



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 14-04573
)
Applicant for Security Clearance)

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: *Pro se*

09/14/2015

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his access to classified information. Before becoming a naturalized U.S. citizen, Applicant exercised the benefits extended to him as a result of his British National Overseas (BNO) status and his birth in Hong Kong. His BNO passport expired in January 2014. Applicant surrendered both his foreign passport and his Hong Kong identification card to his facility security officer (FSO) in early 2014. However, he failed to mitigate the foreign influence concerns raised by his relationships with his parents and three siblings who are residents of the Hong Kong Special Administrative Region (HKSAR) of the People’s Republic of China (PRC). Clearance is denied.

Statement of the Case

On October 28, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the foreign influence and foreign preference guidelines.¹ DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant Applicant’s security clearance.

¹ This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this

Applicant answered the SOR and requested a decision without a hearing. Department Counsel submitted its written case on April 17, 2015. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on June 8, 2015. He did not respond. The items appended to the Government's brief are admitted as Government's Exhibits (GE) 1 through 4. The case was assigned to me on August 3, 2015.

Procedural Issues

Request for Administrative Notice

Department Counsel submitted a written request that I take administrative notice of certain facts about the PRC, including the HKSAR. Applicant did not object to the request, and it was granted.

Findings of Fact

Applicant, 41, works as a senior information technology engineer and developer at a prestigious U.S. university where he has been employed since 2007. This is his first application for a security clearance.²

Applicant was born in Hong Kong in the 1970s while it was a part of the United Kingdom. From 1842 to June 30, 1997, Hong Kong was a British colony. Those born in Hong Kong during this time were considered British subjects. On July 1, 1997, Hong Kong reverted to Chinese sovereignty as a Special Administrative Region (SAR) of the People's Republic of China. As an SAR, Hong Kong maintains some autonomy from the PRC, which the United States supports under the "one country, two systems" framework. However, the PRC maintains authority on foreign relations and national defense. The PRC has an authoritarian government, dominated by the Chinese Communist Party. The PRC has a poor record with respect to human rights, suppresses political dissent, and its practices include arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners. The PRC actively engages in acts of industrial espionage against the United States.³

Applicant immigrated to the United States in March 1996 to complete college, receiving his bachelor's degree in 1998. In 2006, Applicant began attending graduate school at the same university where he is currently employed. He earned his master's degree in 2011. Applicant became a naturalized U.S. citizen in October 2012. Before becoming a U.S. citizen, Applicant traveled abroad and entered the United States using a BNO passport issued by the United Kingdom in 2004. He also held a Hong Kong

case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² GE 2.

³ GE 3.

Identification Card issued by the HKSAR in 2009. The documents expire in January 2014 and January 2019, respectively. In addition to obtaining the Hong Kong identification card, Applicant also received a \$700 tax rebate from the HKSAR government in 2012.⁴ In the beginning of 2014, Applicant surrendered his British Passport and Hong Kong Identification Card to his FSO. Since obtaining a U.S. passport in January 2013, he has used it exclusively while traveling abroad. He has not accepted any benefits from the HKSAR since becoming a naturalized U.S. citizen. On his December 2013 security clearance application, Applicant indicated that he is a dual citizen of Hong Kong, by birth, and the United States, by naturalization. He also expressed his willingness to renounce any foreign citizenship.⁵

In addition to this citizenship status, Applicant disclosed relatives who are residents and citizens of a foreign country. Applicant's parents and his three older sisters were born in mainland China. The family has lived in Hong Kong since at least 1967 when Applicant's older sister, now deceased, was born. Applicant's mother does not work outside the home. His father is a retired business man, who retains part ownership of an export company. One of Applicant's sisters, the one closest in age to Applicant, works at their father's company. Applicant talks with his parents and sister on the phone between once and three times each month, depending on their schedules. He also communicates with them using a popular social media site. Applicant's older two sisters work as a housewife and primary school teacher, respectively. He talks to these sisters less often, but visits with them whenever he is in Hong Kong.⁶

In addition to his family members residing in Hong Kong, Applicant disclosed on his security clearance application, 74 other foreign contacts, from a variety a countries, including Hong Kong and China. A majority of the listed contacts are individuals Applicant met while living in the United States. In discussing his foreign contacts during his April 2014 subject interview, Applicant stated that he did not have close and continuing contact with the majority of the listed individuals. His contact with them is limited to occasional messages on a popular social media site. The interview did not reveal any specific foreign contacts with whom Applicant maintains a close relationship or frequent contact.⁷

Applicant provided little information about his ties to the United States. He owns a home that he continues to share with his ex-wife, who is also a naturalized U.S. citizen.

⁴ The SOR also alleges, based on Applicant's disclosure in his security clearance application, that he received a \$900 tax rebate from the HKSAR in 2013. In his answer to the SOR, Applicant indicated that he was mistaken. Accordingly, this allegation is decided in Applicant's favor.

⁵ GE 1-2.

⁶ GE 2.

⁷ GE 1-2, 4.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Foreign Preference

Security concerns involving foreign preference arise when an individual acts in such a way as to indicate a preference for a foreign country over the United States.⁸ The SOR alleges that Applicant exercises dual citizenship with the United States and Hong Kong. This is inaccurate as Hong Kong is not a country unto itself, but a province that during Applicant's lifetime has been controlled by the United Kingdom and the PRC. The question of citizenship and nationality as it pertains to residents of Hong Kong is complicated. The resolution of which involves a consideration of the citizenship and nationality laws of both the United Kingdom and the PRC, the "one country, two systems" policy adopted by the United States, as well as Applicant's acts of self-determination. Applicant was born a British subject and considered a British National Overseas by the United Kingdom – a status that does not come with the full rights or privileges of British citizenship. After the colony reverted to Chinese sovereignty in 1997, it appears that Applicant chose to retain that status as evidenced by his obtaining a BNO passport in 2004.

The PRC does not recognize the British Overseas National status for residents of the HKSAR. Nor, does the PRC recognize dual citizenship. Once a PRC citizen takes steps, as did Applicant, to obtain any foreign citizenship he loses his Chinese citizenship and must take affirmative steps to obtain it. However, by virtue of his birth in Hong Kong, Applicant was entitled to possess a Hong Kong identification card and receive certain benefits from the Hong Kong government. The receipt of these benefits is not an exercise or attempt to gain Chinese citizenship.

Ultimately, Applicant's receipt of benefits from the United Kingdom and the HKSAR, as alleged in the SOR, is neither disqualifying nor indicative of a foreign preference because they occurred before Applicant became a naturalized U.S. citizen in October 2012. Since obtaining U.S. citizenship, Applicant has not accepted benefits from another country or acted in any way that indicates a foreign preference for another country over the United States. Applicant travels exclusively using his U.S. passport. He surrendered his foreign-issued documents to his FSO. Furthermore, he has expressed a willingness to renounce any foreign citizenship.

Foreign Influence

"[F]oreign contacts and interest may be a security concern if the individual has divided loyalties or financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest."⁹ The SOR alleges that Applicant's parents and siblings are residents of the HKSAR. The SOR also alleges that

⁸ AG ¶ 9.

⁹ AG ¶ 6.

Applicant maintains frequent contacts with friends who are residents of the HKSAR and some who are citizens of the PRC.

While the mere possession of close ties with foreign family members or friends is not disqualifying as a matter of law, a close relationship with even one person living in a foreign country is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. A close relationship with a person who is a resident and citizen of a foreign country can be disqualifying if the contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion; or if the relationship could create a potential conflict of interest between the applicant's obligation to protect sensitive information or technology, and his desire to help a foreign person.¹⁰ In completing this calculus, evaluating the nature of a nation's government, its relationship with the United States, and its human rights record is essential.

The record does not support a finding that Applicant's friendships with foreign nationals create any security risk. Aside from the mere existence of contacts, the Government did not provide any evidence to indicate any close ties to any particular friends who are foreign nationals. However, the same cannot be said about Applicant's relationships with his parents and siblings who are residents of the HKSAR, with whom Applicant maintains close and continuing contact. Given the treatment of the PRC toward its residents, as well as the country's reputation for being an active collector of U.S. economic intelligence, these relationships create a heightened risk of foreign exploitation, inducement, manipulation, and coercion.¹¹

Applicant has not presented sufficient information to mitigate this concern. His relationships with his parents and siblings cannot be considered minimal, casual or infrequent. Furthermore, he did not present sufficient information about his relatives in the HKSAR to support a finding that it is unlikely that he will be placed in a position of having to choose between foreign interests and those of the United States. Also, Applicant failed to present evidence of ties to the United States to support a finding that he could be expected to resolve any conflict of interests in favor of U.S. interests.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. In doing so, I have also considered the whole-person concept as described in AG ¶ 2(a). Ultimately, Applicant failed to meet his burdens of production and persuasion. The security concerns raised in the SOR remain. Following *Egan*¹² and the clearly-consistent standard, I resolve these doubts in favor of protecting national security.

¹⁰ AG ¶¶ 7(a) – (b).

¹¹ AG ¶ 7(a).

¹² *Navy v. Egan*, 484 U.S. 518 (1988).

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:	FOR APPLICANT
Subparagraphs 1.a - 1.e:	For Applicant
Paragraph 2, Foreign Influence	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against Applicant
Subparagraphs 2.c – 2.d:	For Applicant

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Nichole L. Noel
Administrative Judge