

KEYWORD: Guideline B

DIGEST: The Judge’s analysis of the PRC seems to have underestimated the geopolitical threat posed to the U.S. by that country. Whether or not actively hostile actions, such as military conflict, have broken out or are imminent, any country whose policies consistently threaten U.S. national security may be viewed as hostile for purposes of national security adjudications, such as DOHA proceedings. We note that an applicant having relatives in a country hostile of the U.S. is one reason explicitly cited by the Supreme Court for denying a clearance. *Egan*, at 529. Following this, we have regularly held that there is a rational connection between an applicant’s family ties in a country whose interests are adverse to the U.S. and the risk that the applicant might fail to protect classified information. An applicant who has relatives in a hostile country has a “very heavy burden” of persuasion as to mitigation. We note the Judge’s findings that Hong Kong was for many years a British colony. The security significance of a given locale must be evaluated in light of current geopolitical circumstances rather than those that existed in years past. Favorable decision reversed.

CASENO: 17-04208.a1

DATE: 08/07/2019

DATE: August 7, 2019

In Re:	)	
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Applicant for Security Clearance	)	ISCR Case No. 17-04208

**APPEAL BOARD DECISION**

## **APPEARANCES**

### **FOR GOVERNMENT**

Erin P. Thompson, Esq., Department Counsel

### **FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 31, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 14, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Roger C. Wesley granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s favorable decision ran contrary to the weight of the record evidence and, therefore, was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

### **The Judge’s Findings of Fact**

Applicant was born and raised in Hong Kong to parents of Chinese descent. She came to the U.S. in the late 1990s to attend college, eventually earning a master’s degree. She became a naturalized U.S. citizen in the early 2000s and is married with two children.

Applicant’s mother is a dual citizen of the U.S. and the People’s Republic of China (PRC) who lives in Hong Kong. Her father, father-in-law, and mother-in-law are PRC citizens who live in Hong Kong. Applicant has siblings, two of whom live in the U.S., and one in a European country. Applicant has traveled on several occasions to Hong Kong between 2005 and 2011 in order to visit her family, and she has regular telephone contact with her mother.

Applicant has had no compromising incidents, nor has she engaged in illegal activities. She provides no assistance to her family members in Hong Kong. She has no contact with a foreign government, nor does she have financial interests in Hong Kong. She has never voted in a foreign election, and she has no retirement, educational, or medical benefits supplied by Hong Kong or any other foreign country. She has worked in the U.S. for several years and professes no allegiance, sympathy, or alliance with any other country.

Since July 1997, Hong Kong has been a Special Administrative Region of the PRC, which has given it considerable autonomy. The PRC retains responsibility for defense and foreign policy, although it has recently undertaken a more active oversight role in Hong Kong’s politics. Nevertheless, the Basic Law provides safeguards for Hong Kong, and it remains a free and open

state. Hong Kong is active in counter terrorism initiatives, and the U.S. has a strong trade surplus with it.

The PRC is the world's most populous country and is undergoing rapid economic and social change. It is authoritarian and possesses an increasingly sophisticated military. Although not viewed as hostile to the U.S., the PRC is competitive. It is one of the most active collectors of U.S. economic and proprietary information, and it has a poor human rights record. There have been increasing incidents of harassment, arrest, and imprisonment of writers, journalists, lawyers, etc.

### **The Judge's Analysis**

The Judge concluded that Applicant's family connections in Hong Kong pose a heightened risk of foreign exploitation, pressure, and/or coercion. He also concluded that these connections could pose a conflict between Applicant's interest in protecting U.S. security information and her interest in helping her foreign family members. Therefore, he concluded that Applicant's connections in Hong Kong raise security concerns.

In evaluating Applicant's case for mitigation, he cited to Hong Kong's history as a British colony. He concluded that the citizenship status of her relatives posed minimal risks, due to Applicant's strong loyalties within the U.S. He concluded that Applicant is not in a position to be coerced or subjected to pressure and that her ties in the U.S. are such that she can be expected to resolve any conflict of interest in favor of the U.S.

### **Discussion**

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. The standard applicable in security clearance decisions "is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Encl. 2, App. A ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

Department Counsel argues that the Judge's decision runs contrary to the weight both of the record evidence and of the official notice documents that the Judge admitted. She notes that official pronouncements by the President, State Department, Department of Defense, or other appropriate federal agency on matters of national security are legislative facts for purposes of DOHA adjudications and must govern a Judge's analysis. *See, e.g.*, ISCR Case No. 02-04786 at 5, n.6 (App. Bd. Jun. 27, 2003). She argues that Applicant's connections to Hong Kong, understood in the context of the geopolitical circumstances of that region as expressed in the official notice documents, undermine the Judge's favorable decision. We find this argument to be persuasive.

The general principles guiding Foreign Influence analysis are found in Directive, Encl. 2, App. A ¶ 6:

Foreign contacts and interests . . . are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts . . . should consider the country in which the foreign contact . . . is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information[.]

The current language cited above is consistent with prior guideline language regarding identity of the country concerned. Thus, our prior cases on that subject remains valid. In applying the pertinent security concern, we have stated that the nature of the foreign government involved and the intelligence gathering history of that government are among the important considerations that provide context for the record evidence and that must be brought to bear upon the Judge's ultimate conclusions. The country's human rights record is also significant. *See, e.g.*, ISCR Case No. 15-00528 at 3 (App. Bd. Mar. 13, 2017). An applicant's family members living in a foreign country are among the contacts and interests within the scope of this concern. *See, e.g.*, ISCR Case No. 02-04786 (App. Bd. Jun. 27, 2003). In-laws represent a class of persons contemplated by the Directive as entailing possible security risk. As a matter of common sense, we presume that a person has ties of affection for, or obligation to, the immediate family of his or her spouse. *See, e.g.*, ISCR Case No. 14-03112 at 3, n.1 (App. Bd. Nov. 3, 2015).

With this in mind, we note the following matters, drawn from the Judge's decision and from the record:

Applicant is married to a dual Hong Kong and U.S. citizen. Government Exhibit 1, Security Clearance Application, at 19-20.

Applicant's mother, father, stepfather, and mother-in-law are Hong Kong citizens living in Hong Kong. Answer to SOR.

Applicant has regular telephone contact with her mother. Decision at 4.

Hong Kong is a Special Administrative Region of the PRC, which exercises sovereignty. The PRC has responsibility for its defense and for foreign relations. Applicant Exhibit (AE B), U.S. Relations with Hong Kong, July 17, 2018, at 1.

Persons of Chinese descent born in Hong Kong are citizens of the PRC. Decision at 4. Therefore, Applicant's spouse, parents, siblings and in-laws are PRC citizens.

The PRC has recently taken actions that were not consistent with the high degree of autonomy contained in Hong Kong's Basic Law. AE D, Hong Kong Policy Act Report, May 29, 2018, at 1.

The PRC has emphasized that Hong Kong Basic Law is subordinate to the mainland constitution. It has also stated that the PRC will decide "some important matters," blurring the distinction that the Basic Law requires. AE D at 4.

The PRC is the world's most active and persistent practitioner of economic espionage. Hearing Exhibit (HE) 1, Item III, Annual Report to Congress, Military and Security Developments Involving the People's Republic of China 2012.

The U.S. "faces a large and growing threat to its national security from [PRC] intelligence collection operations. Among the most serious threats are [the PRC's] efforts at cyber and human infiltration of U.S. national security organizations." HE 1, Item XII, USCC 2016 Annual Report at 289.

The PRC is an authoritarian state with significant human rights problems. HE 1, Item XIII, 2017 Human Rights Report Regarding the PRC.

Foreign visitors may be placed under surveillance, including the monitoring of electronic communications. HE 1, Item XIV, U.S. Department of State Bureau of Consular Affairs Report. Applicant has traveled to Hong Kong several times in the past to visit family members. Decision at 4.

We are persuaded by Department Counsel's argument that the Judge's analysis of the PRC seems to have underestimated the geopolitical threat posed to the U.S. by that country. Whether or not actively hostile actions, such as military conflict, have broken out or are imminent, any country whose policies consistently threaten U.S. national security may be viewed as hostile for purposes of national security adjudications, such as DOHA proceedings. Viewed in that light, we note that an applicant having relatives in a country hostile of the U.S. is one reason explicitly cited by the Supreme Court for denying a clearance. *Egan*, at 529. Following this, we have regularly held that there is a rational connection between an applicant's family ties in a country whose interests are adverse to the U.S. and the risk that the applicant might fail to protect classified information. *See, e.g.*, ISCR Case No. 15-00528 at 3. An applicant who has relatives in a hostile country has a "very heavy burden" of persuasion as to mitigation. *See, e.g.*, ISCR Case No. 12-12172 at 3-4 (App. Bd.

Jan. 9, 2014). We note the Judge's findings that Hong Kong was for many years a British colony. The security significance of a given locale must be evaluated in light of current geopolitical circumstances rather than those that existed in years past. *See, e.g.*, ISCR Case No. 11-04980 at 6 (App. Bd. Sep. 12, 2012) regarding the necessity of an accurate assessment of a country's geopolitical situation.

Given the totality of the evidence described above, as well as the Judge's own finding that Applicant's circumstances raise security concerns, we conclude that his favorable mitigation analysis is not sustainable. Contrary to the Judge's analysis, it is foreseeable that Applicant's family could be a means through which Applicant comes to the attention of those in the PRC who are devoted to acquiring U.S. protected information, especially in light of her regular contact with her mother. *See, e.g.*, ISCR Case No. 14-03112 at 4. This is in no way an assertion that Applicant is disloyal or is lacking in character. We note the Judge's findings that Applicant has not engaged in illegal activity nor evidenced disloyalty to the U.S. We are not holding these findings to be erroneous. Neither are we asserting that Applicant's family members are untrustworthy. Rather, we conclude that these matters are beside the point, under the facts of this case. Even a person of the highest character can experience circumstances under which he or she could be tempted to place the well-being of foreign relatives over the interests of the U.S. *Id.* Our decision in this case is simply a conclusion that Applicant's evidence is not sufficient to meet her "very heavy burden" of persuasion as to mitigation. Accordingly, the Judge's favorable decision runs contrary to the weight of the record evidence and fails to consider important aspects of the case. *See, e.g.*, ISCR Case No. 04-02058 (App. Bd. Oct. 19, 2006), which cited to Hong Kong's status as a region within the PRC that posed security concerns for an applicant with a relative there.

**Order**

The Decision is **REVERSED**.

Signed: Michael Ra'anan

Michael Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy  
Administrative Judge  
Member, Appeal Board