

DATE: August 26, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-07794

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 27 years old and has worked for a federal contractor since 2000. Applicant was a citizen of Hong Kong and obtained a British National passport in 1995. He became a United States citizen in 2003, but retained his British National passport. It expired in July 2005, and he still possesses it. Applicant's sister, brother and grandmother are citizens and residents of Hong Kong. His sister works for the government of Hong Kong. Applicant's father is a citizen of Hong Kong, but lives with Applicant in the United States. Applicant failed to mitigate the security concerns under Guidelines C, foreign preference and Guideline B, foreign influence. Clearance is denied.

STATEMENT OF CASE

On March 29, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline C, foreign preference and Guideline B, foreign influence considerations.

In a sworn statement dated April 14, 2005, Applicant responded to the SOR allegations, admitting all of them and elected to have his case decided on the written record. Department Counsel submitted the government's file of relevant material (FORM) on June 18, 2005. The FORM was received by Applicant on June 30, 2005. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. No information was submitted by Applicant. The case was assigned to me on August 3, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and statements, I make the following findings of fact:

Applicant is 27 years old and has worked as a software engineer for a federal contractor since 2000. Applicant is not

married. Applicant came to the United States in 1998 to attend college. Applicant was born in Hong Kong and was a citizen of Hong Kong until becoming a naturalized citizen of the United States in August 2003. Applicant obtained a British National (Overseas) passport in 1995. Applicant's British National passport was issued to citizens of the United Kingdom's colony of Hong Kong. This passport expired on July 25, 2005. From the time the United Kingdom's turnover of Hong Kong to China in 1997, until Applicant left to come to the United States in 1998, he maintained that he was a citizen of Hong Kong. He has never claimed to be a citizen of the United Kingdom.

Applicant used his British National passport until he became a U.S. citizen. Applicant has not used it since then and does not intend to renew it. However, no information was provided by Applicant indicating that he is willing to renounce his status, or that he has returned the passport to the issuing authority. Applicant merely stated he would let the passport expire.

Applicant's mother became a naturalized citizen of the United States in 2003 and resides with him. Applicant's father is a citizen of Hong Kong and resides with him in the United States. Applicant's father intends to remain a resident of the United States. No information was provided regarding Applicant's father's background, employment history, financial interests or whether he intends on becoming a United States citizen.

Applicant's sister is a citizen and resident of Hong Kong and is employed by the government of Hong Kong as a tax auditor. Applicant has contact with her through his parents when either she calls or her parents call her few times a year.

Applicant's brother is a citizen and resident of Hong Kong. He is an accountant for a private commercial bank. Applicant's brother either calls or someone in Applicant's household calls the brother a few times a year.

Applicant's grandmother is a citizen and resident of Hong Kong. She receives a large portion of her support from Applicant's sister and is not dependant on the pension she receives from the government. Applicant's grandmother will either call or be called by someone in Applicant's household a few times a year.

Applicant traveled to Hong Kong in August 1999 for a few weeks of vacation and stayed with his siblings. In December 1999, Applicant traveled to Hong Kong for two weeks over Christmas break and stayed with his siblings. In December 2001 to January 2002, Applicant traveled to Japan and Hong Kong spending five days in Japan and the rest of the time in Hong Kong. He again stayed with his siblings.

In 1997 China resumed the exercise of sovereignty over Hong Kong. ⁽²⁾ "Hong Kong is a Special Administrative Region of the People's Republic of China with a high degree of autonomy in all matters except foreign and defense affairs. According to the Sino-British Joint Declaration (1984) and the Basic Law, Hong Kong will retain its political, economic, and judicial systems and unique way of life for 50 years after reversion and will continue to participate in international agreements and organizations under the name 'Hong Kong, China.' In the past year and a half, China has taken on a more active role in overseeing the Hong Kong Government's management of political developments in the Special Administrative Region. While Hong Kong remains a free and open society where human rights are respected, courts are independent, and there is a well-established respect for the rule of law, Hong Kong groups have alleged manipulation or pressure in connection with the September 12, 2004 Legislative Council election." ⁽³⁾

"Under People's Republic of China (PRC) nationality law, persons who are of Chinese descent and who were born in the mainland of China or Hong Kong are PRC citizens. However, under an agreement between the United States and the PRC, all U.S. citizens entering Hong Kong on their U.S. passports including such person as may be considered PRC nationals by the PRC authorities, are considered U.S. citizens by the Hong Kong SAR authorities for purposes of ensuring consular access and protection." ⁽⁴⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline C, foreign preference, and Guideline B, foreign influence considerations, with their respective DC and MC, apply in this case. Additionally, each

security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁵⁾ The government has the burden of proving controverted facts.⁽⁶⁾ The burden of proof is something less than a preponderance of evidence.⁽⁷⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹²⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹³⁾ 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.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline C-Foreign Preference is a security concern because 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.

Guideline B-Foreign Influence is a concern because 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 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 interest 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, as well as those which would mitigate security concerns, pertaining to the adjudicative guidelines are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline C and Guideline B.

Based on all the evidence, 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*) apply. Applicant has a British National passport acquired while a citizen and resident of Hong Kong. Applicant kept this passport even after he became a United States citizen. Although the passport has now expired, Applicant has not relinquished it.

I have considered all the mitigating conditions and especially considered Foreign Preference Mitigating Condition (FP MC) E2.A3.1.3.1 (*Dual citizenship is based solely on parents' citizenship or birth in a foreign country*), FP MC

E2.A3.1.3.2 (*Indicators of possible foreign preference (e.g. foreign military service) occurred before obtaining United States citizenship*), and FP MC E2.A3.1.3.4 (*Individual has expressed a willingness to renounce dual citizenship*). Applicant is in a unique position. He was a citizen of Hong Kong with a British National passport. Hong Kong is no longer a part of the United Kingdom and is now part of China. Applicant obtained a British National passport in 1995 before Hong Kong reverted to China. In 1997, when Hong Kong reverted Applicant maintained his British National passport thereby showing a preference for the United Kingdom. Upon becoming a citizen of the United States in 1998 Applicant did not relinquish his British National passport and still retains it. Applicant also has not renounced any ties he may have with the United Kingdom. Although Applicant's status as a "dual citizen" is somewhat murky because Hong Kong no longer belongs to the United Kingdom, what is clear is Applicant has maintained a status through his passport with the United Kingdom. I find the fact that because Applicant has maintained his British National passport he has exercised dual citizenship beyond his birth in Hong Kong and therefore FP MC E2.A3.1.3.1 does not apply. I have considered FP MC E2.A3.1.3.2 applicability and find Applicant obtained the British National Passport before he came to the United States when he was a citizen of Hong Kong. However, the fact that he kept the passport after he became a United States citizen negates the possibility that this issue is mitigated under this provision. FP MC E2.A3. 1.3.4 does not apply because Applicant has not expressed a willingness to renounce his ties to the United Kingdom. In accordance with a memorandum issued by Assistant Secretary of Defense for Command, Control, Communication, and Intelligence, Arthur L. Money, dated August 16, 2000, (Money Memorandum), a security clearance must be denied or revoked for an Applicant with a foreign passport "unless the applicant surrenders the foreign passport...." Surrender of the passport contemplates returning it to the issuing authority. There is no evidence Applicant has done so, therefore, Applicant has failed to mitigate Guideline C, foreign preference.

Based on all the evidence, 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 of, or resident or present in, a foreign country*), FI DC E2.A2.1.2.2 (*Sharing living quarters with a person or person, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists.*), and FI DC E2.A2.1.2.3 (*Relatives, cohabitants, or associates who are connected with any foreign government*) apply. Applicant's brother and sister are immediate family members who are citizens and residents of Hong Kong. His sister works for the government of Hong Kong. Applicant's grandmother has close ties of affection to Applicant and is a citizen and resident of Hong Kong. Applicant's father remains a citizen of Hong Kong, but lives with Applicant in the United States.

I have considered all the mitigating conditions and specifically considered 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), 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*). Applicant's sister and brother are immediate family members. Applicant's sister actually works for the government of Hong Kong and is an agent. Applicant's brother works for a commercial business in Hong Kong. No information was provided to mitigate the possibility that Applicant's brother could not be exploited and force Applicant to choose between family or country. Limited information was provided regarding Applicant's grandmother, but she receives some pension from the government and is primarily supported by Applicant's sister. This connection could potentially be exploited through Applicant's sister's ties to the government. Based on all the facts provided this mitigating condition does not apply to Applicant's family members.

Applicant's father remains a citizen of Hong Kong, but lives, along with Applicant's mother, with him. No information was provided as to how long he has lived in the United States. No information was provided as to Applicant's father's ties to Hong Kong. However because he physically resides in the United States with Applicant, he is not in a position to be exploited by the government of Hong Kong in a way that would force Applicant to choose between loyalty to his father and to his new country. Therefore, the abovementioned mitigating condition applies.

I have considered FI MC E2.A2.1.3.2. (*Contacts and correspondence with foreign citizens are casual and infrequent*), and conclude it does not apply. Although Applicant states he only speaks with his sister, brother and grandmother a few times a year when either they call or his parents call, he has visited them on his trips to Hong Kong and stays with them when he is in the country. This contact is more than casual. It is also likely he will continue to stay with them if he returns again for a visit to Hong Kong.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered the whole person and I find Applicant has failed to mitigate the security concerns. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline C and Guideline B are decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1 Foreign Preference (Guideline C) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Paragraph 2 Foreign Influence (Guideline B) AGAINST THE APPLICANT

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant a security clearance to Applicant. Clearance is denied.

Carol G. Ricciardello

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. U.S. Department of State, Background Note: Hong Kong, March 2005, at 3.
3. *Id.*
4. Item 7 at 2.
5. ISCR Case No. 96-0277 (July 11, 1997) at 2.
6. ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
7. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

8. ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.

9. ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.

10. *Egan*, 484 U.S. at 531.

11. *Id.*

12. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

13. Executive Order 10865 § 7.