

DATE: March 9, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-27337

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROBERT ROBINSON GALES**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Edward W. Loughran, Esquire, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

The security concerns raised by a 28-year-old Hong Kong-born naturalized U.S. citizen Applicant with Hong Kong-born naturalized U.S. citizen parents, who are temporarily residing in Hong Kong, and a Hong Kong-born boyfriend-a citizen of Hong Kong but permanent U.S. resident--none of whom are agents of Hong Kong or the Peoples Republic of China (PRC) or in a position to be exploited by those foreign governments, have been mitigated by the evidence developed herein. In addition, the security significance of Applicant's keeping her British overseas passport for about five years after she had become a naturalized U.S. citizen has been mitigated by its recent expiration. Clearance is granted.

### **STATEMENT OF THE CASE**

On October 20, 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 an unsworn written statement, dated November 8, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have her case decided on the written record, in lieu of a hearing. Department Counsel submitted the government's written case on January 13, 2004. A complete copy of the file of relevant material (FORM) [\(U\)](#) was provided to Applicant, and she was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. She made no further submissions. The case was assigned to me on March 8, 2004.

### **FINDINGS OF FACT**

Applicant has admitted all of the factual allegations pertaining to foreign preference under Guideline C (subparagraphs 1.a. and 1.b.) and foreign influence under Guideline B (subparagraphs 2.a. through 1.e.). 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 28-year-old employee of a defense contractor, and she is seeking to obtain a security clearance the level of which has not been specified.

Applicant was born in 1975 in Hong Kong, then a British Crown Colony, of ethnic-Chinese parents, both of whom were born in Hong Kong. (2) Applicant immigrated to the United States in 1992, (3) and attended a U.S. university during 1995-97 where she received a B.S. degree and another U.S. university during 1998-99 where she received an M.S. degree. (4) In August 1999, she became a naturalized U.S. citizen. (5) Her mother had previously become a naturalized U.S. citizen in September 1998. (6) Her father also became a naturalized U.S. citizen, (7) but the date of that action is unspecified.

Applicant's father has an insurance business in Hong Kong and has been working as an insurance agent for over 35 years. (8) Her mother is a housewife suffering from Lupus, currently receiving treatment from a doctor in Hong Kong on a regular basis. (9) Applicant's parents split their residence by residing in the U.S. for six months and in Hong Kong for six months each year. (10) Her father continues to pay U.S. taxes even while residing in Hong Kong. (11) Neither of her parents has ever been contacted by representatives or organizations of the Hong Kong government. (12)

While she has maintained a relatively small joint bank account with her father, with a balance of approximately \$2,000.00-derived from her savings before she immigrated to the U.S.-Applicant has not used the account for any foreign financial interests. (13) She is willing to close the account if such action is required. (14)

Since becoming a U.S. citizen, Applicant has never accepted educational, medical, or other benefits, and has not registered to vote. (15) She is not willing, nor would she be obligated, to bear arms on behalf of Hong Kong, and has never performed alternative service in lieu of any military obligation. (16) She has never been contacted by representatives or organizations of the Hong Kong government. (17)

Applicant was issued a passport by the United Kingdom in February 1994, identifying her as a British National (Overseas) because of her birth in Hong Kong. (18) That passport expired on February 3, 2004. (19) Applicant was issued the passport prior to becoming a naturalized U.S. citizen, and it was retained only to have a record of her foreign travel and facilitate future travel to Hong Kong. (20) After obtaining her U.S. passport in October 1999, (21) she did not use the British passport for any foreign travel. (22) Applicant has traveled between the U.S. and Hong Kong on numerous occasions-normally during the Christmas holidays-both before and after she became a U.S. citizen.

Applicant's boyfriend, a permanent U.S. resident and a person whom she has known since they were in junior college, is a citizen of Hong Kong, intending to apply for U.S. citizenship when he is eligible to do so. (23)

In July 1997, PRC resumed the exercise of sovereignty over Hong Kong and established the Hong Kong Special Administrative Region. (24) It is also generally accepted that 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. (25) "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." (26) Moreover, Hong Kong is a strong ally of the U.S. in the global coalition against terrorism. (27)

In its *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage -2000*, the National

Counterintelligence Center identified PRC as one of the most active collectors of foreign economic information and industrial espionage. <sup>(28)</sup>

In May 2000, Applicant commenced her employment with her current employer, and is now a multi-disciplined engineer II. <sup>(29)</sup> The quality of her professional performance has not been characterized.

On August 16, 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD/C<sup>3</sup>I) issued a passport policy "clarification" pertaining to Adjudicative Guideline C--foreign preference. A photocopy of the memorandum <sup>(30)</sup> was furnished to Applicant along with the SOR on October 20, 2003. <sup>(31)</sup> The memorandum states, in pertinent part:

The purpose of this memorandum is to clarify the application of Guideline C to cases involving an applicant's possession or use of a foreign passport. The guideline specifically provides that "possession and/or use of a foreign passport" may be a disqualifying condition. It contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country. The only applicable mitigating factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline are that the possession and use of a foreign passport in preference to a U.S. passport raises doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. ***Therefore, consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government.*** odification of the Guideline is not required. (Emphasis supplied)

## 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.**

**GUIDELINE C - FOREIGN PREFERENCE: When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.**

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to each of the adjudicative guidelines 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,"<sup>(32)</sup> 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.

### 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 C (Foreign Preference), the government has established its case. It is quite true Applicant exercised one of the rights and privileges of a citizen of the United Kingdom (Overseas)/Hong Kong by applying for and using a British overseas passport before she became a naturalized citizen of the United States. What she did with that passport before August 25, 1999-the day she became a naturalized U.S. citizen-is of no security significance because before that date she was not a dual citizen. Of significant security concern is that she maintained that passport for approximately five years after she became a U.S. citizen and kept it, albeit unused, until it expired in February 2004. Nevertheless, Applicant's allegiance to the United States has been questioned because of her exercise of British overseas citizenship, and an allegation was made that she thus prefers the United Kingdom/Hong Kong over the United States.

A review of the evidence reveals her allegiance and loyalty to the United States are resolute, and supported by significant indicia of same. Applicant has: indicated a willingness to renounce her British overseas citizenship; received her college and graduate education here; maintained a residence in the United States; been employed in the United States; and declared allegiance to the United States. It is clear that possession of a foreign passport cannot be considered merely in isolation, but should be analyzed in light of all the facts and circumstances, "with the adjudicator needing to consider whether the facts and circumstances of possession reasonably indicate the applicant is demonstrating a foreign preference within the meaning of [Guideline] C."<sup>(33)</sup> The ASD/C<sup>3</sup> I memo appears to be conclusive in this regard, negating any consideration of the facts and circumstances. Thus, the issue is: whether Applicant's actions in keeping her British overseas passport, unused, from August 1999 until it expired in February 2004, constituted the exercise of dual

citizenship and were indicative of a preference for the United Kingdom over the United States. Applicant's actions in retaining the British overseas passport was an exercise by her of her British/Hong Kong citizenship and falls within foreign preference disqualifying condition (FP DC) E2.A3.1.2.1. (*the exercise of dual citizenship*) and FP DC E2.A3.1.2.2. (*possession and/or use of a foreign passport*).

However, Applicant's dual citizenship is based solely on her parents' citizenship and her birth in Hong Kong when it was a British Crown Colony. Thus, Applicant benefits from foreign preference mitigating condition (FP MC) E2.A3.1.3.1. (*dual citizenship is based solely on parents' citizenship or birth in a foreign country*). Her willingness to renounce her British overseas citizenship comes within FP MC E2.A3.1.3.4. (*individual has expressed a willingness to renounce dual citizenship*). The ASD/C<sup>3</sup> I memo states there are no mitigating factors "related to an applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country," a phrase which I construe to relate to the use of a foreign passport. In this instance, Applicant has not used that passport since obtaining her U.S. citizenship. Furthermore, the memo states "consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport. . . ."

When Applicant was interviewed by a special agent of the Defense Security Service (DSS) in April 2002, she volunteered to "relinquish" the passport if required to do so. Since she was not apprised of the existence of the ASD/C<sup>3</sup> I memo at that time or for another 18 months thereafter, she took no further actions in that regard. Finally, a copy of the memo was furnished to Applicant along with the SOR on October 20, 2003, and with the information therein, she simply permitted the passport to expire. While she may have believed that she had complied with the surrender provisions of the ASD/C<sup>3</sup> I memo, it has been determined by the Appeal Board that expiration of a passport is not equivalent to a surrender of it because "surrender contemplates returning it to the issuing authority, and merely keeping a foreign passport until it expires does not satisfy this requirement in the ASDC3I memo." [\(34\)](#)

In this instance, I believe that interpretation is far too inflexible and is contraindicated by Enclosure 2 of the Directive which requires "an overall common sense determination." Moreover, it implies a requirement that does not have any basis in fact--that the foreign passport be surrendered "to the issuing authority." When Applicant's British overseas passport expired, it effectively and legally became a useless piece of paper which could no longer be used for the purposes for which it was initially created. It ceased to exist. A document no longer in existence need not be returned, or surrendered, as seemingly required by the Appeal Board, for it has already been abandoned or surrendered to uselessness.

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 her immediate family or persons to whom she is bound by affection, influence, or obligation--in this instance, her parents are naturalized citizens of the United States but temporarily residing in Hong Kong, and her boyfriend is a citizen of Hong Kong and permanent resident of the U.S.--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. [\(35\)](#)

The temporary residency status of Applicant's parents and the citizenship status of her boyfriend, when considered in light of the nature of the government in Hong Kong--a democratic special administrative region of PRC with 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, as well as herself, are already naturalized U.S. citizens, and only the temporary residency of her 62-year-old mother and 59-year-old father in Hong Kong, gives cause for concern. The Hong Kong citizenship and U.S. permanent residency of her boyfriend, 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 noted 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. PRC is very active in such activities. But 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 or National Counterintelligence Center publications 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 insurance business her father owns and runs in Hong Kong, do not constitute an unacceptable security risk. The fact these U.S. citizens are temporarily residing in Hong Kong should not cause any additional concern for they 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 and temporary residence. Their continuing personal relationships with each other-as well as Applicant's periodic trips to Hong Kong to be with her parents over the Christmas holidays or during summer vacations- have no security significance. Moreover, neither of her parents nor her boyfriend are agents of Hong Kong or PRC or in a position to be exploited by PRC. Furthermore, there is no evidence that they are targets of any intelligence gathering efforts.

In addition, the existence of a relatively small joint bank account with her father, with a balance of approximately \$2,000.00, derived from her savings before she immigrated to the U.S., is of insubstantial concern and raises the applicability of FI MC E2.A2.1.3.5. (*foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities*).

In situations such as these, DOHA must be *country neutral* but must also avoid being *country ignorant*. PRC is one of the most active collectors of foreign economic information and industrial espionage, but in this instance, there is no evidence of attempted exploitation by the Hong Kong Special Administrative Region. Thus, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case. Accordingly, allegations 1.a. and 1.b., as well as 2.a. through 2.e., 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 C: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Paragraph 2. Guideline B: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

Subparagraph 2.c.: For the Applicant

Subparagraph 2.d.: For the Applicant

Subparagraph 2.e.: 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.

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Robert Robinson Gales

Chief Administrative Judge

1. The Government submitted eight items in support of its contentions.
2. Item 4 (Security Clearance Application (SF 86), dated July 6, 2000), at 4.
  3. *Id.*, at 2.
  4. *Id.*, at 2-3.
  5. *Id.*, at 1.
  6. *Id.*, at 4-5.
7. Item 3 (Applicant's Response to SOR, dated November 8, 2003), at 1.
  8. *Id.*, at 2.
  9. *Id.*
  10. *Id.*, at 1.
  11. *Id.*, at 2.
  12. *Id.*
  13. *Id.*
  14. *Id.*
  15. *Id.*, at 1.
  16. *Id.*
  17. *Id.*, at 2.
18. Item 5 (Statement of Subject, dated April 16, 2002), at 1.
  19. *Id.*
  20. *Id.*, at 1-2.

21. Item 4, *supra* note 2, at 1.
22. Item 5, *supra* note 18, at 2.
23. Item 3, *supra* note 7, at 2.
24. Item 6 (U.S. Department of State, Bureau of Consular Affairs, *Consular Information Sheet: Hong Kong (Special Administrative Region of China)*, dated arch 4, 2003, at 1.
25. U.S. Department of State, Bureau of East Asian and Pacific Affairs, *Background Note: Hong Kong Profile*, dated April 2003, at 3.
26. *Id.*
27. *Id.*, at 5.
28. Item 7 (National Counterintelligence Center, *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage-2000*, undated), at 15.
29. Item 4, *supra* note 2, at 3.
30. Item 8 (Memorandum from ASD/C<sup>3</sup>I: Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline), dated August 16, 2000.
31. Item 2 (DOHA Letter of Transmittal, dated October 20, 2003), at 2.
32. 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).
33. ISCR Case No. 97-0356 (Appeal Board Decision, December 12, 1997), at 5-6.
34. ISCR Case No. 01-24306 (Appeal Board Decision, September 30, 2003), at 5; ISCR Case No 00-0009 (Appeal Board Decision, September 26, 2001) at p. 4.
35. ISCR Case No. 98-0507 (Appeal Board Decision and Reversal Order, May 17, 1999), at 10.