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B-178882, May 7, 1974

Number: B-178882

Date: 1974-05-07

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ALTHOUGH CIVIL SERVICE REGULATIONS PROHIBITED APPOINTMENT OF ALIENS IN COMPETITIVE SERVICE, EMPLOYMENT BY DEPARTMENT OF THE NAVY OF NATIONAL OF REPUBLIC OF CHINA FROM 1944 TO PRESENT IS NOT ILLEGAL SINCE APPOINTMENT WAS NOT VOID, BUT VOIDABLE, BECAUSE EMPLOYEE WAS EXEMPT FROM CITIZENSHIP REQUIREMENT DURING PERIOD OF 1944-1946 BY STATUTES EXEMPTING CITIZENS OF COUNTRIES ALLIED WITH UNITED STATES IN WAR EFFORT, AND DURING SUBSEQUENT PERIOD STATUTES PROVIDED THAT EMPLOYEES OF DEPARTMENT OF THE NAVY OR DEPARTMENT OF DEFENSE WERE NOT SUBJECT TO CITIZENSHIP REQUIREMENT.

TO DEPARTMENT OF THE NAVY:

THE DEPARTMENT OF THE NAVY PRESENTED FOR DECISION THE QUESTION OF THE LEGALITY OF EMPLOYMENT OF MR. MAN DONG MA, A NATIONAL OF THE REPUBLIC OF CHINA IN LIGHT OF CIVIL SERVICE COMMISSION REGULATION 338.101(B), TITLE 5, CODE OF FEDERAL REGULATIONS, WHICH PROVIDES IN PERTINENT PART AS FOLLOWS:

"(B) A PERSON MAY BE GIVEN APPOINTMENT ONLY IF HE IS A CITIZEN OF OR OWES PERMANENT ALLEGIANCE TO THE UNITED STATES. ***"

THE RECORD INDICATES THAT MR. MA HAS BEEN EMPLOYED CONTINOUSLY BY VARIOUS ACTIVITIES OF THE DEPARTMENT OF THE NAVY SINCE HIS ORIGINAL WAR SERVICE APPOINTMENT EFFECTIVE JANUARY 24, 1944. THAT STATUS WAS CONVERTED TO AN APPOINTMENT IN THE COMPETITIVE SERVICE EFFECTIVE FEBRUARY 20, 1950. UPON ADVICE OF THE OFFICE OF CIVILIAN MANPOWER MANAGEMENT MR. MA'S COMPETITIVE CIVIL SERVICE STATUS WAS TERMINATED EFFECTIVE FEBRUARY 5, 1974, AFTER IT HAD BEEN DISCOVERED THAT HE WAS A NATIVE OF THE REPUBLIC OF CHINA AND HAD NEVER BECOME A NATURALIZED CITIZEN OF THE UNITED STATES. ON FEBRUARY 6, 1974, MR. MA WAS TRANSFERRED TO A SCHEDULE A POSITION IN THE EXCEPTED SERVICE UNDER PROVISIONS OF SUBSECTION 213.3102(G) OF TITLE 5, CODE OF FEDERAL REGULATIONS. HE IS CURRENTLY EMPLOYED IN THAT STATUS AT THE NAVAL RESERVE CENTER, SAN MATEO, CALIFORNIA.

THE QUESTIONS PRESENTED BY THE LOCAL CIVILIAN PERSONNEL OFFICE ARE THE FOLLOWING:

"A. WAS MR. MA'S INITIAL APPOINTMENT VOID OR VOIDABLE?

"B. IF SO, IS HIS CONTINUED EMPLOYMENT AUTHORIZED UNDER ANY STATUTORY OR REGULATORY AUTHORITY?

"C. SINCE MR. MA HAS INDICATED HIS DESIRE TO RETIRE, MAY HE AVAIL HIMSELF OF CIVIL SERVICE RETIREMENT?

"D. WILL HIS APPLICATION FOR STATUS AS A PERMANENT RESIDENT AFFECT THE ISSUE?

"E. IF HIS EMPLOYMENT IS NOT AUTHORIZED, WHAT HAPPENS TO HIS RETIREMENT CONTRIBUTIONS, LUMP SUM ANNUAL LEAVE, ETC.?"

TO DETERMINE WHETHER AUTHORITY EXISTED FOR LAWFUL EMPLOYMENT OF MR. MA AT THE TIME OF HIS ORIGINAL APPOINTMENT AND AT ALL TIMES SINCE, AN EXAMINATION HAS BEEN MADE OF PROVISIONS APPEARING IN VARIOUS APPROPRIATION STATUTES AFFECTING THE STATUS OF ALIEN EMPLOYEES OF THE DEPARTMENT OF THE NAVY. IN THIS CONNECTION WE HAVE TAKEN NOTE OF THE CASE OF MOW SUN WONG, ET AL. V. HAMPTON, NO. 72-1079, NINTH CIRCUIT COURT OF APPEALS, DECIDED JANUARY 25, 1974, IN WHICH THE COURT HELD THE CIVIL SERVICE COMMISSION'S REGULATION IN QUESTION TO BE UNCONSTITUTIONAL AND GRANTED PLAINTIFFS INJUNCTIVE RELIEF AGAINST ITS ENFORCEMENT. ALSO, WE HAVE NOTED THE CASE OF MARR V. LYON, ET AL., CASE NO. 72-286 CIVIL, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, MEMORANDUM OPINION DATED JANUARY 14, 1974, HOLDING THAT THE REGULATION CITED ABOVE WAS NOT APPLICABLE TO AN EMPLOYEE OF A DEPARTMENT OF DEFENSE INSTALLATION WHO IS A CHINESE NATIONAL BECAUSE IT IS CONTRARY TO THE STATUTORY PROVISION CITED AS SECTION 700 OF TITLE 31, U.S.C. ANNOTATED, WHICH IS AS FOLLOWS:

"SEC 700. DEFENSE DEPARTMENT APPROPRIATIONS; ALIEN PERSONNEL

"PROVISIONS OF LAW PROHIBITING THE PAYMENT OF COMPENSATION TO, OR EMPLOYMENT OF, ANY PERSON NOT A CITIZEN OF THE UNITED STATES SHALL NOT APPLY TO PERSONNEL OF THE DEPARTMENT OF DEFENSE."

WE UNDERSTAND THOSE CASES ARE BEING APPEALED BY THE DEPARTMENT OF JUSTICE. THEREFORE, OUR DECISION IS RENDERED ON THE BASIS OF VARIOUS APPROPRIATION ACTS AFFECTING THE EMPLOYMENT OF ALIENS BY THE DEPARTMENT OF THE NAVY. FURTHER, AS INDICATED BELOW, THE OUTCOME OF THOSE SUITS WOULD NOT AFFECT MR. MA'S ENTITLEMENT TO BENEFITS ARISING FROM HIS PAST EMPLOYMENT.

THE PROVISION IN 31 U.S.C. 700, IS DERIVED FROM APPROPRIATION ACT LANGUAGE APPLICABLE TO THE MILITARY ESTABLISHMENT WHICH HAS BEEN INCLUDED IN SUCH ACTS FOR EACH FISCAL YEAR SINCE 1950 WHEN AN APPROPRIATION WAS MADE FOR THE NATIONAL MILITARY ESTABLISHMENT, APPROPRIATING FUNDS FOR THE FIRST TIME TO THE UNIFIED SERVICES WHICH CONSTITUTED THE NEWLY ORGANIZED DEPARTMENT OF DEFENSE. SECTION 603, ACT OF OCTOBER 29, 1949, 63 STAT. 987, 1017. THE SAME PROVISION APPEARS IN THE CURRENT APPROPRIATION ACT FOR FISCAL YEAR 1974, SECTION 703, PUBLIC LAW 93-238, APPROVED JANUARY 2, 1974.

DURING THE THREE FISCAL YEARS PRECEDING THE FIRST APPROPRIATION TO THE NATIONAL MILITARY ESTABLISHMENT FOR 1950, THE APPROPRIATION ACT FOR THE DEPARTMENT OF THE NAVY INCLUDED A SIMILAR PROVISION EXEMPTING PERSONNEL OF THE NAVAL ESTABLISHMENT FROM LAW PROHIBITING EMPLOYMENT OF ALIENS. SEE SECTION 109, ACT OF JUNE 24, 1948, 62 STAT. 584, 595; SECTION 110, ACT OF JULY 18, 1947, 61 STAT. 382, 394; AND SECTION 116, ACT OF JULY 8, 1946, 60 STAT. 481, 498.

FOR EACH OF THE THREE FISCAL YEARS PRECEDING THOSE IN WHICH THE ABOVE CITED ACTS WERE ENACTED, INCLUDING FISCAL YEAR 1944 IN WHICH MR. MA WAS ORIGINALLY APPOINTED, THE FOLLOWING LANGUAGE OR A SIMILAR PROVISION APPEARED IN THE ANNUAL APPROPRIATION FOR THE EXECUTIVE OFFICE AND INDEPENDENT AGENCIES:

"SEC. 206. UNLESS OTHERWISE SPECIFIED AND UNTIL JULY 1, 1946, NO PART OF ANY APPROPRIATION CONTAINED IN THIS OR ANY OTHER ACT SHALL BE USED TO PAY THE

COMPENSATION OF ANY OFFICER OR EMPLOYEE OF THE GOVERNMENT OF THE UNITED STATES *** WHOSE POST OF DUTY IS IN CONTINENTAL UNITED STATES UNLESS SUCH PERSON (1) IS A CITIZEN OF THE UNITED STATES, (2) IS A PERSON IN THE SERVICE OF THE UNITED STATES ON THE DATE OF ENACTMENT OF THIS ACT WHO, BEING ELIGIBLE FOR CITIZENSHIP, HAD FILED A DECLARATION OF INTENTION TO BECOME A CITIZEN OF THE UNITED STATES PRIOR TO SUCH DATE, OR (3) IS A PERSON WHO OWES ALLEGIANCE TO THE UNITED STATES: ***

THIS SECTION SHALL NOT APPLY TO CITIZENS OF THE COMMONWEALTH OF THE PHILIPPINES OR TO NATIONALS OF THOSE COUNTRIES ALLIED WITH THE UNITED STATES IN THE PROSECUTION OF THE WAR." ACT OF MAY 3, 1945, 59 STAT. 106, 132.

SEE, ALSO, SECTION 205, ACT OF JUNE 27, 1944, 58 STAT. 361, 384-385; AND SECTION 205, ACT OF JUNE 26, 1943, 57 STAT. 169, 196.

WITH RESPECT TO THE FISCAL YEARS 1944 THROUGH 1946, A DETERMINATION THAT THE REPUBLIC OF CHINA WAS ALLIED WITH THE UNITED STATES IN THE PROSECUTION OF WORLD WAR II IS A POLITICAL JUDGMENT NOT SUBJECT TO THE DECISION OF THIS OFFICE. HOWEVER, WE BELIEVE IT TO BE A COMMONLY ACCEPTED FACT THAT THE REPUBLIC OF CHINA WAS SO ALLIED AND WOULD NOT QUESTION AN AFFIRMATIVE ADMINISTRATIVE DETERMINATION AS TO THIS. SEE 35 COMP. GEN. 216 (1955).

IN VIEW OF THE ABOVE, OUR ANSWERS TO THE SPECIFIC QUESTIONS POSED ARE AS FOLLOWS:

A. MR. MA'S ORIGINAL APPOINTMENT WAS NOT VOID, BUT VOIDABLE ONLY. COMP. GEN. 483 (1958); B-178882, AUGUST 29, 1973.

B. MR. MA'S CONTINUED EMPLOYMENT MUST BE CONSIDERED SUBJECT TO THE REGULATIONS OF THE CIVIL SERVICE COMMISSION PENDING THE FINAL DISPOSITION OF THE MOW SUN WONG AND MARR CASES CITED ABOVE. WHETHER HIS CURRENT EMPLOYMENT IS IN COMPLIANCE WITH THOSE REGULATIONS IS PRIMARILY A MATTER FOR DETERMINATION BY THE COMMISSION.

C. IN B-178882, SUPRA, WE STATED THE FOLLOWING:

"WITH RESPECT TO FUNDS DEDUCTED FOR RETIREMENT THE CIVIL SERVICE COMMISSION HAS BEEN GIVEN THE RESPONSIBILITY FOR MAKING DETERMINATIONS AS TO THE CREDITABILITY OF SERVICE FOR RETIREMENT PURPOSES AND FOR THE ADMINISTRATION OF THE CIVIL SERVICE RETIREMENT FUND. 5 U.S.C. 8347, 8348. HOWEVER, IN VIEW OF OUR DECISION WITH RESPECT TO MR. TABOADA'S STATUS WHILE EMPLOYED WE WOULD SEE NO REASON TO QUESTION A DETERMINATION BY THE COMMISSION THAT HE IS ENTITLED TO REFUND OF HIS CONTRIBUTIONS TO THE FUND OR TO CREDIT TOWARD RETIREMENT FOR THE PERIOD OF EMPLOYMENT IN QUESTION IN THE EVENT HE IS EMPLOYED BY THE GOVERNMENT IN THE FUTURE."

THE SAME STATEMENT IS APPLICABLE TO THE FACTS OF MR. MA'S EMPLOYMENT.

D. MR. MA'S APPLICATION FOR STATUS AS A PERMANENT RESIDENT WOULD HAVE NO EFFECT ON THE DETERMINATIONS STATED ABOVE. IN THE EVENT HE BECOMES A NATURALIZED CITIZEN OF THE UNITED STATES THE ISSUE WILL, OF COURSE, BECOME MOOT.

E. IN VIEW OF OUR DECISION THAT MR. MA'S EMPLOYMENT WAS AT ALL TIMES LAWFUL NO BAR EXISTS TO HIS ENTITLEMENT TO A LUMP-SUM ANNUAL LEAVE PAYMENT. AS TO THE STATUS OF HIS RETIREMENT CONTRIBUTIONS SEE OUR REPLY TO C. ABOVE.