

DATE: September 18, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-15446

**DECISION OF ADMINISTRATIVE JUDGE**

**MARTIN H. MOGUL**

**APPEARANCES**

**FOR GOVERNMENT**

Candace Le'i , Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant has renounced his Hong Kong citizenship to the Government of Hong Kong and returned his Hong Kong passport and identification. He has lived in the United States since 1973 and been a U. S. citizen since 1980. Because of Applicant's powerful attachment to the United States, and his family, including his parents, sister and brother, all of whom are citizens and residents of the United States. Applicant's brother, who is a U. S. citizen, residing in Taiwan, is not in a position to be exploited in a way that could force Applicant to choose between loyalty to this family member and his loyalty to the United States. Mitigation has been shown. Clearance is granted.

**STATEMENT OF THE CASE**

On March 21, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR) to the 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 the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted or denied. The SOR was based on Foreign Preference (Guideline C) and Foreign Influence (Guideline B) concerns.

Applicant, acting *pro se*, filed a notarized response to the SOR (RSOR), dated April 16, 2006, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On May 31, 2006, the case was assigned to this Administrative Judge to conduct a hearing. Pursuant to formal notice dated August 8, 2006, a hearing was held on August 29, 2006.

At the hearing, Department Counsel offered 14 documentary exhibits (Exhibits 1 through 14) and no witnesses were called. Applicant offered five documentary exhibits (Exhibits A through E) and offered his own testimony. The transcript (Tr) was received on September 7, 2006.

## **FINDINGS OF FACT**

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of the Directive. The SOR contained five allegations, 1.a. through 1.e., under Guideline C, and three allegations, 2.a. through 2.c., under Guideline B. In his RSOR, Applicant admitted SOR allegations 1.a. through 1.e., and he denied 2.a. through 2.c. All of the admissions are incorporated herein as Findings of Fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR and the documents, and upon due consideration of that evidence, I make the additional Findings of Fact:

Applicant is 50 years old and has been employed by a United States defense contractor since 1990, which seeks a security clearance on his behalf. He received a Bachelor of Science Degree in Business Management in 1978 from a United States university.

Applicant was born in Hong Kong in 1956, and he moved to the United States in 1973. He became a United States citizen in 1980. He is not married and he has no children.

Applicant's mother, father, sister and one brother live in the United States and are United States citizens. He communicates with his parents on a monthly basis and his sister every two or three months. He talks to his brother, who lives with his parents, when he goes to see them.

### **Paragraph 1 (Guideline C - Foreign Preference)**

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has acted in such a way as to indicate a preference for another country over the United States.

Applicant applied for and was issued a Hong Kong Special Administrative Region, People's Republic of China, passport on February 10, 2004, even though he became a naturalized United States citizen on September 26, 1980, and had a valid United States passport, issued to him on September 31, 1997. The Hong Kong passport is not scheduled to expire until February 10, 2014.

Applicant also applied for a Hong Kong Permanent identity card that and was issued to him on March 2, 2004.

Applicant retained his Hong Kong passport and his Hong Kong Permanent identity card, when he responded to Government interrogatories on January 17, 2006.

Applicant testified that he applied for the Hong Kong passport and Permanent identity in 2003. He was not aware of any restrictions to his applying for these, and he did it for convenience so that when he traveled to Hong Kong, he would not have to apply for a Chinese Visa. When he became aware, through a security officer of his employer, that there were security concerns with his retention of the Hong Kong passport and identity, he returned them to the Government of Hong Kong. He never used either the Hong Kong passport or identity during any of his travels (Tr at 32-37).

Applicant also has begun the process of renouncing his Hong Kong citizenship. He initially completed the renunciation form in March 2008, but the process was not completed, because he was informed that he would have to use a different form, which he did in August 2, 2006 (Exhibits A, B, C).

### **Paragraph 2 (Guideline B - Foreign Influence)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has immediate family members or people to whom he may be bound by affection or obligation who are not citizens of the United States, or may be subject to duress.

Applicant has one brother, who is a resident of the Republic of China (Taiwan) and a citizen of the United States. His brother moved to Taiwan from the United States approximately 20 years ago, to receive an education to become a doctor. He has lived in Taiwan since he moved there, and he currently works in a hospital there. Applicant communicates with his brother in two or three e-mails a year. He has not spoken to him in approximately two years. Neither Applicant's brother, nor his wife or children, belong to, or are active with any national government agency of Taiwan (Tr at 56-57).

In 1997, Applicant traveled for pleasure with a tour group, including his parents and his brother, to a number of countries including: Singapore, Thailand, and Malaysia. He also visited Taiwan and Hong Kong. In 2002, he also traveled with a tour group, including his mother, sister and brother-in-law, to the PRC, and Hong Kong.

Applicant owns four properties in the United States and significant other assets here. He has no assets outside of the United States.

Applicant introduced two positive letters of reference (Exhibit E) from two men that know Applicant in his work environment.. His manager stated about Applicant, "He is a very conscientious person and I feel strongly that he is completely trustworthy." Another individual, who is the Flight Test Chief Engineer said, "In summary, I would regard [Applicant] is affirmatively loyal to the United States who is trustworthy, honest, reliable, with discrete and sound judgement that is free from conflicting allegiances and potential for coercion."

### **POLICIES**

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2.

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

### **Burden of Proof**

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or

continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

### CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of those who testified, I conclude the following with respect to Guidelines C and B:

#### **(Guideline C - Foreign Preference)**

Guideline C is based on actions taken by an individual that indicate a preference for a foreign country over the United States. Applicant's application for a Hong Kong passport after becoming a United States citizen raises serious Foreign Preference (Guideline C) concerns. At the time the SOR was issued, Disqualifying Condition DC (E2.A3.1.2.1.), the exercise of dual citizenship could be argued to apply because he renewed his Hong Kong passport, and DC (E2.A3.1.2.2.), possession and/or use of a foreign passport, applied. However, Applicant only renewed his passport for convenience and he never used it. He has subsequently returned his Hong Kong passport and identification, and he formally renounced his Hong Kong citizenship. Mitigating Condition (MC) (E2.A3.1.3.4.), an individual has expressed a willingness to renounce his dual citizenship, is applicable, as Applicant has renounced his Hong Kong citizenship. Guideline C is found for Applicant.

#### **(Guideline B - Foreign Influence)**

Under Guideline B, a security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he is bound by affection, influence or obligation, are not citizens of the United States or may be subject to duress. The evidence of one brother, who is a citizen of the United States and resident of Taiwan, potentially comes within DC (E2.A2.1.2.1.), an immediate family members, or persons to whom the individual has close ties of affection or obligation, are citizens of, or resident or present in, a foreign country.

However, based on the nature of the overall record, the whole person concept, and the totality of the evidence, including the lack of government involvement of Applicant's brother, Applicant's powerful attachment to his parents, sister, and brother in the United States and to the United States, itself, his significant assets in the United States, and his long and successful history here, I have determined that his brother in Taiwan does not constitute an unacceptable security risk, and MC (E2.A2.1.3.1.), a determination that the immediate family member, in question is not an agent 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 involved and the United States, applies.

After considering all of the evidence of record on this issue, I conclude that the mitigating evidence substantially outweighs the evidence supporting the SOR, and even in the unlikely event pressure was exerted upon Applicant to compromise classified information, he would reject it, and would report the incident to the proper authorities.

### FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

#### **Paragraph 1. Guideline C: 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

**Paragraph 2. Guideline B: FOR APPLICANT**

Subparagraph 2. a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For 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.

**Martin H. Mogul**

**Administrative Judge**