

DATE: October 20, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00270

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 66-years old and has served his current employer, a defense contractor, since December 1999. Chinese by birth, he became a naturalized United States citizen in 1973. Applicant has held a security clearance and worked in the defense industry since the early 1980s. Although he has not physically returned to China since 1957, he regularly sends financial support to his mother, who remains a citizen and resident of that country. Moreover, Applicant traveled to Hong Kong on a number of occasions when his wife was temporarily residing there for work, often visiting with a brother who is a Canadian citizen living in Hong Kong. Because Applicant presented minimal evidence regarding his mother and scant information regarding his brother, he has failed to meet his burden in mitigating the security concern raised by his foreign relatives. Clearance is denied.

STATEMENT OF THE CASE

On May 2, 2005, 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). That SOR detailed why, pursuant to Guideline B (Foreign Influence), it 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. In his response, dated May 12, 2005, Applicant admitted to four of the allegations contained in the SOR while denying the remaining three allegations. Additionally, he requested an administrative determination based on the submissions.

The Government's case was submitted on June 6, 2005, and a complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to him. Applicant received a copy of the FORM on June 20, 2005, and was afforded the opportunity to file objections and submit evidence in refutation, extenuation, or mitigation. On June 28, 2005, Applicant submitted a five page Rebuttal Brief with one attachment item, Applicant's 1999 Standard Form 86. I was assigned this case on August 3, 2005.

FINDINGS OF FACT

Applicant has admitted to four of the seven allegations set forth in the SOR.⁽²⁾ After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is 66-years old and has served his current employer, a defense contractor, since December 1999. He was born and raised in geographic China, well prior to its current political organization as the People's Republic of China. After receiving his Bachelor of Science degree in Hong Kong, Applicant conducted his graduate study in Canada. There, he earned a Master of Science degree and, in 1967, a Doctor of Philosophy degree. The following year, he and his wife, a fellow Chinese émigré, married in the United States.

On September 17, 1973, Applicant became a naturalized United States citizen. Professionally, Applicant has served the defense industry and held a secret clearance since approximately 1983; from 1986 to 1993, he held a top secret clearance. Domestically, he and his family have lived in the same home since 1985.

Although the first in his family to emigrate to North America from China, his brothers eventually followed. His elder brother and his wife are United States immigrants with children living and working in the U.S. and Canada. His younger brother and his family, presently living in Hong Kong, are Canadian citizens. With the family's patriarch deceased, Applicant's 88-year-old mother is his last connection to China. He and his brothers collectively contribute some financial support to supplement her pension.⁽³⁾ Recognizing that she will not be emigrating from China, Applicant notes that he has, consequentially, "reduced his Chinese connections to the minimum."⁽⁴⁾ Of what that "minimum" consists beyond financial support is left undefined by Applicant, although he does note that he has not physically visited China since 1957.

In 1998, Applicant's wife accepted a challenging job offer from a private parochial university located in Hong Kong. This position included an 80% salary increase and generous travel allowances, as well as the opportunity to reformulate and build a significant university resource from the ground up. During her tenure at that university, she worked 10-hour-plus days and returned home about every six weeks, either at university or personal expense.⁽⁵⁾ As part of her travel allowance package, and as part of her contract as an employee of foreign residence, Applicant could be flown into Hong Kong up to twice a year; between arch 1999 and October 2004, Applicant thus visited his wife and brother at least five times. Applicant also visited Taiwan, as a tourist, in April 2001. At some point in the past couple of years, however, Applicant's wife finished her project at the Hong Kong university, returned home, and has since become a senior consultant with her home state's college and university system.

Applicant has had a clean record with regard to his handling of classified materials. Moreover, all the factors regarding his family have long been documented and known, and his foreign travel has been conducted with appropriate caution. Applicant submits that this current scrutiny is the result of external factors beyond his control, specifically as the result of the Chinese publication of Zhongwen and Zongxiao's *Source and Technique in Obtaining National Defense Science and Technology Intelligence*. That source notes that China gathers intelligence from open literature and from experts, especially ethnic Chinese experts, working in the United States. Applicant argues that this resource was purposefully published by the Chinese to "drive a wedge and to create difficult situations for many ethnic Chinese Americans working in the U.S. defense industry,"⁽⁶⁾

including individuals such as himself.

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, these adjudicative guidelines are subdivided into those that may be considered in deciding whether to deny or revoke one's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to determine one could still be eligible for access to classified information (Mitigating Conditions).

In application, an Administrative Judge is not strictly bound to the adjudicative guidelines. As guidelines, they are but

part of an amalgam of elements for the Administrative Judge to consider in assessing an applicant in light of the circumstances giving rise to the SOR, as well as in assessing the applicant as a whole. The concept of the "whole person" means that all available, reliable information about the person - whether it is good or bad, present or past - should be considered in making a fair, impartial, and meaningful decision as to his or her suitability to hold a security clearance. To that end, Enclosure 2 also sets forth factors to be considered during this part of the adjudicative process, including: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

After a full and thorough examination, however, the final assessment must comport with the considerable gravity of the final decision. There is no right to a security clearance,⁽⁷⁾ and one seeking access to classified information must be prepared to enter into a fiduciary relationship with the United States Government that is inherently predicated on trust and confidence. Therefore, when the facts proven by the Government raise doubts as to an applicant's judgment, reliability, or trustworthiness, the applicant has the heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁸⁾ Therefore, any doubts will be resolved in favor of the national security, not the applicant.

Finally, it must be noted that Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that 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." Therefore, nothing in this Decision should be construed to suggest I have based it, in whole or in part, on any express or implied determination as to this Applicant's allegiance, loyalty, or patriotism.

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 not citizens of the United States or 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.⁽⁹⁾

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to this adjudicative guideline, are set forth and discussed below.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all legal precepts, factors, and conditions, I find the following with respect to the allegations set forth in the SOR:

With respect to Guideline B (Foreign Influence), the Government has established its case. Applicant admits that he provides financial support to his mother, and that she is both a citizen and resident of the People's Republic of China. Moreover, Applicant admits that one brother, a Canadian citizen, is also a resident of Hong Kong. The citizenship and residency of these family members raise security concerns with regard to Foreign Influence Disqualifying Condition (FI DC) E2.A2.1.2.1 (*[a]n 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*).

When, as here, the Government's initial burden has been met and a disqualifying condition raised, the burden shifts to the Applicant to go forward with evidence in rebuttal, explanation, or mitigation which is sufficient to overcome or outweigh the Government's case.

As a threshold issue, Applicant has explained, and the Government acknowledged in its reply to his response to the SOR, that the first of the 7 allegations contained in the SOR is no longer correct. With regard to allegation 1.a ("Your spouse is a citizen of the United States and a resident of Hong Kong. She returns to the United States approximately every six weeks") and, consequentially, 1.g ("Your wife's employer ... has paid your travel expenses to visit your wife in Hong Kong ... (and) will pay these expenses up to twice a year."), Applicant's wife is a resident of the United States; she specifically left her work in Hong Kong to rejoin her family in the United States and to assume a senior position with her home state's extensive public college and university system sometime in the recent past. Therefore, I find subparagraph 1.a and 1.g no longer represent disqualifying conditions and, concomitantly, I find those subparagraphs in Applicant's favor. With regard to allegation 1.c ("Your brother is a citizen and resident of Hong Kong"), Applicant also has shown that this brother, while a resident of Hong Kong, is a citizen of Canada. Therefore, to the limited extent that subparagraph 1.c alleges that Applicant's brother is a citizen of Hong Kong, I find in favor of Applicant.⁽¹⁰⁾ Finally, because Applicant's one pleasure trip to Taiwan does not represent a disqualifying connection, nor add weight to any of the remaining disqualifying conditions, I find subparagraph 1.f in Applicant's favor.

With regard to Applicant's mother and his younger brother, of Chinese and Hong Kong citizenry, respectively, Applicant has offered little personal information. Specifically, he has neither directly stated, nor provided facts upon which I can find, that neither is an agent of a foreign power or in a position to be exploited by a foreign power in a way that could force him to choose loyalty between these relations and the United States. Indeed, the scant information Applicant has offered with regard to these relations raises more questions than it settles. For example, Applicant provides no facts as to his mother except that she is an aged widow who receives a pension and supplemental income from her sons. He implies, however, that the paucity of her pension is the result of past persecution and present mistreatment by China,⁽¹¹⁾ without giving any details about past acts of persecution or showing how current treatment is lacking in some fashion. Moreover, as noted, *infra*, the risk posed by Hong Kong is considerably lower than that posed by China. This does not, however, excuse Applicant for his failure to offer any information as to his brother, his employment, or his relationship to the government of Hong Kong. With such questions left unanswered, Applicant has failed to establish that Foreign Influence Mitigating Condition (FI MC) E2.A2.1.3.1 (*[a] determination that the family member(s), (spouse, father, mother, sons, daughters, brothers, sons), 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*) applies.

Applicant also has failed to present mitigating evidence regarding, or a full description of, the nature and extent of his relationship with his mother and brother. With regard to his mother, he has presented argument that except for his financial support of her, he has otherwise "reduced his Chinese connections to a minimum."⁽¹²⁾ He has failed, however, to define what that minimum is or otherwise detail the extent of his contact, if any, with his mother. Regarding his brother, there is no indication as to whether their relationship is intimate or casual. All that he has offered is that they jointly contribute to their mother's financial well-being and that they visited somewhat regularly, at least five times in Hong Kong, between 1999 and 2004.⁽¹³⁾

Based on the minimal evidence proffered, mitigation under FI MC E2.A2.1.3.3 (*[c]ontact and correspondence with foreign citizens are casual and infrequent*) cannot be applied. No other mitigating circumstance applies.

This assessment cannot be complete without addressing the countries at issue. The People's Republic of China is a communist regime with well documented abuses of human rights, and the National Counterintelligence Center lists China as one of the most active collectors of foreign economic information and industrial espionage.⁽¹⁴⁾ Notwithstanding Applicant's theory that the specter of foreign information gathering by China is the result of a China-borne rumor, perpetuated to stimulate suspicion of Chinese academics, the argument and exhibits proffered by the Government, here, outweigh Applicant's theory with regard to the security concern and potential risk that this country poses. Hong Kong, on the other hand, may be a Special Administrative Region of China, but it is also one of the world's most open and dynamic economies.⁽¹⁵⁾ It is noted as a free and open society where human rights are respected, courts are independent, and there is a well-established respect for the rule of law.⁽¹⁶⁾ Indeed, it is of additional note that the Government offers no evidence indicating any sinister Hong Kong intentions or activities, such as industrial espionage or active collection of foreign economic information, directed toward the United States. In contrast to China, therefore,

the risk posed by Hong Kong is comparatively low.

I have considered both the record evidence and the Applicant in light of the "whole person" concept. Applicant is a mature, highly educated professional whose security issues emerged late in his career. His answers demonstrate candor and his years of service demonstrate a dedication to this country that is as impressive as his wife's dedication to the groves of academe. Although Applicant has shown himself to be a man of character and integrity, that does not preclude the Government from considering whether his facts and circumstances pose a security risk. [\(17\)](#)

By failing to better flesh out his descriptions of his mother and younger brother and his relationships with them in such a way as to mitigate concerns, Applicant has failed to carry his burden and assuage the doubts they raise. Further, because any doubts *must* be resolved in favor of the national security, not the Applicant, I find against Applicant with regard to the allegations set forth at paragraph 1, subparagraphs 1.b, 1.d, 1.e, and, to the extent it relates to his brother's residency in Hong Kong, subparagraph 1.c of the SOR. Consequentially, I find against Applicant.

FORMAL FINDINGS

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.2.5 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B: AGAINST THE APPLICANT

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: For the Applicant

Subparagraph 1.g: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is denied.

Arthur E. Marshall, Jr.

Administrative Judge

1. ⁰ The government submitted 7 items in support of its case.

2. Specifically, 1.b (his mother is both a citizen and resident of the People's Republic of China); 1.d (he provides his mother with financial assistance); 1.e (he traveled to Hong Kong at least five times between March 1999 and October 2004 to visit his wife and brother); and 1.g (his wife's former employer in Hong Kong paid his travel expenses to visit Hong Kong).

3. The fact that he helps supplement his mother's pension is of much significance to Applicant inasmuch as he feels it "is testimony to the fact that the communist state of China, which had persecuted his family ruthlessly in the past, is not being 'extra-friendly' to his family at present." *See Applicant's Rebuttal Brief (June 29, 2005), at 2.*

4. *Id.*

5. Additionally, 3-4 trips back to the United States were paid for by an international professional organization, to which Applicant's wife served as a representative. Such trips were for attendance at regular meetings conducted at its headquarters, located in the couple's home state. Government Item 3 (Applicant's Answer to the SOR, May 12, 2005), at 2.

6. Respondent's Rebuttal Brief, *supra* note 3, at 4.

7. ⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

8. ⁰ *Id.* at 531.

9. Directive, Enclosure 2, Attachment 2, Guideline B, ¶ E2.A2.1.1.

10. Inasmuch as this brother remains a Hong Kong resident, and since residency, alone, can stand independently as disqualifying under ¶ E2.A2.1.2.1, I find the allegation contained in subparagraph 1.c of the SOR in the Government's favor.

11. Applicant's Rebuttal Brief, *supra* note 3, at 2.

12. *Id.*

13. Government Item 3, *supra* note 5, at 2.

14. Government Item 5 (National Counterintelligence Center Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, 2000), at 15.

15. Government Item 7 (U.S. Department of State Background Note: Hong Kong, 2005), at 2-3.

16. *Id.*

17. ISCR Case No. 01-26893a at 8 (App. Bd., Oct. 16, 2002).