

DATE: April 11, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07855

## DECISION OF ADMINISTRATIVE JUDGE

**ELIZABETH M. MATCHINSKI**

### APPEARANCES

#### FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

#### FOR APPLICANT

Josiah M. Black, Esq.

### SYNOPSIS

Applicant's spouse, a native of Hong Kong, became a United States naturalized citizen in September 2004. In October 2004, she renounced her British National Overseas status and surrendered her expired foreign passports. While her parents are Hong Kong residents with foreign citizenship (mother a Hong Kong-Chinese citizen and father with British National Overseas status), there is little risk of undue foreign influence as her parents are both retired, have never been agents of a foreign government, and are not likely to be exploited. Clearance is granted.

### STATEMENT OF THE CASE

On May 3, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the 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 the Applicant. [\(1\)](#) DOHA recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked. The SOR was based on foreign influence (Guideline B).

On May 17, 2004, Applicant, acting pro se, filed his response to the SOR and requested a hearing before a DOHA administrative judge. The case was assigned to me on September 16, 2004, and a notice was issued scheduling the hearing for October 6, 2004. At the hearing, Applicant was represented by legal counsel. One government exhibit and three Applicant exhibits were admitted into the record, and Applicant, his spouse, and a coworker testified, as reflected in a transcript received October 18, 2004. At the government's request, administrative notice was taken of three U.S. State Department publications: *Background Note: Hong Kong*, December 2003; *Background Note: China*, August 2004; and *Country Reports on Human Rights Practices-2003* for China (includes Tibet, Hong Kong, and Macau), February 25, 2004. Administrative notice was also taken of extracts of the Operations Security Threat Handbook, revised May 1996.

### FINDINGS OF FACT

The SOR alleges foreign influence concerns: specifically Applicant's spouse is a citizen of Hong Kong residing in the U.S.; his father-in-law is a resident citizen of Hong Kong; his mother-in-law is a citizen of the PRC residing in Hong Kong and she visited them in the U.S. in about October 2000; Applicant and his spouse traveled to Hong Kong to see her parents in about July 2002 and they sent her parents approximately \$10,000 in 2001 and \$3,000 in December 2002. Applicant admitted the allegations, but indicated his spouse "is very pro-American" and had applied for U.S. citizenship, his in-laws are retired and do not like the Chinese government, and the monetary gifts to her parents caused them no financial hardship. Applicant's admissions are accepted and incorporated as findings of fact. After a thorough consideration of the evidence, I make the following additional findings:

Applicant is a 34-year-old nuclear physicist with his doctorate degree who has worked for a nonprofit research and development laboratory since July 2002. He held an interim secret clearance for his duties until it was revoked in June 2004, following issuance of the SOR.

Born and raised in the U.S., Applicant met his spouse, a native of Hong Kong, when both were graduate students at a prestigious private university in the U.S. He had just taken a preliminary examination in physics and she was pursuing graduate studies in electrical engineering. They began dating and eventually married in June 2000 in the U.S. Virgin Islands.

An only child, Applicant's spouse was born in 1970 in Hong Kong. Her father worked as a school teacher for the deaf and her mother was a typist for the social welfare department in Hong Kong. Long time residents of Hong Kong, her parents retired before the British handover of Hong Kong to the PRC in late June 1997. Her father has British National Overseas citizenship status and her mother is a Hong Kong-Chinese citizen. Unable to produce legal documentation of her birth in Hong Kong, her mother was ineligible to apply for British National Overseas status. <sup>(2)</sup>

Applicant's spouse was educated in Hong Kong through the 11<sup>th</sup> grade in a school run by American missionary nuns. Because her parents were very concerned about the future of Hong Kong once it fell under the sovereignty of the PRC, Applicant's spouse was sent to Canada in 1987 to finish high school. From September 1987 to 1989, she attended an international high school where she lived in a dormitory but had a local host family. Applicant's spouse became very close to her host family during those two years. In July 1996, she traveled to Canada for the funeral of a member of her host family.

After high school, Applicant's spouse elected to continue her education at a private liberal arts college in the U.S. She entered the U.S. in 1989 on a British Dependent Territory citizen passport issued August 10, 1987, that was scheduled to expire on June 30, 1997, the date of Britain's handover of Hong Kong to the PRC. Distrustful of the PRC government, and not wanting Chinese citizenship, Applicant's spouse subsequently applied for British National Overseas status. While attending college in the U.S., she was issued through the British Embassy a British National Overseas passport in November 1993 valid for ten years. <sup>(3)</sup> Applicant's spouse traveled on this passport to Hong Kong in December 1998 when her father was hospitalized with peritonitis.

In about June 2000, Applicant's spouse earned her doctorate degree in electrical engineering. That same month, she and Applicant wed. Applicant's spouse moved across the country where she began working for a computer microchip manufacturer at a large salary. Applicant continued his graduate studies at the same university. They were able to pay off the debt both had acquired in graduate school and to send a gift of \$10,000 to her parents for the down payment on an apartment in Hong Kong. Her parents had been living in low income public housing in Hong Kong.

In October 2000, Applicant's mother-in-law came to the U.S. to assist Applicant's spouse, who was recovering from surgery. In November 2000, Applicant and his spouse celebrated their wedding with a reception in her area. Applicant's parents, who are divorced, attended with their spouses. Applicant's mother-in-law was also there. Applicant's father-in-law did not come from Hong Kong as he does not travel well.

After Applicant earned his doctorate degree in 2002, he and his spouse traveled to Hong Kong in about July 2002 so that Applicant could meet his father-in-law. Applicant and his spouse also met some of his mother-in-law's relatives at a dinner held during their stay. Applicant's father-in-law is estranged from his family.

In July 2002, Applicant began working for the research and development laboratory as a member of the technical staff. Needing a secret-level clearance for his duties, Applicant executed a security clearance application (SF 86) on July 30, 2002. He indicated his spouse and her father have Hong Kong citizenship and that her mother has PRC citizenship. Applicant also disclosed his pleasure travel to Hong Kong in July 2002.

In about December 2002, Applicant's spouse gave her mother \$3,000 which Applicant understands was to cover the cost of her travels to the U.S. In May 2003, Applicant and his spouse had their first child, a son. Applicant's mother-in-law came to the U.S. from Hong Kong in about April 2003, and stayed for a few months to help out after her grandson was born. She returned to the U.S. again in June 2004 to help out, since Applicant's spouse is employed full-time for the computer microchip company. She was residing with Applicant and his spouse as of October 2004, but planned to return to Hong Kong in mid-November 2004.

In mid-September 2004, Applicant's spouse became a U.S. naturalized citizen, taking the oath to renounce all foreign allegiances, to support and defend the U.S. Constitution and its laws, and to bear arms or noncombatant service or civilian service on behalf of the U.S. if required. She also registered to vote in the U.S. On October 4, 2004, she surrendered to the British Embassy her British National Overseas passport that expired in November 2003, and her British Dependent Territory citizen passport that expired in June 1997. Applicant's spouse also formally filed to terminate her British National Overseas status, notifying British authorities she had acquired U.S. citizenship and wanted to be a citizen of only the U.S. She had applied for her U.S. passport but had not received it as of October 2004.

When her mother is in Hong Kong, Applicant's spouse telephones her parents once a week or once every other week. Her father calls occasionally during her mother's stays in the U.S. Applicant's interaction with his father-in-law is limited to a few sentences on the telephone about once a month. Applicant has daily contact with his mother-in-law while she is staying with them, but his communication with her is usually by gesture or translated by his spouse, as her mother speaks little English.

Applicant's in-laws are of average means in Hong Kong. They live primarily on his mother-in-law's pension earned under a system in place before the transfer of Hong Kong sovereignty to the PRC.

Applicant is very well respected by his colleagues at work. Hired into a group that specializes in missile defense, Applicant proved to be an expert in certain tracking areas. In a relatively brief period, he progressed to a leadership role as a principal investigator. With the withdrawal of his interim secret clearance in June 2004, Applicant could no longer serve on the classified project or as a principal investigator. Assigned unclassified work, he responded conscientiously to his new challenges, questioning on three occasions whether information was appropriately designated as unclassified. A group leader familiar with Applicant's work has no concern with Applicant being granted a security clearance as Applicant has demonstrated personal and technical integrity.

### POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

## CONCLUSIONS

Having considered the evidence in light of the appropriate legal precepts and factors, and having assessed the credibility of those who testified, I conclude the following with respect to 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. (Directive ¶ E2.A2.1.1.) With her recent naturalization in the U.S., Applicant's spouse is now a U.S. citizen. However, her parents reside in Hong Kong and are foreign citizens. Her father has status as a British National Overseas, but her mother, unable to produce her birth certificate proving her birth in Hong Kong, is a Hong Kong-Chinese citizen.

In determining whether an applicant's family ties in a foreign country pose an unacceptable security risk, the administrative judge must consider the record evidence as a whole. Common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is improperly influenced, brought under control, or even used as a hostage by a foreign intelligence or security service. While there are exceptions, in-law ties are not generally as strong as the bonds with one's own immediate family members. Applicant's contact with his father-in-law has been limited to brief telephone conversations about once a month. Since his father-in-law does not travel, Applicant has had in-person contact with his father-in-law only during his and his spouse's visit to Hong Kong in July 2002. Applicant's mother-in-law has twice come from Hong Kong to help the family since April 2003. She resided with Applicant and his spouse for several months each time, and was in their home as of his security clearance hearing in October 2004. Although Applicant has had extensive in-person contact with his mother-in-law of late, cultural and language barriers have hindered the development of close personal bonds between them.

However, the DOHA Appeal Board has held it reasonable for the administrative judge to consider the significance not only of an applicant's ties, but also of his spouse's ties, to a foreign country and the possible effect they may have on applicant's contacts under Guideline B (*see* ISCR Case No. 01-02452, November 21, 2002). Applicant's spouse is close to her parents. When her mother is in Hong Kong, Applicant's spouse calls her parents once a week or every other week. She sent monetary gifts totaling \$13,000 to her parents in Hong Kong. Disqualifying conditions 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*, and E2.A2.1.2.2., *Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse influence or duress exists*, apply in evaluating Applicant's security suitability.

Foreign influence concerns raised by the foreign citizenship and/or foreign residency of family members to whom one is bound by ties of affection or obligation may be mitigated where it can be determined that the relatives 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 (*see* MC E2.A2.1.3.1.). Applicant's in-laws have never been agents of a foreign power. Applicant's father-in-law taught the deaf before his retirement. Although his mother-in-law worked for a social welfare agency in Hong Kong, not all government employees are foreign agents. There is nothing about her former job as a typist which suggests she held a position of influence or authority in the Hong Kong government. Moreover, when she worked for the Hong Kong social welfare agency, Hong Kong was under the control of Great Britain, a close ally of the U.S.

The inquiry in a foreign influence case is not limited to consideration of whether the foreign contacts or connections are agents of a foreign power. Rather, the foreign contacts or connections must also be evaluated in terms of whether they place an applicant in a position of vulnerability to be influenced by coercive or non-coercive means, even if there is no evidence that a foreign country has sought to exploit that vulnerability. (*See* ISCR Case No. 00-0628, February 24, 2003). The likelihood of pressure or coercion being placed on the foreign relatives depends, in large part, on the nature of the country involved (whether it respects democratic principles and human rights, has friendly relations with the U.S.,

etc.). With the handover of Hong Kong to the PRC on June 30, 1997, Applicant's in-laws are seen to be more at risk than if Hong Kong was still under British sovereignty. The PRC has significant intelligence collection capability of which the U.S. is a primary target,<sup>(4)</sup> and the PRC continues to have a poor human rights record.<sup>(5)</sup> Yet, as a special administrative region of the PRC, Hong Kong enjoys a high degree of autonomy, except in matters of defense and foreign affairs. Hong Kong remains a free and open society where human rights and the rule of law are respected, and courts remain independent.<sup>(6)</sup>

Even though Applicant's mother-in-law does not enjoy the protections afforded those Hong Kong natives with British National Overseas status, the risk of undue foreign influence is found to be very minimal. Applicant credibly testified he would report to his employer's security officials any improper attempt by a foreign entity to gain classified information. The DOHA Appeal Board has consistently held that a statement of intention about what an applicant will do in the future under some hypothetical set of circumstances is not entitled to much weight, unless there is record evidence that the applicant has acted in an identical or similar manner in the past under identical or similar circumstances. (*See* ISCR Case No. 99-0501, December 19, 2000; ISCR Case No. 01-26893, October 16, 2002). While Applicant has not been tested in this regard, he has demonstrated personal and technical integrity and been conscientious in the protection of classified information. On three occasions since his interim clearance was withdrawn in June 2004, he sought guidance from his employer as to whether the information was appropriately unclassified. His spouse, who has applied to renounce her British National Overseas status, is not likely to pressure Applicant to place her family members' welfare above his obligation to the U.S. government. SOR ¶¶ 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., and 1.g. are resolved in Applicant's favor.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline B: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For 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 clearly consistent with the national interest to grant or continue a security clearance for Applicant.

**Elizabeth M. Matchinski**

**Administrative Judge**

1.

2. Applicant's spouse testified that her maternal grandfather burned the birth certificates of all of his children when Japan was at war with Britain as he feared the consequences if the Japanese learned he worked for the British government. (Tr. 93)

3. The British National Overseas passport guaranteed security to those Hong Kong residents who did not want to acquire Chinese citizenship, but it did not authorize holders the right to live in Britain.
4. *See* Operations Security Intelligence Threat Handbook, Section 3.
5. *See* the U.S. State Department's Country Reports on Human Rights Practices-2003 pertaining to China (PRC) including Tibet, Hong Kong, and Macau, released February 25, 2004, by the Bureau of Democracy, Human Rights, and Labor.
6. *See* the U.S. State Department publications: *Background Note: Hong Kong*, December 2003, and *Country Reports on Human Rights Practices-2003* pp. 42-55.