

DATE: November 30, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-09431

## **DECISION OF ADMINISTRATIVE JUDGE**

**JACQUELINE T. WILLIAMS**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric H. Borgstrom, Esq., Department Counsel

#### **FOR APPLICANT**

Elizabeth I. Newman, Esq.

### **SYNOPSIS**

Applicant is a 53-year-old naturalized United States citizen since 1982. He was born in Hong Kong. He married a U.S. citizen and his three children were born in the U.S. During the past 30 years, he has visited Hong Kong about eight times, which included attending birthday parties for his elderly parents, visiting his hospitalized mother, and attending the funerals of his parents. His sister and brother are both citizens and residents of Hong Kong. Another brother, a citizen of Hong Kong, resides in Canada. Applicant is not vulnerable to foreign influence because of his strong attachment to the U.S. and because his family is not in a position to be exploited in a way that could force him to choose between loyalty and these family members and his loyalty to the U.S. By mitigating these foreign influence security concerns, Applicant demonstrated it is clearly consistent with the national interest to grant or continue his security clearance. Clearance is granted.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (the "Directive"). On February 13, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision: security concerns under Guideline B (Foreign Influence). Applicant answered the SOR on arch 3, 2004. He elected to have a hearing before an administrative judge.

This case was assigned to me on April 21, 2005. The Notice of Hearing was issued on June 2, 2005. With the concurrence of the parties, I conducted the hearing on June 14, 2005. The government presented eleven exhibits (Exs. 1-11) and no witnesses were called. Applicant's counsel presented five exhibits (Exs. A-E), the testimony of three witnesses, and Applicant's testimony. DOHA received the transcript (Tr.) on June 23, 2005.

### **FINDINGS OF FACT**

Applicant admitted the factual allegations in ¶ 1.a, 1.b, 1.c, 1.d, and 1.e in the SOR and offered mitigating circumstances. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following findings of fact:

Applicant is 53 years old; he was born and raised in Hong Kong.<sup>(1)</sup> He lived there from 1952 to 1973.<sup>(2)</sup> He emigrated to the U.S. in 1973<sup>(3)</sup> to further his education and received his undergraduate degree in 1976 from a major university in the U.S.<sup>(4)</sup> In 1982, he became a naturalized U.S. citizen.

Since 1997, Applicant works as a senior staff project manager for a defense contractor; he has had a security clearance since 1978.<sup>(5)</sup> From 1976 to 1997, he worked for one other defense contractor.<sup>(6)</sup>

In 1977, Applicant married a U.S. citizen in the U.S.<sup>(7)</sup> Applicant, his wife, and their three American born children live in the U.S. For the past eight years, his wife has worked as an instructional assistant for children who need extra support with their reading and writing in an elementary public school.<sup>(8)</sup> His children are enrolled in universities in the U.S. or seeking work after graduating from a university.<sup>(9)</sup>

While his children were growing up and attending public schools in their community, Applicant attended their school-related sports activities, which included soccer games.<sup>(10)</sup> He has coached soccer in his community for several years.<sup>(11)</sup>

A friend who lives in his community and shares social activities as well, and who has known Applicant for at least 12 years, testified regarding Applicant's character, including his trustworthiness, loyalty, and participation in social events in their community.<sup>(12)</sup>

At his present job, a coworker who has known Applicant for approximately five years and who is now his immediate supervisor since six months ago, testified about Applicant's character and work ethic.<sup>(13)</sup> His supervisor strongly believes that Applicant should maintain his security clearance based on Applicant's respect for the work he does and stated "that he keeps his clearance and work in perspective with the right amount of respect."<sup>(14)</sup>

Applicant has relatives living in Hong Kong. None of Applicant's relatives were ever engaged in gathering intelligence for any government.<sup>(15)</sup>

Applicant's eldest sister was born in China in 1940; she emigrated to Hong Kong with her mother in 1948 and lives there presently with her husband. During her career, she worked in a department store and has been retired since 1990.<sup>(16)</sup> He has limited contact with his sister in Hong Kong.<sup>(17)</sup> In his Answer to the SOR, Applicant stated: "As with my parents, my contact with her [eldest sister] has been limited to very infrequent phone calls and even fewer frequent letters (less than 10 in the last 30 years)." He did see his other siblings when he visited his parents.

Applicant's parents are deceased. They were both citizens of the People's Republic of China, residing in Hong Kong.<sup>(18)</sup> His mother was a housewife and his father worked along the waterfront in a warehouse.<sup>(19)</sup> His mother died in August 2000; his father died in November 2001.<sup>(20)</sup>

One brother was born in Hong Kong in 1951, and thereby obtained his United Kingdom citizenship by birth; he currently resides in Hong Kong. This brother has spent his career working as a director in the import/export textile industry in Hong Kong. Applicant's contact with him is limited since contact was mainly through their parents; however, he does have email communication, which is less than a dozen times a year.<sup>(21)</sup>

Applicant has another brother who was born in China in 1944; he is a citizen of the People's Republic of China and is currently residing in Canada.<sup>(22)</sup> This brother retired in early 1990 from a civil servant position in the Customs Department, in the Labor Department in Hong Kong, which at the time was under British government rule.<sup>(23)</sup> He emigrated to Canada and became a Canadian citizen in mid-1990s; he currently resides in Canada.<sup>(24)</sup> In his Answer, Applicant stated:

As with my parents, I had communicated with [my eldest brother] infrequently via telephone calls while he was residing in Hong Kong. While we have communicated more frequently via email after his immigration to Toronto, our discussion topics have been limited to occasional updates on family well beings and casual exchanges of family photos. We also have never discussed the nature of my work assignments. In addition, since his immigration to Toronto, we have visited each other's residence only once even though we are only within hours of each other.

Between 1979 and 2001, Applicant visited Hong Kong eight times, attending milestone birthday celebrations and funerals. In 1989 he visited Hong Kong to attend his mother's 71<sup>st</sup> birthday. He attended his father's 90<sup>th</sup> birthday banquet in 1997. In 1999, he attended his mother's 81<sup>st</sup> birthday banquet. In August 2002, he visited his mother in the hospital; she was suffering from Alzheimer's and he attended her funeral in Hong Kong in September of that same year. His last visit to Hong Kong occurred in December 2001 to attend his father's funeral. His parents left a small monetary  
<sup>(25)</sup>

inheritance to him and his siblings.

He has no plans to return to Hong Kong and stated "now that my parents have passed away we really don't have any plans to go back."<sup>(26)</sup>

Applicant has substantial assets in the U.S., including a home, retirement funds, bank accounts, and a presence in his community.<sup>(27)</sup>

In July 1997, PRC (People's Republic of China) resumed the exercise of sovereignty over Hong Kong and established the Hong Kong Special Administrative Region.<sup>(28)</sup> Hong Kong had a high degree of autonomy in all matters, except foreign and defense affairs, and retained its own currency, laws, and border controls.<sup>(29)</sup> Hong Kong remains a free and open society where human rights are respected, courts are independent, and there is well-established respect for the rule of the law.<sup>(30)</sup>

## 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).

Based on 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: The Concern: 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.<sup>(31)</sup>

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

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 Section E2.2, Adjudicative Process, of the Directive, are intended to assist the administrative judge in reaching fair and impartial 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.<sup>(32)</sup>

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, that 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

on trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. Because of this special relationship, 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 an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions are predictive in nature and must often address potential, rather than actual, risk of compromise of classified information.

Finally, 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." 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, 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:

A security concern 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.

Based on the allegations in the SOR, ¶ E2.A2.1.2.1 provides that it may be a disqualifying condition (DC) if *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*. DC 1 must be evaluated in determining whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant under Guideline B.

DC 1 applies in this case because Applicant's sister and brother are citizens of China and this same sister and another brother, the latter is a United Kingdom citizen, live in China. Once the government meets its burden of proving controverted facts, the burden shifts to an applicant to present evidence to refute, explain, extenuate, or mitigate those security concerns sufficiently to warrant a favorable security clearance decision.

Similarly, pursuant to ¶ E2.A2.1.2.3, it may be disqualifying where *[r]elatives . . . are connected with any foreign government*. The record in this case shows that none of his aforementioned siblings are in a position to be exploited by the government in a way which could force Applicant to choose between loyalty to them or the U.S. Thus, I find that DC 3 does not apply.

The Government purported to offer evidence of Hong Kong's sinister activities and intentions because of the People's Republic of China has sovereignty over Hong Kong.<sup>(33)</sup> While the People's Republic of China exercised sovereignty over Hong Kong, Hong Kong had a high degree of autonomy in all matters, except foreign and defense affairs, and retained its own currency, laws, and border controls.<sup>(34)</sup> Hong Kong remains a free and open society where human rights are respected, courts are independent, and there is well-established respect for the rule of the law.<sup>(35)</sup> There is no proof of any immediate activities or threats posed by Hong Kong toward the U.S.<sup>(36)</sup>

Although Applicant has relatives living in Hong Kong, none of his relatives were ever engaged in gathering intelligence for any government.<sup>(37)</sup> His eldest sister was born in China and lives there currently with her husband. During her career, she worked in a department store and has been retired since 1990. He has limited contact with his sister in Hong Kong. In his Answer to the SOR, Applicant stated: "As with my parents, my contact with her [eldest sister] has been limited to very infrequent phone calls and even fewer frequent letters (less than 10 in the last 30 years)."

One brother was born in Hong Kong and obtained his United Kingdom citizenship by birth; he currently resides in Hong Kong. This brother has spent his career working as a director in the import/export textile industry in Hong Kong. Applicant's contact with him is limited since contact was mainly through their parents; however, they do have email communication, which is less than a dozen times a year. Applicant's other brother is a citizen of the People's Republic of China and is currently residing in Canada. This brother retired in early 1990 from a civil servant position in the Customs Department, in the Labor Department in Hong Kong, which at the time was under British government rule.<sup>(38)</sup> He emigrated to Canada and became a Canadian citizen in mid-1990s; he currently resides in Canada.<sup>(39)</sup> In his Answer, Applicant stated:

As with my parents, I had communicated with [my eldest brother] infrequently via telephone calls while he was residing in Hong Kong. While we have communicated more frequently via email after his immigration to Toronto, our discussion topics have been limited to occasional updates on family well beings and casual exchanges of family photos. We also have never discussed the nature of my work assignments. In addition, since his immigration to Toronto, we have visited each other's residence only once even though we are only within hours of each other.

Under the Directive, the security concerns arising from possible foreign influence may be mitigated under certain circumstances. These security concerns may not be disqualifying where it is determined that *the immediate family members . . . 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 involved and the United States*<sup>(40)</sup> and choosing between loyalty to them and loyalty to the United States if they were put in harm's way. I conclude this mitigating condition applies. I conclude that Applicant's contact with his sister and two brothers is casual and infrequent. Thus, I find that MC 3 applies in this case because *contact and correspondence with foreign citizens are casual and infrequent*.<sup>(41)</sup>

I considered carefully all the facts and circumstances in this case in light of the "whole person" concept. Applicant is a mature individual who has spent the majority of his adult life in the United States. He received his undergraduate degree in the U.S. His wife and three children, all U.S. citizens, live in the U.S. He owns a home in the U.S. He has been a U.S. citizen for 23 years. The personal, professional, and economic ties that bind him to the United States outweigh his connections with relatives in Hong Kong. I conclude Applicant has mitigated any potential security concerns arising from Applicant's family ties in Hong Kong.

## **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1, Guideline B: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

## **DECISION**

In light of all of 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.

Jacqueline T. Williams

Administrative Judge

1. Ex. 1, SF 86, dated January 27, 1999, at 1.
2. *Id.*; Tr. at 20.
3. *Id.* at 20.
4. Ex.1, *supra* note 1, at 2.
5. Tr. at 22; Ex. 2, SF 86, dated January 28, 1999, at 12.
6. Ex. 1, *supra* note 1, at 2.
7. Ex. 1 *supra* note 1, at 4; Tr. at 11; Answer at 1.
8. Tr. at 60.
9. *Id.* at 25, 26, 37-39, 61, 62.
10. *Id.* at 61, 68.
11. Ex. E; Tr. at 38, 39.
12. *Id.* at 68-70.
13. Tr. at 51, 52-57.
14. *Id.* at 56.
15. *Id.* at 28-42.
16. *Id.*
17. *Id.* at 29, 30.
18. Exs. A, B.
19. Tr. at 28.
20. *Id.*; Tr. at 27.
21. *Id.* at 33.
22. *Id.* at 30, 31.
23. *Id.* at 30.
24. *Id.*
25. *Id.* at 41.
26. *Id.* at 36.
27. Tr. at 43, 44.
28. Ex. 3, Consular Information Sheet: Hong Kong SAR, dated April 5, 2005, at 1.
29. *Id.*

30. Ex. 4, U.S. Department of State, Background Note: Hong Kong, dated March 2005, at 3..

31. Directive, ¶ E2.A2.1.1.

32. Directive, ¶ E2.2.

33. Tr. at 72-76.

34. *Id.*

35. Ex. 4, U.S. Department of State, Background Note: Hong Kong, dated March 2005, at 3..

36. Exs. 4-11.

37. *Id.* at 28-42.

38. *Id.* at 30.

39. *Id.*

40. Directive, ¶ E2.A2.1.3.1.

41. *Directive*, ¶ E2.A2.1.3.3.