

KEYWORD: Foreign Preference; Foreign Influence

DIGEST: Applicant was born in Hong Kong in 1978 and immigrated to the U.S. with his parents and brother in 1995. He became a U.S. citizen in 2001. At his hearing he successfully mitigated the security concerns alleged in the Statement of Reasons under Guideline C, Foreign Preference, and Guideline B, Foreign Influence. Clearance is granted.

CASENO: 04-04023.h1

DATE: 11/25/2005

DATE: November 25, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-04023

**DECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

**APPEARANCES**

**FOR GOVERNMENT**

Stephanie Hess, Esq., Department Counsel

## FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant was born in Hong Kong in 1978 and immigrated to the U.S. with his parents and brother in 1995. He became a U.S. citizen in 2001. At his hearing he successfully mitigated the security concerns alleged in the Statement of Reasons under Guideline C, Foreign Preference, and Guideline B, Foreign Influence. Clearance is granted.

### STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On March 30, 2005, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing April 13, 2005, and elected to have a hearing before an administrative judge. On June 27, 2005, the case was assigned to me. I convened a hearing on September 12, 2005, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government called no witnesses, introduced two exhibits (Ex.), and offered nine documents for administrative notice. Applicant called no witnesses and introduced two exhibits, which were identified as Ex. A and Ex. B. The Government's exhibits were numbered Ex. 1 and 2, and its documents offered for administrative notice were numbered I through IX. All exhibits and documents were admitted into evidence without objection. At the close of the proceeding, with the agreement of both parties, I left the record open until close of business September 22, 2005, so that Applicant could submit additional documentation regarding the surrender of his Hong Kong passport and declaration of change of nationality. On September 23, 2005 and on September 29, 2005, Applicant filed, through Department Counsel, documents pertaining to those matters. The documents were identified as Applicant's Ex. C-1 and C-2. Department Counsel did not object to the admission of these documents. Accordingly, Applicant's post-hearing exhibits were admitted to the administrative record of this case. DOHA received the transcript (Tr.) of the proceeding October 5, 2005.

## **RULING ON PROCEDURE**

After Applicant testified about his foreign travel to Hong Kong, Department Counsel moved to amend allegation 2.b. of the SOR to reflect the facts as established and admitted by Applicant. Without objection, allegation 2.b. of the SOR was revised to read: "You traveled to Hong Kong to visit relatives in at least 1996 and 1998."

## **FINDINGS OF FACT**

The SOR contains two allegations of disqualifying conduct charged under Guideline C, Foreign Preference, and two allegations of disqualifying conduct charged under Guideline B, Foreign Influence. In his answer to the SOR, Applicant denied one allegation and admitted one allegation under Guideline C. He admitted both allegations under Guideline B. His admissions are incorporated as findings of fact.

Applicant is twenty-seven years old and unmarried. He was born in Hong Kong in 1978. In 1995, Applicant, his parents, and brother left Hong Kong and immigrated to the U.S. (Ex. 1, 2; Tr.34-36.) In addition to his Chinese name, Applicant uses an English language first name. (Exs.A, B, C-2.)

Applicant received his higher education in the U.S. He holds a bachelor of science degree and a master of science degree. Since June 2002, he has been employed as an Engineer 1 by a defense contractor. (Ex. 1, 2.)

Applicant became a U.S. citizen in 2001. (Tr. 41.) His mother and brother are also U.S. citizens. Applicant's father remains a permanent resident of the U.S. because he has not yet been able to learn sufficient English to qualify for citizenship. The father wishes to become a U.S. citizen and his wife and sons are helping him to learn English. (Ex. 1; Tr. 35-36.)

All of Applicant's immediate family members reside in the U.S. Applicant has aunts, uncles and cousins who are citizens and residents of Hong Kong. Applicant is related to most of these individuals through his mother. (Tr. 38.) Applicant's father's relatives emigrated from Hong Kong with Applicant's family. (Tr. 38.)

Applicant's younger brother recently graduated from college in the U.S. and took a job in a city some distance away from his parents. Applicant has purchased his own home, and lives in the same metropolitan area as his parents. On weekends, he goes to visit his parents at their home for dinner. Sometimes when he is at his parents' home, his mother will telephone her sister in Hong Kong. Applicant occasionally speaks with the aunt when he is at his parents' home and his mother places the call. His contacts with his relatives in Hong Kong are infrequent and casual. (Tr. 38-39.) Applicant's Hong Kong relatives are not connected with any foreign government. (Answer to SOR at 2; Tr. 62.)

In 1996 and 1998, while a college student, Applicant traveled to Hong Kong with his mother to visit relatives. (Tr. 37-39.) In 1998, he renewed his Hong Kong passport. (Tr. 53; Ex. B.) At the time of his hearing, he still possessed the Hong Kong passport, although he had not used it since becoming a U.S. citizen. (Tr. 45.) He intends to visit Hong Kong for a vacation at some unspecified time in the future. (Tr. 40.)

Applicant's status as a dual citizen of Hong Kong was the consequence of being born in Hong Kong. After becoming a citizen of the U.S., he took no active steps to exercise or maintain his Hong Kong citizenship. He considers himself to be a U.S. citizen only. (Tr. 43-44.)

Prior to his hearing, Applicant was not aware of the August 16, 2000 memorandum, signed by Assistant Secretary of Defense Arthur L. Money (Money memorandum), which clarified the application of the foreign preference adjudicative guideline to cases involving an applicant's possession or use of a foreign passport. (Tr. 45-47.) Applicant was provided with a copy of the Money Memorandum at the hearing and his attention was called to its policy "that 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." (Money Memorandum, at 1; Tr. 48.)

When made aware of the policy of the Money Memorandum, Applicant expressed his intent to relinquish his Hong Kong citizenship and his Hong Kong passport. The record was left open for 10 days so that he could pursue his intent. On September 23, 2005 and September 29, 2005, Applicant filed documents, through Department Counsel, showing he had formally declared a change of nationality and surrendered his Hong Kong passport to the issuing authority. (Ex. C-1 and Ex. C-2.)

Applicant submitted a letter from his supervisor stating Applicant was highly skilled, conscientious, and honest. (Ex. A.)

I take administrative notice of a U.S. Department of State Consular Information Sheet entitled "Hong Kong SAR," dated October 22, 2004 (Government document for administrative notice I.), a U.S. Department of State publication entitled "Background Note: Hong Kong," dated March 2005 (Government document for administrative notice II.), a U.S. Department of State Consular Information Sheet entitled "China," dated January 15, 2005 (Government document for administrative notice III.), and the Annual Report to Congress on Foreign Economic Collection and Industrial Espionage:2000 (Government document for administrative notice VII.). The Government's documents for administrative notice I, II, and III state, in pertinent part, that since July 1, 1997, Hong Kong has been designated as a Special Administrative Region (SAR) of the People's Republic of China (PRC), a totalitarian state ruled by the Chinese Communist Party, and that Hong Kong is subject to the PRC in matters of defense and foreign affairs. The Government's document for administrative notice VII states, in pertinent part, that the PRC has exercised active and historic roles as a collector of competitive information and as a perpetrator of industrial espionage against U.S. companies producing militarily critical technologies such as information systems, sensors and lasers, and electronics.

### 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. 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 for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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. *See Egan*, 484 U.S. at 531. 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. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to

grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

## CONCLUSIONS

### Guideline C - Foreign Preference

In the SOR, DOHA alleged Applicant exercised dual citizenship with Hong Kong and the United States (¶ 1.a.) and possessed a Hong Kong passport, issued July 20, 1998, which would not expire until July 20, 2008 (¶ 1.b.)

A Guideline C security concern exists when an individual's conduct indicates a preference for a foreign country over the United States. A preference for another country could lead a person to provide information or make decisions that are harmful to the interests of the United States. Applicant's possession of a valid Hong Kong passport while, at the same time, possessing a valid U.S. passport, raises security concerns under DC E2.A3.1.2.1. and DC E2.A3.1.2.2. of Guideline C.

We turn to an examination of applicable mitigating conditions under Guideline C. An applicant may mitigate Guideline C DC E2.A3.1.2.1. if he shows his dual citizenship is based solely on his parents' citizenship or birth in a foreign country (MC E2.A3.1.3.1.) and if he expresses a willingness to renounce dual citizenship. (MC E2.A3.1.3.4.) At his hearing, Applicant persuasively demonstrated his Hong Kong citizenship was the result of having been born in Hong Kong to citizens of Hong Kong. He further demonstrated he had taken no actions to exercise such citizenship after becoming a U.S. citizen. After his hearing and after learning what constituted dual citizenship, he presented evidence he had formally declared his change of nationality from citizenship of Hong Kong to U.S. citizenship and had filed that declaration with responsible authorities of the Hong Kong government. Accordingly, I conclude MC E2.A3.1.3.1. and MC E2.A3.1.3.4. apply to allegation 1.a. of the SOR. Allegation 1.a. of the SOR is concluded for the Applicant.

Possession and use of a foreign passport may be a disqualifying condition under DC E2.A3.1.2.2. of Guideline C. The Money Memorandum specifies that Guideline C "contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country." Pursuant to the policy articulated in the Money Memorandum, the only applicable mitigating factor for the lawful possession of a foreign passport by a U.S. citizen is "the official approval of the United States Government for the possession or use." In 1998, three years before becoming a U.S. citizen, Applicant renewed his Hong Kong passport so he could accompany his

mother on a trip to Hong Kong. The renewed passport was set to expire in 2008. Applicant had not used the Hong Kong passport since becoming a U.S. citizen. He presented no evidence to show he had official approval from the U.S. Government for his possession or use of this valid Hong Kong passport.

At his hearing, Applicant credibly stated he was unaware of the Money Memorandum and its clarification of the application of Guideline C to cases involving an applicant's possession of a foreign passport. When made aware of the policy of the Money Memorandum, Applicant surrendered his Hong Kong passport to the issuing authority. Applicant's surrender of his Hong Kong passport in compliance with the requirements of the Money Memorandum mitigates the security concern articulated by the Government in allegation 1.b. of the SOR. Allegation 1.b of the SOR is concluded for the Applicant. Accordingly, the Guideline C allegations of the SOR are concluded for the Applicant.

### **Guideline B - Foreign Influence**

In the amended SOR, DOHA alleged, under Guideline B of the Directive, that Applicant's aunts, uncles, and cousins are citizens and residents of Hong Kong (§ 1.a.), and that he traveled to Hong Kong to visit relatives in at least 1996 and 1998 (§ 1.b.).

A Guideline B security concern exists when an individual seeking clearance is bound by ties of affection, influence, or obligation to immediate family, close friends, or professional associates in a foreign country, or to persons in the United States whose first loyalties are to a foreign country. A person who places a high value on family obligations or fidelity to relationships in another country may be vulnerable to duress by the intelligence service of the foreign country or by agents from that country engaged in industrial espionage, terrorism or other criminal activity. The more faithful an individual is to family ties and obligations, the more likely the chance that the ties might be exploited to the detriment of the United States.

Applicant's case requires the recognition that the PRC, a totalitarian regime, exercises governmental control over Hong Kong and is able to use that control if it so wishes to obtain, through illegal methods, militarily critical technologies from companies doing business as government contractors in the United States. These actions threaten U.S. security interests. American citizens with immediate family members who are citizens or residents of Hong Kong could be vulnerable to coercion, exploitation, or pressure.

Applicant admitted both allegations under Guideline B. The individuals identified in allegation 2.a. of the SOR as citizens and residents of Hong Kong are Applicant's aunts, uncles, and cousins on his mother's side of the family. They are not immediate family members as specified in DC E2.A2.1.2.1. and defined in MC E2.A2.1.3.1. of Guideline B. (3) Applicant's testimony did not reflect close ties of affection or obligation to these individuals, as required by DC E2.A2.1.2.1. Applicant acknowledged two trips to Hong Kong since immigrating to the United States at the age of 17 years. One trip occurred in 1996, when he was 18 years old, and the other occurred in 1998, when he was 20 years old.

He is now 27 years old, and has made no additional trips to Hong Kong since 1998. He stated he might visit Hong Kong on a vacation at some unspecified time in the future, but denied ties of affection or obligation as motivation for such travel.

The allegations admitted by Applicant raised security concerns under DC E2.A2.1.1. of Guideline B. However, Applicant was able to provide persuasive evidence to rebut the Government's concerns under Guideline B about his security worthiness. The record shows that DC E2.A2.1.2.1. is inapplicable in Applicant's case: he has no immediate family member, or a person to whom he has close ties of affection or obligation, who is a citizen of or resident in Hong Kong, the country at issue in this case. None of his relatives in Hong Kong are connected with any foreign government, and thus DC E2.A2.1.2.3. does not apply. He does not exhibit conduct that could make him vulnerable to coercion, exploitation, or pressure by a foreign government, making DC E2.A2.1.2.6. also inapplicable. While Applicant admitted to having relatives who are citizens and residents of Hong Kong, he presented persuasive evidence to show he was not close to them, and his contacts with them were casual and infrequent. Thus, MC E2.A2.1.3.3. applies to the facts of his case. Applicant has successfully rebutted the Government's security concerns under Guideline B. The SOR allegations under Guideline B are concluded for the Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline C: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2. Guideline B: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant



## DECISION

In light of all of 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.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Mitigating Condition E2.A2.1.3.1. defines an immediate family member as "spouse, father, mother, sons, daughters, brothers, sisters."