



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**

In the matter of:	)	
	)	
	)	ISCR Case No. 07-03096
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Braden M. Murphy, Esq., Department Counsel  
For Applicant: *Pro Se*

February 29, 2008

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**Decision**

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TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline B (Foreign Influence). Clearance is denied.

**Statement of the Case**

On October 3, 2006, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) also known as Security Clearance Application (SF 86). On August 31, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, 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,

modified and revised.<sup>1</sup> The SOR alleges security concerns under Guideline B (Foreign Influence). 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 him, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

On September 11, 2007, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated November 7, 2007, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.<sup>2</sup> Applicant did not submit any information within the 30-day time period after receiving a copy of the FORM. The case was assigned to me on January 28, 2008.

## **PROCEDURAL RULINGS**

### **Request for Administrative Notice**

Department Counsel submitted a formal request in his FORM that I take administrative notice of certain facts relating to Hong Kong. Department Counsel also provided supporting documents to show the basis for the facts in his FORM, which are contained in Exs. I through IX. Inasmuch as Applicant did not respond to Department Counsel's FORM, any objection Applicant may have had to my considering these documents is considered waived.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from government reports. See Stein, *ADMINISTRATIVE LAW*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). I took administrative notice of various facts derived from Department Counsel's FORM and Exs. I through IX as indicated under subheading "Hong Kong" of this decision.

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<sup>1</sup>On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

<sup>2</sup>Defense Office of Hearings and Appeals (DOHA) transmittal letter, is dated Nov. 7, 2007; and Applicant acknowledged receipt on Nov. 14, 2007, which DOHA received on Nov. 15, 2007. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit information.

## Findings of Fact

As to the SOR's factual allegations, Applicant admitted the allegations in SOR ¶¶ 1.a to 1.d in his response to the SOR. However, he denied that he had "divided loyalties" under ¶ 1. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 36-year-old engineer, who has been employed by his defense contractor employer since May 2005. Government Exhibit (GE) 4. He is a U.S.-born citizen and does not hold dual citizenship and/or a foreign passport. GE 5. He seeks a security clearance in conjunction with his employment.

Applicant was awarded a Master of Science Degree in Mechanical Engineering in May 1999. Applicant married his wife in August 2005. She was born in Hong Kong in 1973 and is a citizen of Hong Kong. SOR ¶ 1.a. The U.S. Department of Homeland Security granted her permanent residence status (green card) in June 2006. Applicant does not list any children in his October 2006 security clearance application. In addition to Applicant's wife, Applicant's immediate family members consist of his parents, and three adult siblings. His parents are naturalized U.S. citizens, and his siblings are U.S.-born citizens. His parents and siblings reside in the U.S. GE 4.

Applicant's wife came to the U.S. in "1999/2000" on a student visa and attended college from "1999/2000 to 2000/2001." GE 5. After attending college, she worked for a non-profit organization after being granted a work visa.

Applicant's mother-in-law was born in Hong Kong in 1947 and is a citizen and resident of Hong Kong. She is employed in a senior position for a university in Hong Kong. Applicant's father-in-law was born in China in 1943 and is a citizen and resident of Hong Kong. He is a retired politician, who lost his last election in 2004. SOR ¶¶ 1.b. and 1.c. He held office under British rule and under the People's Republic of China (PRC) until he was defeated in 2004. Applicant's spouse has monthly telephone contact with her parents in Hong Kong. Applicant's telephone contact with his in-laws averages one-to-two times a year around holidays. His e-mail contact with his in-laws averages two-to-three times a year also around holidays. GE 5.

Applicant and his wife traveled to Hong Kong from August 2004 to September 2004. This visit occurred before their marriage for the purpose of visiting Applicant's wife's parents. Applicant and his wife traveled to Hong Kong for a second time in December 2005 to visit Applicant's wife's parents. SOR ¶ 1. d.

Applicant denied the notion that he had any divided loyalties between the U.S. and Hong Kong. He stated he witnessed the 9/11 disaster from his office in New York

City, which is where he worked at the time. This tragedy deeply affected him and he added that he would not do anything to endanger American lives.

### **Hong Kong<sup>3</sup>**

Hong Kong became a Special Administrative Region of the People's Republic of China (PRC) on July 1, 1997. Hong Kong has a population of 6.9 million and 95% of Hong Kong's population is of Chinese descent. China has given Hong Kong a high degree of autonomy, except the PRC has retained responsibility for defense and foreign policy. Recently, China has taken a more active oversight role of Hong Kong's control of political developments.

Under Chinese law, PRC citizenship is automatic for persons of Chinese descent, who were born in Hong Kong. The Hong Kong government generally respects the human rights of its citizens, however, reported human rights problems include some political restrictions on the legislature's power, media self-censorship, violence and discrimination against women, and restrictions on workers' rights to collectively bargain.

China has an authoritarian, Communist government. China has a poor human rights record, suppresses political dissent, and practices arbitrary arrest and detention, forced confessions, torture, and other prisoner mistreatment.

China is a nuclear power with a large Army. China is geographically vast, and has a population of over one billion people. It has significant resources, and an economy that in recent years has expanded about 10% per year. China aggressively competes with the United States in many areas. PRC's competitive relationship with the United States exacerbates the risk posed by Applicant's Hong Kong connections.

China actively collects military, economic and proprietary, industrial information about the United States because of the following circumstances: (1) its position as a global superpower; (2) its military, political, and economic investments in the Pacific Rim and Asia; (3) its leading role in development of advanced technology that China desires for economic growth; and (4) China considers the large number of Americans of Chinese ancestry as intelligence targets. China's active intelligence gathering programs focus on sensitive and protected U.S. technologies. China maintains intelligence operations in Hong Kong utilizing PRC nationals with Hong Kong connections.

### **Policies**

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list

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<sup>3</sup>The contents of the Hong Kong section are taken in whole or in part from Department Counsel's FORM and its attachments.

potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." 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 Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"<sup>4</sup> demonstrating, 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. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).<sup>5</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of

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<sup>4</sup> See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).

<sup>5</sup> "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

the possible risk the 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.

Section 7 of Executive Order 10865 provides that 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.” See *also* Executive Order 12968 (Aug. 2, 1995), Section 3.

### **Analysis**

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 the allegations set forth in the SOR:

#### **Guideline B (Foreign Influence)**

AG ¶ 6 explains the Government’s concern about “foreign contacts and interests” stating:

[I]f the individual has divided loyalties or foreign financial interests, [he or she] may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 indicates three conditions that could raise a security concern and may be disqualifying in this case, including:

(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligation to protect sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information; and

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001). Applicant has frequent contact with his in-laws. These close relationships with these relatives create a potential risk of foreign exploitation, inducement, manipulation, pressure, or coercion meriting a close examination of all circumstances.

The Government produced substantial evidence of these three disqualifying conditions as a result of Applicant's admissions and evidence presented. The Government established Applicant's spouse is a citizen of Hong Kong and resident of the U.S.; that his in-laws are citizens and residents of Hong Kong; that his father-in-law is a retired politician in Hong Kong, who ran for office in 2004; and that Applicant traveled to Hong Kong in 2004 and 2005. The burden shifted to Applicant to produce evidence and prove a mitigating condition. As previously indicated, the burden of disproving a mitigating condition never shifts to the Government.

Three Foreign Influence Mitigating Conditions under Guideline ¶ 8 are potentially applicable to these disqualifying conditions:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

Applying common sense and life experience, there is a rebuttable presumption that a person has ties of affection for, and/or obligation to, the immediate family members of the person's spouse. ISCR Case No. 04-07766 at 4 (App. Bd. Sept. 26, 2006); ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002). Applicant has demonstrated the indicia of ties of affection for/and or obligation to his in-laws by

frequent telephone and e-mail contact as well as accompanying his wife to Hong Kong to visit his in-laws in 2004 and 2005.

The record is void of details regarding the status of Applicant's father-in-law as a retired politician, including the type of position he held, level of past responsibility, length of service, and circumstances surrounding his electoral defeat in 2004. Also identified in the record is what influence, if any, the Chinese Government could exert on Applicant's mother-in-law as a result of her employment in a senior position for a major university in Hong Kong. As a result of the positions held by Applicant's in-laws, the burden shifted to Applicant to show his in-laws and their positions do not create security risks.

"[T]he nature of the foreign government involved in the case, and the intelligence-gathering history of that government are important evidence that provides context for all the other evidence of the record . . ." See, e.g., ISCR Case No. 04-0776 at 3 (App. Bd. Sept. 26, 2006); see also ISCR Case No. 02-07772 at 7 (App. Bd. Aug. 28, 2003). As noted *supra* under the subheading "Hong Kong," Hong Kong is a part of the PRC, which is ruled by a communist government that actively engages in intelligence gathering against the U.S. The PRC also has a poor human rights record.

Applicant denies having "divided loyalties" between the U.S. and any foreign country. It should be noted Applicant's allegiance to the U.S. was not challenged in this proceeding. The issue is rather a positional one.

[Guideline B] hinges not on what choice Applicant might make if he is forced to choose between his loyalty to his family and the United States, but rather hinges on the concept that Applicant should not be placed in a position where he is forced to make such a choice. ISCR Case No. 03-15205 at 3-4 (App. Bd. Jan. 21, 2005).

On balance, Applicant has not met his burden of showing there is "little likelihood that [his relationship with his in-laws] could create a risk for foreign influence or exploitation." The nature of the PRC's government and its ongoing intelligence gathering activities against the U.S. places Applicant in just this position, given his family's continued presence and connection with Hong Kong and the PRC. Accordingly, Mitigating Conditions 8(a), 8(b), and 8(c) do not apply.

### **Whole Person Concept**

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under Directive ¶ E2.2.1. "Under the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant's life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant's security eligibility by considering the totality of an applicant's conduct and



circumstances.”<sup>6</sup> The directive lists nine adjudicative process factors (APF) which are used for “whole person” analysis. Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation and behavior changes, etc., the eighth APF, “the potential for pressure, coercion, exploitation, or duress,” Directive ¶ E2.2.1.8, is the most relevant of the nine APFs to this adjudication.<sup>7</sup> In addition to the eighth APF, other “[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.” Directive ¶ E2.2.1. Ultimately, the clearance decision is “an overall common sense determination.” Directive ¶ E2.2.3.

The Appeal Board requires the whole person analysis address “evidence of an applicant’s personal loyalties; the nature and extent of an applicant’s family’s ties to the U.S. relative to his [or her] ties to a foreign country; his or her social ties within the U.S.; and many others raised by the facts of a given case.” ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

There is some mitigating evidence that weighs towards grant of Applicant’s security clearance. Applicant is a U.S.-born citizen and has lived in the U.S. his entire life except for brief periods of foreign travel. His parents are naturalized U.S. citizens and his three adult siblings are U.S.-born citizens. All of his immediate family members live in the U.S. His ties to the United States are stronger than his ties to his wife’s family members in Hong Kong. There is no evidence Applicant has ever taken any action which could cause potential harm to the United States. He takes his loyalty to the United States very seriously, and he has worked diligently for a defense contractor for almost three years. The FORM contains no derogatory record evidence about the Applicant.

I have carefully considered Applicant’s family connections and personal connections to Hong Kong. Several circumstances weigh against Applicant in the whole person analysis. First, the PRC is a nuclear power and PRC’s government is a rival of the United States. China is an authoritarian, Communist state. More importantly for security purposes, PRC actively seeks classified and industrial/economic information. The PRC may attempt to use Applicant’s in-laws who live in Hong Kong to obtain such information. Second, he had significant connections to Hong Kong vis-à-vis his wife’s parents. Although his wife immigrated to the United States in “1999/2000,” she was born in Hong Kong, and spent her formative years there. Her parents live and reside in Hong Kong and held or hold visible positions in Hong Kong. Applicant and his wife have

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<sup>6</sup> ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)); ISCR Case No. 05-02833 at 2 (App. Bd. Mar. 19, 2007) (citing *Raffone v. Adams*, 468 F.2d 860 (2nd Cir. 1972) (taken together, separate events may have a significance that is missing when each event is viewed in isolation)).

<sup>7</sup> See ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006) (stating that an analysis under the eighth APF apparently without discussion of the other APFs was sustainable); ISCR Case No. 03-10954 at 5 (App. Bd. Mar. 8, 2006) (sole APF mentioned is eighth APF); ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (remanding grant of clearance because Judge did not assess “the realistic potential for exploitation”), *but see* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 5, 2007) (rejecting contention that eighth APF is exclusive circumstance in whole person analysis in foreign influence cases).

visited Applicant's in-laws in Hong Kong two times recently, i.e. 2004 and 2005. Applicant did not rule out visiting Hong Kong in the future. Applicant's wife, and to a lesser extent Applicant, maintain frequent contact with Applicant's wife's parents in Hong Kong by telephone and e-mail. These contacts are manifestations of strong affection and regard Applicant and/or his wife have for family members in Hong Kong.

"Because of the extreme sensitivity of security matters, there is a strong presumption against granting a security clearance. Whenever any doubt is raised . . . it is deemed best to err on the side of the government's compelling interest in security by denying or revoking [a] clearance." *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1990). This Analysis must answer the question whether there is a legitimate concern under the facts presented that the Hong Kong Government or its agents might exploit or attempt to exploit Applicant's family members in such a way that this U.S. citizen would have to choose between his pledged loyalty to the U.S. and those family members. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to foreign influence. This is a close case, but ultimately the evidence leaves me with doubts as to Applicant's security eligibility and suitability.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"<sup>8</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

### **Formal Findings**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraphs 1.a - 1.d:	Against Applicant

### **Conclusion**

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

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Robert J. Tuiider  
Administrative Judge

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<sup>8</sup>See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).