



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-01191

Appearances

For Government: Melvin Howry, Esquire, Department Counsel
For Applicant: *Pro Se*

March 23, 2009

Decision

WESLEY, Roger C., Administrative Judge:

History of Case

On August 28, 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended (Directive), issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on September 26, 2008, and requested a hearing. The case was assigned to me on December 8, 2008, and was scheduled for hearing on February 24, 2009. A hearing was held on the scheduled date, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of four exhibits; Applicant relied on one witness (himself)

and four exhibits. The transcript (R.T.) was received on March 10, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility to access classified information is granted.

Besides its four exhibits, the Government requested administrative notice of eight documents: *Background Note: China*, U.S. Department of State (October 2008); *Country Specific Information: China*, U.S. Department of State (November 2008); *Country Reports on Human Rights Practices - 2007, China*, U.S. Department of State (March 2008); *Annual Report to Congress from the National Counterintelligence Executive on Economic Collection, 2005-2006* (August 2006); *Intelligence Threat Handbook* (Unclassified/For Official Use Only), Interagency OPSEC Support Staff (IOSS) (June 2004); *2007 Report to Congress, U.S.-China Economic and Security Review Commission* (November 2007); *Background Note: Hong Kong*, U.S. Department of State (September 2008); *Country Specific Information: Hong Kong SAR*, U.S. Department of State (August 2008).

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See *ISCR Case No. 05-11292 (App. Bd. April 12, 2007)*; *ISCR Case No. 02-24875 (App. Bd. October 12, 2006)*. Administrative notice is appropriate for noticing facts or government reports that are well known. See Stein, *Administrative Law*, Sec. 25.01 (Bender & Co. 2006).

For good cause shown, administrative notice was granted with respect to the above-named background reports addressing the geopolitical situation in Hong Kong. Administrative notice was extended to the facts in the documents themselves that were reasonably not in dispute, consistent with the provisions of Rule 201 of Fed. R. Evid. This notice did not foreclose Applicant from challenging the accuracy and reliability of the information contained in the reports addressing Hong Kong's current state.

Summary of Pleadings

Under Guideline B, Applicant is alleged (a) to have an uncle who is a citizen and resident of Hong Kong, (b) to have a business established in Hong Kong by his mother to support Applicant in case the economy in the U.S. stayed bad after the dot.com burst in the early 2000s, (c) to have a bank account in Hong Kong between 2002 and 2005 that was established by his parents, (d) to have traveled to Hong Kong in 1999 and 2001 through 2006, (e) to have traveled to the Peoples Republic of China (PRC) in 2001, 2003, and 2004, and (f) to have traveled to Taiwan in 2004 and 2006.

For his answer, Applicant admitted each of the allegations in the SOR with explanations. He explained he had little contact with his uncle since his uncle's heart attack. He claimed to have ceased his contacts with the company in Hong Kong established by his mother, in response to the Air Force's (AF) denial of his application for a top secret clearance in January 2005. And he claimed to have closed the bank account opened by his parents in Hong Kong.

Findings of Fact

Applicant is a 30-year-old systems engineer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Applicant's background

Applicant was born and raised in the U.S. to parents of Chinese descent who immigrated to the U.S. in 1979 (R.T., at 56). He earned undergraduate and graduate degrees in engineering from a recognized U.S. university and has worked for his current defense employer since November 2004 (see ex. 1).

Applicant is unmarried and has no children. His parents started a textile business in his home state when he was a young boy. He worked for his parents during his high school and college years (see ex. 2; R.T., at 59-60). While he was still in college his parents established a bullion company in Hong Kong to provide support for him in case the U.S. economy did not recover following the dot.com collapse, and Applicant wished to go to Hong Kong to work (see ex. 3: R.T., at 46-47, 60-61). Capitalization requirements are lower in Hong Kong for start-ups than they are in the U.S. (R.T., at 61-62).

Applicant's mother opened a bank account with a \$3,000.00 deposit in Applicant's name in 2002 (R.T., at 41-42, 64). Between 1999 and 2006 he traveled to Hong Kong on various occasions to visit his uncle (his father's brother) who had serious health issues. His completed electronic questionnaire for investigation processing (e-QIP) corroborates Applicant's claims that he traveled to Hong Kong: twice in 1999-2000, once in 2001-2002, once in 2002-2003, once in 2004, once in 2005-2006, and once in December 2006 (see ex.1; R.T., at 55, 67-69, 74-76). While in Hong Kong in 2001, he also traveled to the PRC. During his visit to Hong Kong in 2005-2006, he closed the bullion business his parents opened in his behalf and the account his parents established in his name (R.T., at 45, 63).

Besides his travels to Hong Kong in 2005-2006, Applicant has traveled three times to the PRC (in 2001, 2003, and 2004), and twice to Taiwan (in 2004 and 2006). His parents always accompanied him on his Asian trips (R.T., at 75-76). His trip to Hong Kong in 2005 to see his uncle was the lone exception when his parents did not accompany him (R.T., at 76). Since his uncle's heart attack in 2004, Applicant and his parents have maintained infrequent contact with his uncle (R.T., at 48).

Applicant first applied for a security clearance in 2005 with the AF. His application for a top secret clearance was denied by the AF in August 2005 (R.T., at 44-46). Once he received his rejection notice from the AF, he transferred to another department that did not require a top secret clearance (R.T., at 46). After joining his new department, he applied for a security clearance through his employer. His rejection for a top secret clearance was overturned by the AF in January 2007 (see ex. A; R.T., at 49-50). By this time, however, he had moved out of the department requiring the top secret clearance,

and did not need a clearance at this level any more. Reciprocity based on the AF's actions with his top secret clearance in 2007 was not be available to Applicant on his collateral clearance request because of his movement to another department that did not require a clearance.

Applicant has excellent performance evaluations for the rating years of 2006 through 2008 (see ex. B; R.T., at 53). He owns a home in his State (purchasing it for \$360,000.00 (see ex. C; R.T., at 72) and documents his mortgage payments (ex. C). He maintains a checking account with a U.S. bank in his State and has a 401(k) retirement account valued at \$25,000.00 (see ex. D; R.T., at 72).

Neither Applicant nor his parents currently have any bank accounts or business activities in Hong Kong or any other foreign country (R.T., at 76-77). Applicant has no intentions to transfer or place any assets in any Hong Kong bank or business entity. The same is true for his parents.

Hong Kong's historical background

Hong Kong's history as a seaport and important trading center dates back over five millennia. It developed strong trading relationships with Britain in 1842 (following the First Opium War) under the Treaty of Nanking (see *Background Note: Hong Kong, supra*, at 2). Britain was granted a perpetual lease on the Kowloon Peninsula under the 1860 Convention of Beijing, and expanded its control over the surrounding area under a 99-year lease of the New Territories in 1898 (*id.*).

In the late 19th and early 20th centuries, Hong Kong developed as a warehousing and distribution center for British trade with southern China (see *Background Note: Hong Kong, supra*). Heavy migration to Hong Kong occurred after the Communist takeover of mainland China in 1949. Hong Kong achieved considerable economic success as a British colony in the post-1949 period as a manufacturing, commercial, finance, and tourism center. High life expectancies, literacy, per capita income, and a confluence of other socioeconomic indicators serve to illustrate Hong Kong's measurable socioeconomic achievements.

Hong Kong's reversion

Since July 1, 1997, Hong Kong has been a Special Administrative Region (SAR) of the PRC. This is important to note because of the generally recognized heightened risks that are associated with the PRC, and the unilaterally imposed citizenship and residency status on Applicant and his father as birth residents and citizens of Hong Kong before the reversion (see *Country Specific Information: Hong Kong SAR, supra*, at 2).

Hong Kong today has a population of 6.92 million (95 per cent of which are Chinese), and is one of the most densely populated regions of the world. China has given Hong Kong considerable autonomy over its domestic affairs. The PRC has retained responsibility and control over foreign and defense affairs. State Department records

confirm that the PRC has taken an increasingly active oversight role over Hong Kong's political developments.

Still, both the Sino-British joint declaration (1984) and the basic Law provide political safeguards to ensure that Hong Kong retains its own political, economic, and judicial systems and unique status for at least 50 years after reversion and continue to participate in international conventions and organizations under the name of "Hong Kong, China" (see *Background Note: Hong Kong, supra*, at 2). Hong Kong, with its quasi autonomy, remains a free and open society where human rights are respected, courts are independent, and there are established traditions of respect for the rule of law (see *id.*, at 3).

Citizens of Hong Kong are limited, however, in their ability to change their government, and the legislature is limited in its power to change government policies (see *Background Note: Hong Kong, supra*). And the PRC still retains oversight and ultimate veto authority over all of Hong Kong's economic and political decision making. Any changes in Hong Kong's Basic Law (such as to achieve full universal suffrage) will require approval by Hong Kong's chief executive (currently Donald Tsang), at least a two thirds approval by the Legislative Council (Legco), and then the PRC's National People's Congress Standing Committee (NPSCS), which is by no means assured (see *id.*, at 3).

Because Applicant's uncle is still a citizen and resident of Hong Kong with unilaterally imposed Chinese citizenship by the PRC's immigration law, his PRC connections raise some heightened risk concerns. Such concerns become quite relevant to evaluating any potential security risks associated with Applicant and his uncle because of the PRC's system of authoritarian government, its poor record for respecting human rights and the rule of law, and its collection activities that extend throughout its maintained intelligence operations in Hong Kong and Macau.

The Peoples Republic of China's country status

Established in 1949, the PRC with over 1.3 billion people is the world's most populous country. Today it continues to undergo rapid economic and social change. Political power, however, remains centralized in the Chinese Communist Party (CCP) with little indication of any change in the foreseeable future. China's 70.8 million strong CCP is authoritarian in structure and ideology and possesses increasingly sophisticated military forces which continues to transform itself from a land-based military power to a smaller, more mobile, high-tech military that eventually will be capable of mounting limited operations beyond its coastal waters (see *Background Note: China, supra*, at 6-8).

While not a country acclaimed to be hostile to U.S. persons and interests, the PRC maintains a relationship that is more competitive than cooperative. The PRC operates a large and sophisticated intelligence bureau, entitled the Ministry of State Security (MSS) (see *Intelligence Threat Handbook, supra*, at 17). These operations use clandestine agents to collect intelligence on Western consortia investing in the PRC who are suspected of involvement in attempts to democratize the PRC, as well as other pro-

democracy groups thought to be engaging in anti-communist activities (see *Intelligence Threat Handbook, id.*, at 72).

Based on past reports to Congress, the PRC is considered one of the most active collectors of U.S. economic and proprietary information (see *Annual Report to Congress from the National Counterintelligence Executive on Economic Collection, 2005-2006, supra*). The PRC is known especially to use its intelligence services to gather information about the US and to obtain advanced technologies (see *Intelligence Threat Handbook, supra*, at 17). The PRC actively monitors international communications satellites from maintained intercept facilities, in addition to collecting information on U.S. military operations and exercises. Examples of PRC economic espionage are cited in the *Annual Report to Congress from the National Counterintelligence Executive on Economic Collection, 2005-2006, supra*, at 10-12). Most of the examples of illegally exported technology to the PRC involved high tech equipment and devices used in missile and aircraft guidance systems, highly sophisticated weapons parts, infrared cameras and missile microchips.

As a corollary of its authoritarian roots, the PRC has never been known for a positive human rights record among Western nations and international human rights groups. Part of this can be explained in terms of the PRC's lack of any cognizable democratic traditions and the absence of respect for developing democracies and the rule of law. State Department country reports on the PRC cite the country's poor human rights record. Its noted historical abuses include the suppression of political dissent, arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners (see *Country Reports on Human Rights Practices - 2007, China, supra*, at 2-9).

Of growing concern to U.S. security interests are the State Department's latest reports of increased high profile cases in the PRC involving the monitoring, harassment, detention, arrest, and imprisonment of journalists, writers, activists, and defense lawyers seeking to exercise their law-protected rights (see *Country Reports on Human Rights Practices-2007, supra*). The State Department cites a comprehensive, credible accounting of all those killed, missing, or detained, reported incidents of deaths in custody, disappearance, torture, and other cruel, inhuman, or degrading treatment or punishment (see *id.*, at 2-3). While the PRC officially denies holding any political prisoners, Western non-government organizations estimate that approximately 500 persons remained in prison in 2006 for the repealed crime of counterrevolution, and thousands of others were either serving sentences or were being detained for counter-revolutionary offenses (*id.*, at 8).

In its November 2007 Report to Congress, the Security Review Commission describes the PRC as a country intent on acquiring and exploiting the knowledge developed by multiples of collection agents: legally, if possible, and otherwise illegally by espionage (see *2007 Report to Congress, U.S.-China Economic and Security Review Commission, supra*, at 104-06). The PRC's concerted efforts to acquire sensitive technology poses a considerable challenge to U.S. counterintelligence measures. Recent indictments of Chinese/U.S. citizens for espionage have served to highlight the PRC's

spying activities in the U.S. (*see id.*). Violating its own 2004 U.S.-China agreement, the PRC off-fails to schedule timely end-use inspection visits of dual-use items licensed for export to the PRC. Better export controls can be effective only if they are multilateral in scope (*see id.*). Without effective dual use export controls in place, the PRC can be expected to acquire dual use technologies with military potential through the U.S. and other source countries.

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by administrative judges in the decision-making process covering DOHA cases. These Guidelines require the administrative judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the administrative judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the administrative judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Foreign Influence

The Concern: Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign 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. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism. See revised Adjudicative Guidelines (AG), ¶ 6.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continued Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance

depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: It must prove any controverted facts alleged in the Statement of Reasons, and it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant was born in the U.S. to parents of Chinese descent who themselves are naturalized U.S. citizens who have long resided and prospered in the U.S. Applicant received his undergraduate engineering training at a respected American university and is a highly regarded engineer for a U.S. defense contractor. Security issues of concern to the Government focus on the citizenship and residence of an extended family member (his uncle), and prior business and bank account start-ups in Hong Kong (which reverted to the PRC in 1997, a country known for its poor human rights record and its engagement in economic data collection in Hong Kong and the U.S).

The Government's principal security concerns center on Applicant's immediate family member (his uncle) who resides in Hong Kong (which has since reverted to the PRC) might be subject to undue foreign influence by PRC authorities to access classified information in Applicant's possession or control. Because Applicant's uncle has PRC citizenship by virtue of Hong Kong's reversion to the PRC in 1997, he presents potential heightened security risks covered by Disqualifying Condition (DC) ¶ 7(a), "contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion," of AG ¶ 6.

The citizenship/residence status of Applicant's uncle in what is now the PRC poses some potential concerns for Applicant because of the risks of undue foreign influence that could compromise classified information under Applicant's possession and/or control. DC ¶ 7(b), "connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by

providing that information,” has possible application due to the presence of Applicant’s uncle in Hong Kong. Although, Applicant has not seen his uncle since his last visit to Hong Kong in 2005-2006, and has no current financial interests in Hong Kong or elsewhere in the PRC that could create potential conflicts of interest.

Applicant and his family have deep roots in the U.S. (Applicant’s birth place) Hong Kong (for years a British colony) is his parents’ birth place and, as a former colony of Great Britain, is steeped in British culture, free markets, democratic government, human rights protections, and respect for the rule of law. Applicant has no contacts with or interests in the PRC. His parents (as naturalized U.S. citizens) have a long-established U.S.-based business with no links to the PRC. And Applicant’s only assets are located in the U.S. What business and bank account his mother established for him in Hong Kong have either been closed or are no longer in operation.

From what is known from the presented evidence, none of Applicant’s extended family residing in Hong Kong (with only his uncle identified as such an extended family member residing in the country) have any political affiliations with the Hong Kong or PRC governing bodies. Nor does his uncle have any history to date of being subjected to any coercion or influence, or appear to be vulnerable to the same.

The citizenship status and presence in Hong Kong of Applicant’s uncle poses some risk because of Hong Kong’s reversion to the PRC’ and the latter’s sovereign oversight powers over all of Hong Kong’s domestic affairs, and plenary responsibility over its external affairs. This risks are manageable, though, and reconcilable with U.S. security interests. Applicant’s contacts with his uncle are more than neutralized by Applicant’s demonstrated strong loyalties to the U.S. and manifest commitments to protect this country’s security interests and resist any family pressures that could weaken his fiducial duties to protecting classified information.

The Adjudicative Guidelines governing collateral clearances do not dictate *per se* results or mandate particular outcomes for applicants with relatives who are citizens/residents of foreign countries in general. What is considered to be an acceptable risk in one foreign country may not be in another. While foreign influence cases must by practical necessity be weighed on a case-by-case basis, guidelines are available for referencing in the supplied materials and country information about Hong Kong.

The new AGs do take into account the country’s demonstrated relations with the U.S. as an important consideration in gauging whether the particular relatives with citizenship and residency elsewhere create a heightened security risk. The geopolitical aims and policies of the particular foreign regime involved do matter.

As for security concerns associated with the presence of Applicant's uncle in Hong Kong (a Chinese sector that continues in a semi-autonomous way despite its reversion to the PRC), any potential heightened risk of a hostage situation or undue foreign influence

brought in the hopes of eliciting either classified information or economic or proprietary data out of Applicant through his uncle's residing in Hong Kong is a manageable one.

For Hong Kong, with its quasi autonomy, remains a free and open society where human rights are respected, courts are independent, and there are established traditions of respect for the rule of law (see *Background Note: Hong Kong, supra*, at 3). True, citizens of Hong Kong are limited in their ability to change their government, and the legislature is limited in its power to change government policies (*id.*). And the PRC still retains oversight and ultimate veto authority over all of Hong Kong's economic and political decision making. But since reversion, the PRC has essentially left Hong Kong to manage its own internal affairs without any interference from PRC authorities. This deference is not expected to change in the foreseeable future.

Applicant, accordingly, may take partial advantage of mitigating condition: MC ¶ 8(a), "the nature of the relationships with foreign persons, the country in which these persons are located, or the persons or activities of these persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign a foreign individual, group, organization, or government and the interests of the U.S." Further, in the hypothetical situation where Applicant's uncle or any of his family members residing in Hong Kong or the U.S. were to be pressured, Applicant's strong loyalties and security commitments to the U.S. make it very unlikely that he would permit himself to be pressured into compromising classified information.

Of full benefit to Applicant also is MC ¶ 8(b), "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest." Applicant's demonstrated loyalty, patriotism, and professional commitments to the U.S., are well demonstrated and enough under these circumstances to neutralize all potential conflicts that are implicit in his relationship with his uncle, a Hong Kong resident and citizen of the PRC by virtue of Hong Kong's reversion to the former.

Whole person assessment also serves to minimize Applicant's exposure to conflicts of interests with his uncle in Hong Kong, and potential risks associated with his numerous visits to Hong Kong and the PRC. Not only is Applicant a U.S. citizen by birth and a recipient of undergraduate and advanced degrees of a respected American university, but he has made every effort to work, save, and pursue his financial interests exclusively in the U.S. Applicant is highly regarded and trusted by his employer, from whom he has earned excellent performance evaluations.

In Applicant's case, any likelihood of coercion, pressure, or influence being brought to bear on his uncle or any of his extended family members would appear to be minimal. Aside from any risks associated with Applicant's trips to Hong Kong and his uncle's having Hong Kong citizenship and residence, Applicant has no visible conflicts of interest with Hong

Kong and the PRC or property interests in China that could be at risk to exploitation or compromise by Hong Kong government authorities or PRC military or intelligence officials.

Overall, any potential security concerns attributable to Applicant's uncle residing in Hong Kong are sufficiently mitigated to permit safe predictive judgments about Applicant's ability to withstand risks of undue influence attributable to his familial relationships in Hong Kong (now part of the PRC). His demonstrated loyalties and commitments to protecting U.S. security interests, make it highly unlikely he would succumb to any foreign influence brought to bear on himself or his uncle by PRC government or military officials. Favorable conclusions warrant with respect to the allegations covered by Guideline B.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E2(a) of the Adjudicative Process of Enclosure 2 of the Directive.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE B: (FOREIGN INFLUENCE):	FOR APPLICANT
Sub-paras 1.a through 1.f:	For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge

