

DATE: February 10, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-27322

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The security concerns raised by a 42-year-old Hong Kong-born naturalized U.S. citizen Applicant with Hong Kong-born parents, who are temporarily residing in Hong Kong while his father recovers from a stroke, siblings, and wife, all of whom are naturalized U.S. citizens permanently residing in the U.S., and a widowed mother-in-law--a citizen and resident of Hong Kong, with whom he does not maintain close ties of affection or obligation--none of whom are agents of Hong Kong or the Peoples Republic of China or in a position to be exploited by those foreign governments, have been mitigated by the evidence developed herein. Clearance is granted.

STATEMENT OF THE CASE

On July 10, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR 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 a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated July 17, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the government's written case on November 18, 2003. A complete copy of the file of relevant material (FORM) ⁽¹⁾ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He made no further submissions. The case was assigned to me on February 9, 2004.

FINDINGS OF FACT

Applicant has admitted both of the factual allegations pertaining to foreign influence under Guideline B (subparagraphs 1.a. and 1.b.). Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 42-year-old employee of a defense contractor, and he is seeking to retain a SECRET security clearance previously granted to him in December 1985.

Applicant was born in 1961 in Hong Kong, then a British Crown Colony, of ethnic-Chinese parents, both of whom were born in China in 1935.⁽²⁾ In 1977, Applicant's entire immediate family, including his parents, two brothers, one sister, and himself, immigrated to the United States, because his mother wanted them to take advantage of educational and employment opportunities in the U.S.⁽³⁾ In May 1983, everyone in the family except his mother, became naturalized U.S. citizens.⁽⁴⁾ Because of difficulties learning the English language, his mother had to wait until December 1992 to obtain her U.S. citizenship.⁽⁵⁾ In about 1998-99, Applicant's father returned to Hong Kong to visit his mother. At some point during his visit, she suffered a massive heart attack and died.⁽⁶⁾ Applicant's mother returned to Hong Kong upon her mother-in-law's death to assist her husband, but while they were there, Applicant's father suffered a stroke.⁽⁷⁾ He has been undergoing physical therapy in Hong Kong.⁽⁸⁾ Although they eventually intend to return to the United States for good, and Applicant's mother has actually returned for temporary visits with her children, they have not yet done so because Applicant's father wants to first sell the house he inherited from his mother.⁽⁹⁾

Applicant's parents have no financial or business interests in Hong Kong other than the residence he inherited.⁽¹⁰⁾

Applicant has not seen his father, since he returned to Hong Kong in about 1998-99, and had not seen his mother for about 20 months prior to May 2002.⁽¹¹⁾ It is unclear if she had visited him since that time.

Applicant's wife was born in Hong Kong, also of ethnic-Chinese parents, in 1964.⁽¹²⁾ She and Applicant were married in 1987,⁽¹³⁾ and she became a naturalized U.S. citizen in November 1994.⁽¹⁴⁾ Her father is deceased, and her mother, born in 1931, is purportedly a citizen of Hong Kong,⁽¹⁵⁾ as opposed to being a citizen of the Peoples Republic of China (PRC), and lives in Hong Kong as well. Her children all reside in the U.S.⁽¹⁶⁾ She remains in Hong Kong because of the language barrier, and feels more comfortable residing there.⁽¹⁷⁾

In July 1997, PRC resumed the exercise of sovereignty over Hong Kong and established the Hong Kong Special Administrative Region.⁽¹⁸⁾ Hong Kong has a high degree of autonomy in all matters except foreign and defense affairs, and has retained its political, economic, and judicial systems since 1997.⁽¹⁹⁾ "Hong Kong remains a free and open society where human rights are respected, the courts remain independent, and there is well established and longstanding respect for the rule of law."⁽²⁰⁾ Moreover, Hong Kong is a strong ally of the U.S. in the global coalition against terrorism.⁽²¹⁾

Applicant graduated in August 1985 from a large U.S. university with a master of science degree. Shortly thereafter, in October 1985, he commenced his employment with his current employer, and is now a principal engineer.⁽²²⁾ The quality of his professional performance has not been characterized.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E.2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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

GUIDELINE B - FOREIGN INFLUENCE: 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 obligation are: (1) not citizens of the United States or (2) 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 interests 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 could mitigate security concerns, are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"⁽²³⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance 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." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or

implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of credibility, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Guideline B, the government has established its case. Applicant has been portrayed as a person who is a potential security risk because members of his immediate family or persons to whom he is bound by affection, influence, or obligation--in this instance, his parents are citizens of the United States but temporarily residing in Hong Kong, and his mother-in-law is a citizen and resident of Hong Kong--are either not citizens or residents of the United States or may be subject to duress. These situations raise the potential for vulnerability to coercion, exploitation, or pressure, and the exercise of foreign influence that could result in the compromise of classified information. However, the mere possession of family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B:

The language of [Guideline] B (Foreign Influence) in the Adjudicative Guidelines makes clear that the possession of such family ties *may* pose a security risk. Whether an applicant's family ties in a foreign country pose a security risk depends on a common sense evaluation of the overall facts and circumstances of those family ties. *See* ISCR Case No. 98-0419 (April 30, 1999) at p. 5. [\(24\)](#)

The temporary residency status of Applicant's parents and the citizenship and residency status of his mother-in-law, when considered in light of the nature of the government in Hong Kong--a democratic special administrative region of PRC with and a free and open society where human rights are respected, the courts remain independent, and there is well established and longstanding respect for the rule of law--makes an analysis involving the adjudicative guidelines and the various applicable conditions set forth therein, relatively easy. Applicant's parents, two brothers, his sister, and his wife, as well as himself, are already naturalized U.S. citizens, and only the temporary residency of his 68-year-old parents in Hong Kong, after they resided in the U.S., gives cause for concern. The Hong Kong citizenship and residency of his nearly 73-year-old widowed mother-in-law, raises the issue of potential foreign influence as well. In this regard, see 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*).

It is with some interest that I note that no evidence has been offered by the Government indicating any sinister Hong Kong intentions or activities, such as industrial espionage or active collection of foreign economic information, directed towards the United States. While I acknowledge PRC is active in such activities, the U.S. Department of State description of Hong Kong reverberates resoundingly: "a free and open society where human rights are respected, the courts remain independent, and there is well established and longstanding respect for the rule of law." Likewise, I have seen no indication in the U.S. Department of State, Bureau of East Asian and Pacific Affairs, *Background Note: Hong Kong Profile*, or the U.S. Department of State, Bureau of East Asian and Pacific Affairs, *U.S.-Hong Kong Policy Act Report*, [\(25\)](#) commenting on any such activities or threats posed by Hong Kong.

Also applicable, in this instance, is 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*), and FI MC E2.A2.1.3.5. (*foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities*). I determine that Applicant's parents, considering their citizenship and residency status, notwithstanding the property his father now owns in Hong Kong, do not constitute an unacceptable security risk. Applicant's siblings and his wife's siblings, as well as he and his wife, are all U.S. citizens residing in the U.S. His parents are U.S. citizens, who, but for the rather difficult times associated with his grandmother's demise and his father's stroke, would still be residing in the U.S. The fact they are temporarily residing in Hong Kong until they are able to sell the family residence and his father's physical therapy is completed, should not cause any additional concern. Applicant's entire immediate family is comprised of relatively long-standing residents of the United States who have chosen to make their life here with their allegiance solely to the

country of their acquired citizenship, rather than the country of their birth. Their continuing personal relationships with each other have no security significance. Moreover, neither of his parents are agents of Hong Kong or PRC or in a position to be exploited by PRC. Considering the absence of any scintilla of evidence that they are targets of any intelligence gathering efforts, their residency status does not establish any doubts regarding possible duress.

Also, the citizenship and residency of Applicant's mother-in-law, are of insubstantial concern because there is no evidence that she is a person with whom Applicant has close ties or affection or obligation. Applicant's 73-year-old widowed mother-in-law resides in a political entity which is a "free and open society where human rights are respected," and I can see no evidence of attempted exploitation by the Hong Kong Special Administrative Region. Furthermore, there is no evidence to indicate they have what could be construed as close ties of affection or obligation. Thus, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case with respect to Guideline B. Accordingly, allegations 1.a. and 1.b. of the SOR are concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is eligible for access to classified information.

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. Guideline B: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

DECISION

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 a security clearance for Applicant. Clearance is granted.

Robert Robinson Gales

Chief Administrative Judge

1. The Government submitted seven items in support of its contentions.
2. Item 4 (Security Clearance Application (SF 86), dated November 26, 2001), at 1, 3.
3. Item 5 (Statement, dated May 28, 2002), at 1.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*, at 2.
9. *Id.*; Item 3 (Response to SOR, dated July 17, 2003).

10. *Id.*, Item 5, at 2.

11. *Id.*

12. Item 4, *supra* note 2, at 2-3.

13. *Id.*, at 2.

14. *Id.*, at 5.

15. *Id.*, at 3.

16. Item 3, *supra* note 9.

17. *Id.*

18. Item 6 (U.S. Department of State, Bureau of East Asian and Pacific Affairs, *Background Note: Hong Kong Profile*, dated April 2003), at 2.

19. *Id.*

20. *Id.*, at 3.

21. *Id.*

22. Item 4, *supra* note 2, at 1-2.

23. Exec. Or. 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).

24. ISCR Case No. 98-0507 (Appeal Board Decision and Reversal Order, May 17, 1999), at 10.

25. Item 7, dated April 11, 2003.