents and sister. Since September 11, 2001, her mother started calling her daily to make sure she was safe. Since that time they talk almost daily. They never discuss her employment. None of her family has any political or religious ties that would focus attention on them by the Chinese government.⁽⁵⁾ She calls her other family members in China during the Chinese New Year holiday as a courtesy. She also maintains telephone contact with three friends living in China about every three months. She has visited her family in PRC and Hong Kong three times since 1995. She monthly sends money to her parents out of respect, not as it is needed or as an obligation. Her family and friends living in PRC and Hong Kong know nothing of her work.⁽⁶⁾

In July 1997, PRC resumed the exercise of sovereignty over Hong Kong and established the Hong Kong Special Administrative Region.⁽⁷⁾ Hong Kong has a high degree of autonomy in all matters except foreign and defense affairs, and has retained its political, economic, and judicial systems since 1997.⁽⁸⁾ "Hong Kong remains a free open society where human rights are respected, the courts remain independent, and there is well established and longstanding respect for the rule of law," although there were alleged irregularities in the fall 2004 legislative council elections which the government is investigating.⁽⁹⁾ Moreover, Hong Kong is a strong ally of the U. S. in the global coalition against terrorism.⁽¹⁰⁾

POLICIES

"[No] one has a 'right' to a security clearance."⁽¹¹⁾ 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."⁽¹²⁾ 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 coercion, and willingness and ability to abide by regulations governing use, handling, and protection of classified information."⁽¹³⁾

The Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth § E.2.2, Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the surrounding circumstances of the conduct, to include knowledgeable participation; (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 pertinent 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.

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.⁽¹⁴⁾ 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.⁽¹⁵⁾

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

Having considered the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

GUIDELINE B - FOREIGN INFLUENCE: (FI), Directive, ¶ E2.A2.1.1. *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 obligations are: (1) not citizens of the United States or (2) 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.*

GUIDELINE C (foreign preference) (FP), Directive, ¶ E2.A3.1.1. *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.*

On August 16, 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD/C³I) issued a passport policy "clarification" pertaining to Guideline C - foreign preference.⁽¹⁶⁾ A photocopy was furnished Applicant. The memorandum states, in pertinent part:

The purpose of this memorandum is to clarify the application of Guideline C to cases involving an applicant's possession or use of a foreign passport. The guideline specifically provides that "possession and/or use of a foreign passport" may be a disqualifying condition. It contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country. The only applicable mitigating factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline are that the possession and use of a foreign passport in preference to a U. S. Passport raises a doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. ***Therefore, consistent application of the guideline requires 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.*** Modification of the guideline is not required. (Emphasis supplied.)

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"⁽¹⁷⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.⁽¹⁸⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽¹⁹⁾ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The

Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the Government.⁽²⁰⁾ Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

CONCLUSIONS

1. Foreign Influence Guideline

The Government established its case under Guideline B. Applicant has been portrayed as a person who has a potential security risk because members of her immediate family or persons to whom she is bound by affection, influence, or obligation - in this instance her parents, sister, and half-brother are citizen residents of Hong Kong - and may be subject to duress. These situations raise the potential for vulnerability to coercion, exploitation, or pressure, and the exercise of foreign influence that could result in the compromise of classified information. However, the mere possession of family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B:

The language of [Guideline] B (Foreign Influence) in the Adjudicative Guidelines makes clear that the possession of such family ties *may* pose a security risk. Whether an applicant's family ties in a foreign country pose a security risk depends upon a common sense evaluation of the overall facts and circumstances of those family ties. *See* ISCR Case No. 98-0419 (April 30, 1999) at p.5.⁽²¹⁾

Applicant's husband is a native-born U. S. Citizen, and only the continuing Hong Kong citizenship of her immediate family members raise the potential issue of foreign influence. In this regard, see Foreign Influence Disqualifying Condition (FI DC) 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 or present in, a foreign country*).

However, also applicable, in this instance is Foreign Influence Mitigating Condition (FI MC)

E2.A2.1.3.1. (*a determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitants, or associate(s) in question are not agents of a foreign power or in a position to be exploited by foreign power in a way that would force the individual to choose between loyalty to the person(s) involved and the United States*). After an examination of the evidence, I determine that Applicant's parents, sister, half-brother, great-aunts and great-uncle, considering their Hong Kong citizenship, residency, and work status, do not constitute an unacceptable security risk. Furthermore, their continuing personal relationship has no security significance.

Also applicable in this case is FI MC and FI MC E2.A2.1.3.5. (*foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities*). Applicant's trips to Hong Kong and the PRC in 1995, 1998, and 2003, were to visit family and friends and appear innocuous. Her phone calls with her mother are the result of calming her mother's natural concern for her daughter in a time of worldwide terrorist threats. Applicant has not engaged in any misconduct such as to render her an inappropriate candidate for a security clearance. Considering the absence of any scintilla of evidence that Applicant's family and friends are targets of any intelligence gathering efforts, their residency status does not establish any doubts regarding possible duress.

I note with some interest that no evidence has been offered by the Government indicating any sinister Hong Kong intentions or activities, such as industrial espionage or active collection of foreign economic information, directed toward the United States. Although the PRC has an abusive civil rights record⁽²²⁾ and is among the most active collectors of intelligence from U. S. sources⁽²³⁾, Applicant's immediate family live in Hong Kong. The fact that extended family members live in the PRC must be contrasted with the resounding support for Hong Kong, "a free and open society where human rights are respected, the courts remain independent, and there is a well established and longstanding respect for the rule of law."

Thus I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case with respect to Guideline B. Accordingly, allegations 2.a through 2.h of the SOR are concluded in favor of Applicant find for Applicant.

2. Foreign Preference Guideline

The Government has established its *prima facie* case under Guideline C by showing that Applicant has exercised dual citizenship with Hong Kong, and had used a Hong Kong passport. Applicant's actions clearly fall within the Foreign Preference Disqualifying Condition (FP DC) E2.A3.1.2.1. (*the exercise of dual citizenship*), and FP DC E2.A3.1.2.2. (*possession and/or use of a foreign passport*). The ASD/C³I memo states there are no mitigating factors "related to applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country," a phrase which I construe to relate solely to the use of a foreign passport, and not to mere possession of the same. On the other hand, the memo requires a 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." Applicant's actions in surrendering her passport and renouncing her citizenship by obtaining a Declaration of Change of Nationality in February 2005, makes the issue moot. Consequently, allegation 1.b. of the SOR is concluded in favor of Applicant.

Also applicable is Foreign Preference Mitigating Condition (FP MC) E2.A3.1.3.4. (*individual has expressed a willingness to renounce dual citizenship*). For the reasons expressed above, I conclude Applicant has successfully mitigated allegation 1.a. of the SOR.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline C: FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Paragraph 2. Guideline B: FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. For the Applicant

Subparagraph 1.d. For the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f. For the Applicant

Subparagraph 1.g. For the Applicant

Subparagraph 1.h. 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 Applicant's security clearance. Clearance is granted.

Christopher Graham

Administrative Judge

1. This action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, 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.
2. Item 4 (*Standard Form 86, security Clearance Application, signed July 23, 2002*) at 1, 4.
3. Item 3 (*Applicant's Answer to the SOR dated December 22, 2004*) at 1-2.
4. Letter from Applicant with attached *Declaration of Change of Nationality* dated February 15, 2005.
5. Item 3, *supra*, at 1-2.
6. *Id.*, at 2.
7. Item 9 (*U.S. Department of State, Background Note: Hong Kong, dated December 2004*) at 3.
8. *Id.*, at 3.
9. *Id.*, at 3.
10. *Id.*, at 4.
11. See *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1998).
12. *Id.*, at 527.
13. Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995).
14. *Egan, supra*, at 531.
15. See *ISCR Case No. 95-0611* at 2 (App. Bd. May 2, 1996).
16. Item 6(ASD/C³I Memorandum from Arthur L. Mooney, Subject: *Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline*, dated August 16, 2000.
17. Exec. Or. 12968, "*Access to Classified Information*;" as implemented by Department of defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (§ 2.3; §2.5.3; §3.2; and §4.2.; Enclosure 3, §E3.1.1.; §E3.1.2.; §E3.1.25.; §E3.1.26.; and §E3.1.27.); and "clearly consistent with the interests of national security" (Enclosure 2, §E2.2.3.); and "clearly consistent with national security" (Enclosure 2, §E2.2.2.)
18. See *ISCR Case No. 01-20700* at 3 (App. Bd. Dec. 19, 2002).
19. *Id.*, at 3.
20. See *Egan*; Directive ¶ E2.2.2.
21. *ISCR Case No. 98-0507* (Appeal Board Decision and Reversal Order, May 17, 1999), at 10.
22. Item 12 (*U.S. State Dept. Country Reports on Human Rights: China (includes...Hong Kong...(2003)*) at 1-69.
23. Item 7 (*Annual Report to Congress on Foreign Economic Collection and Industrial Espionage 2000*) at 15.

