



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-13907
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Eric H. Borgstrom, Esq., Department Counsel  
For Applicant: Peter J. Conese, Personal Representative

July 11, 2008

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence), based on Applicant's ties to Hong Kong. Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted her security clearance application on March 2, 2006. On March 5, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing security concerns under Guideline B (Foreign Influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on March 11, 2008; answered it on March 20, 2008; and requested a hearing before an administrative judge. DOHA received the request on March 27, 2008. Department Counsel was ready to proceed on April 21, 2008, and the case was assigned to me on April 29, 2008. DOHA issued a notice of hearing on April 30, 2008, scheduling the hearing for May 21, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified on her own behalf, presented the testimony of one witness, and submitted Applicant's Exhibit (AX) A, which was admitted without objection. The record closed on May 21, 2008. DOHA received the transcript (Tr.) on June 5, 2008.

## **Evidentiary and Procedural Rulings**

### **Authentication of a Report of Investigation**

Department Counsel offered GX 2, DOHA interrogatories that included a personal subject interview extracted from a report of investigation, without calling an authenticating witness as required by the Directive ¶ E3.1.20. I explained the authentication requirement to Applicant, and she waived it (Tr. 48-50). Accordingly, I admitted GX 2 in its entirety.

### **Administrative Notice**

Department Counsel requested that I take administrative notice of relevant facts about Hong Kong and the People's Republic of China (PRC). The request and its enclosures were not admitted in evidence but are attached to the record as Hearing Exhibit (HX) I. I took administrative notice as requested by Department Counsel (Tr. 43). The facts administratively noticed are set out below in my findings of fact.

## **Findings of Fact**

In her answer to the SOR, Applicant admitted all the allegations in the SOR and offered explanations. Her explanation regarding SOR ¶ 1.d, that the person is no longer a citizen of Hong Kong but is now a citizen and resident of the U.S., amounts to a denial, and I have treated it as such. Her admissions in her answer to the SOR and at the hearing are incorporated in my findings of fact.

Applicant is a 24-year-old native of Hong Kong. She, her mother, and her brother emigrated from Hong Kong to the U.S. in 1997, shortly before the transfer of Hong Kong from the United Kingdom to the PRC (Tr. 59-60). Her father remained in Hong Kong. Applicant was then about 13 years old (Tr. 60). She attended 8<sup>th</sup> grade, high school, and college in the U.S., receiving a bachelor's degree in computer science in May 2006.

Applicant, her mother, and her brother became U.S. citizens in May 2003 (Tr. 61). Applicant testified that she and her family members are dual citizens because they automatically became PRC citizens when Hong Kong was transferred to the PRC in

1997, with no action on their part (Tr. 65). She also testified she would be willing to renounce her PRC citizenship if it were necessary (Tr. 59).

In July 2006, Applicant was selected to participate in a three-year leadership program operated by a government contractor, in which she works a 40-hour week rotating across the various engineering disciplines and participates in an academic program leading to a master's degree. She testified her long-term goal is "to become a leader" for her employer (Tr. 82). She held an interim clearance for a short time, but she has never held a permanent security clearance.

Applicant's manager testified she is technically very competent and very conscientious. She earned a "resounding chorus" of favorable comments from supervisors and peers for her performance as a team player (Tr. 17-18). In a written statement, he described her as "dependable, reliable, hard-working, conscientious, and honest in all her assignments and interactions with others." He also commented on her "constant loyalty and dedication." (AX A.)

Applicant's parents were divorced in 2003, and they have no contact with each other (Tr. 68-69). Both parents are financially self-sufficient.

Applicant's mother has never worked outside the home. She returned to Hong Kong at some time after May 2003, because she did not speak English well and found it difficult to interact with others (Tr. 84). Applicant traveled to Hong Kong during school breaks in 1998, 1999, 2000, 2002, and 2005, to visit her mother, and she stayed with her mother during these visits (Tr. 79). Her mother last visited her when she came to Applicant's graduation in 2006 (Tr. 71). She speaks with her mother about two to three times a month.

As of the date of the hearing, Applicant had no contact with her father for about six months. During her multiple visits to Hong Kong, she saw her father once (Tr. 79). She has not been comfortable with her father since the divorce (Tr. 85). She became emotional when testifying about her father (Tr. 69), and she was reluctant to be specific about the basis for their estrangement. She appears to blame him for the divorce (Tr. 85). Her father is an electrician and a director of a small, privately-owned electrical construction company (Tr. 74-75). She knows he lives in Hong Kong, but she does not know his current address (Tr. 67). She last saw her father about two years ago. He did not attend her college graduation (Tr. 78).

Applicant's brother lives and works in the U.S. He is a consultant for an information technology company (Tr. 64).

Applicant testified she does not talk to her family about her work, and they do not ask about it (Tr. 57-58). None of her immediate family members are politically active or connected to the government of Hong Kong or the PRC.

Applicant's college roommate was a citizen of Hong Kong, but is now a U.S. citizen and resident (Tr. 58). After they graduated from college, they did not remain in close contact. Their contact is now limited to an occasional email, perhaps once a month (Tr. 59). By contrast, Applicant testified she has developed very close relationships with her 13 classmates in the leadership development program (Tr. 92). The relationships go beyond work and school and include travel and social events (Tr. 93).

When Applicant first came to the U.S., she held a passport issued by the United Kingdom. It expired in July 2005, and she now holds only a U.S. passport.

Hong Kong has been a special administrative region of the PRC since July 1997. Hong Kong enjoys a high degree of autonomy, except in the areas of defense and foreign policy. While defense and foreign policy are a PRC responsibility, Hong Kong is an independent customs authority and economic entity separate from the PRC, with the authority to make international agreements on its own behalf in commercial and economic matters. Hong Kong has one of the world's most open and dynamic economies. It remains 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. However, residents are limited in the ability to change their government, and the legislature is limited in its power to affect government policies.

Hong Kong is an active member of the global coalition against terrorism. It has cooperated in eliminating funding for terrorist networks and combating money laundering, and it has enacted legislation designed to comply with the United Nations' anti-terror resolutions and financial task force recommendations.

Due to the substantial role of the PRC in the areas of defense and foreign policy, the relationships between the PRC and the U.S. are relevant on Guideline B cases arising from family and other connections with Hong Kong. The PRC has an authoritarian government dominated by the Communist Party. It has large and increasingly sophisticated military forces. The U.S. and the PRC have been rivals since the Cold War, with particular disagreement on Taiwan. Despite political disagreements, the U.S. and the PRC have become major economic and trading partners. The PRC aggressively targets sensitive and protected U.S. technology and military information, using worldwide intelligence operations, including those in Hong Kong. It is one of the most aggressive practitioners of industrial espionage. U.S. citizens of Chinese ancestry are considered prime intelligence targets.

The PRC has a poor human rights record. It suppresses political dissent, and it practices arbitrary arrest and detention, forced confessions, torture, and mistreatment of prisoners. Travelers to the PRC can expect to be placed under surveillance, with their hotel rooms, telephones, and fax machines monitored and personal possessions, including computers, searched without their knowledge or consent.

The PRC considers persons of Chinese descent born in Hong King to be PRC citizens. However, the PRC and the U.S. have agreed that all U.S. citizens entering Hong Kong on U.S. passports will be considered as U.S. citizens by Hong Kong authorities, even though such persons may be considered PRC citizens by PRC authorities.

### **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 have 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), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of 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.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the

criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. 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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Guideline B, Foreign Influence**

The SOR alleges Applicant's mother is a dual citizen of Hong Kong and the U.S. and resides in Hong Kong (SOR ¶ 1.a); her father is a citizen and resident of Hong Kong (SOR ¶ 1.b); her brother is a dual citizen of Hong Kong and resides in the U.S. (SOR ¶ 1.c); her college roommate is a citizen of Hong Kong residing in the U.S. (SOR ¶ 1.d); and she traveled to Hong Kong in 1998, 1999, 2000, 2001, 2001, and 2005 (SOR ¶ 1.e).

The security concern relating to Guideline B is set out in AG ¶ 6 as follows:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, 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.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at \*\*15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of

a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The new guidelines recognize that the nature of the country involved is a factor that must be considered. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S.

A disqualifying condition under this guideline may be raised by "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." AG ¶ 7(a). Under the old guidelines, any risk of foreign influence was sufficient to raise a potentially disqualifying condition. The new guidelines require a "heightened risk." The totality of an applicant's ties to a foreign country as well as each individual tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003).

Applicant's brother is a citizen and resident of the U.S. His dual citizenship is solely the result of a unilateral decision by the PRC to declare that anyone born in Hong Kong or the PRC is a citizen of the PRC, and it does not raise a "heightened risk" of foreign influence. Similarly, Applicant's present relationship with her former roommate, now a U.S. citizen, does not raise a "heightened risk" of foreign influence. However, the facts that Applicant's mother resides in Hong Kong and her father is a PRC citizen residing in Hong Kong are sufficient to raise AG ¶ 7(a). Applicant's travel to Hong Kong was solely to visit her mother, and it has no independent security significance. See ISCR Case No. 02-26978 (App. Bd. Sep 21, 2005).

A disqualifying condition also may be raised by "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." AG ¶ 7(b). Applicant is close to her mother. She is estranged from her father, but it was not clear from her testimony whether she still has any feelings of affection or obligation for him. I conclude AG ¶ 7(b) is raised.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 7(a) and (b), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline can be mitigated by showing that "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.” AG ¶ 8(a). Applicant’s mother has never worked outside the home, has no political affiliations, and has no governmental connections. Her father is an electrician by trade and he runs a private electrical construction company. Like her mother, he has no governmental connections or political affiliations. Neither parent is involved in high-technology industries likely to engage in industrial espionage or be used as a conduit for industrial espionage. The Hong Kong government, unlike the PRC, has a good human rights record and does not use abuse of its citizens as a means of military or industrial espionage. The Hong Kong government has strong economic and political connections with the U.S., independent of the PRC. Applicant’s only connections to Hong Kong, like her brother’s, are through her parents. I conclude AG ¶ 8(a) is established for Applicant’s immediate family members.

There is no information in the record about Applicant’s former roommate’s family ties or background. Accordingly, Applicant has not carried her burden of establishing AG ¶ 8(a) for her former roommate.

Security concerns under this guideline also can be mitigated by showing “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.” AG ¶ 8(b). Under the old adjudicative guidelines, a disqualifying condition based on foreign family members could not be mitigated unless an applicant could establish that the family members were not “in a position to be exploited.” Directive ¶ E2.A2.1.3.1. The Appeal Board consistently applied this mitigating condition narrowly, holding that an applicant should not be placed in a position where he or she is forced to make a choice between the interests of the family member and the interests of the U.S. See ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006); ISCR Case No. 03-24933 at 6 (App. Bd. Jul. 28, 2005); ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2005); ISCR Case No. 03-15205 at 3 (App. Bd. Jan. 21, 2005). Thus, an administrative judge was not permitted to apply a balancing test to assess the extent of the security risk. Under the new guidelines, however, the potentially conflicting loyalties may be weighed to determine if an applicant “can be expected to resolve any conflict of interest in favor of the U.S. interest.”

Applicant’s sense of loyalty and obligation to her parents is certainly not minimal. However, her relationships and loyalties in the U.S. are strong. She left Hong Kong while it was still a British colony. She has no sense of loyalty or obligation to the current government of Hong Kong or the PRC. She has lived in the U.S. since she was a child. She was educated in the U.S. and has been a citizen for more than five years. She has formed strong bonds with her classmates in the leadership development program. Her manager regards her as a conscientious, dedicated, and loyal team player. She aspires to be a leader in the U.S. In the unlikely event that she was required to resolve conflicting loyalties to her family or the interests of the U.S., I am satisfied she would resolve any conflict in favor of the U.S.



Security concerns under this guideline also may be mitigated by showing that “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.” AG ¶ 8(c). There is no evidence indicating whether Applicant had a close relationship with her former roommate when they were students, but it is clear that they now have only occasional and casual contact. I conclude AG ¶ 8(c) is established for her former roommate.

### **Whole Person Concept**

Under the whole person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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 extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant was candid, sincere, and credible at the hearing. She left Hong Kong when it was a British colony, and she has no attachment or sense of obligation to the current government of Hong Kong or the PRC. She came to the U.S. as a child, and she has matured into a talented, dedicated adult with strong ties to the U.S. She was selected for a highly competitive leadership development program. She has excelled in her academic pursuits and impressed her peers and supervisors with her interpersonal skills, loyalty, and dedication. She aspires to be an industry leader in the U.S. She is circumspect about discussing sensitive information and does not discuss her work with her family. After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Guideline B (Foreign Influence):                   FOR APPLICANT

Subparagraphs 1.a-1.e:   For Applicant

### **Conclusion**

In light of all of the circumstances, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman  
Administrative Judge