



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 09-04086
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Francisco Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

August 3, 2010

**Decision**

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MARSHALL, Jr., Arthur E., Administrative Judge:

On March 15, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising 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 adjudicative guidelines (AG).

In a response dated April 5, 2010, Applicant admitted four of the five allegations raised under Guideline B and requested an administrative determination. Department Counsel submitted a File of Relevant Material (FORM), dated May 13, 2010.<sup>1</sup> Applicant received the FORM on May 19, 2010, but did not submit either a response or any

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<sup>1</sup> In response to Applicant's offer of evidence refuting SOR allegation ¶ 1.a, regarding the nationality of Applicant's spouse, the denied allegation was withdrawn. See FORM at 2.

additional information for consideration. The case was assigned to me on July 20, 2010. Based on a review of the case file, submissions, and exhibits, I find Applicant failed to meet his burden regarding the security concerns raised. Security clearance denied.

### **Administrative Notice**

In its FORM, the Government requested administrative notice of pertinent facts regarding the People's Republic of China (PRC) and the Hong Kong Special Administrative Region (Hong Kong). Those facts are derived from eight U.S. Government publications and "Web postings of Hong Kong Immigration Department."<sup>2</sup> Those materials were fully reviewed and accepted into the record. The following facts are reflected in the Government's argument and materials.

The PRC is a communist party-led state. It has a population of approximately 1.3 billion people and an economy growing at about 9.8% per year. The PRC has an authoritative government dominated by the Chinese Communist Party. Its human rights record has been and remains poor. Its military is large and sophisticated. The United States is a primary intelligence target of China because the United States is a global superpower, has a substantial presence in the Pacific Rim and Asia, develops advanced technology that the PRC requires for economic growth, and has a large population of citizens of Chinese heritage. Such United States citizens are considered prime intelligence targets by the PRC.<sup>3</sup> The PRC's Military Intelligence Department, First Bureau, is responsible for collecting military information about the United States.<sup>4</sup> The United States is its second most targeted intelligence source.<sup>5</sup> The PRC is also involved in gathering industrial intelligence. There is evidence that enterprise-directed espionage may be growing in importance and taking on a targeted form.<sup>6</sup>

Hong Kong has been a special administrative region of the PRC since 1997. It has a population of 7 million, 95% of whom are Chinese. It is highly autonomous, except in areas of foreign and defense affairs, which are the responsibility of the PRC. Hong Kong generally respects human rights. Claims of press self-censorship persist and violence against women remains a concern. Hong Kong has a thriving economy. The United States has strong financial ties with Hong Kong. Hong Kong is active in counter-terrorism efforts.<sup>7</sup>

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<sup>2</sup> Administrative Notice (May 12, 2010), attachments I – IX.

<sup>3</sup> Administrative Notice (May 12, 2010) at 3.

<sup>4</sup> *Id.* at 3-4.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.*, attachment I (U.S. Dep't of State, *Background Note, Hong Kong*, Dec. 2009).

## Findings of Fact

Applicant is a 34-year-old information technology professional who has worked for the same defense contractor since May 2006. He was born in Hong Kong, later moving to the United States. He attended a large American university from 1994 until 1999. He then entered into the information technology field. With the exception of a two month break in employment before starting his current position, Applicant has been continuously employed since college graduation. In choosing an administrative determination, Applicant chose to rely on the scant facts he previously submitted and those provided in his response to the SOR.

Applicant was granted U.S. citizenship in March 2007. Later that year, he married his wife, a U.S. citizen born in Hong Kong. Applicant has several family members living abroad. Applicant's father is a citizen and resident of Hong Kong and his stepmother is a citizen of China residing in Hong Kong. Both have been retired for several years. Neither has been a "member of any group, organization, or government."<sup>8</sup> They have no debt. Applicant speaks with them one or two times a month. Applicant also has a step-sister who is a citizen of China and permanent resident of Canada. She plans to become a Canadian citizen. A housewife, she has never been a "member of a group, organization, or government."<sup>9</sup> She has no debt. Applicant has only met her in person about five times. There is no evidence as to whether they maintain alternative modes of contact.

Applicant's mother-in-law is a citizen of Hong Kong. She plans to become a United States citizen once her requirements are met. She was granted permanent resident status by the United States, but is currently residing in Hong Kong in order to care for her own mother-in-law. Applicant's mother-in-law has been retired for over six years. She has never been a "member of a group, organization, or government."<sup>10</sup>

## Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this

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<sup>8</sup> In using this phrase and limiting his facts regarding his family members, Applicant was not specific as to its intended meaning. For example, there is no indication whether these individuals receive governmental aid, worked for a foreign government, etc.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” An 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.

The United States Government (Government) must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”<sup>11</sup> The burden of proof is something less than a preponderance of evidence.<sup>12</sup> The ultimate burden of persuasion is on the applicant.<sup>13</sup>

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 the possible risk the applicant may deliberately or inadvertently fail to 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.”<sup>14</sup> “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>15</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.<sup>16</sup> A security

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<sup>11</sup> See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>12</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>13</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>14</sup> See also EO 12968, § 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

<sup>15</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>16</sup> *Id.*

clearance denial does not necessarily reflect badly on an applicant's character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

### **Analysis**

The concern under Guideline B is that 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. The adjudication 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 U.S. citizens to obtain protected information or is associated with a risk of terrorism. Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions below.

The countries at issue are the PRC, a communist party-led state, and Hong Kong, a special administrative region of the PRC. The PRC has an authoritative government dominated by the Chinese Communist Party. Its human rights record is poor. Its military is large and sophisticated. The United States is a primary intelligence target of China. It targets the United States for many reasons, including the fact that the United States has a large population of citizens of Chinese heritage who are considered prime intelligence targets by the PRC. The PRC's Military Intelligence Department, First Bureau, is responsible for collecting military information about the United States. There is evidence that enterprise-directed espionage may be growing in importance and taking on a targeted form. While Hong Kong is highly autonomous, it remains under the administration of the PRC. Its population is mostly comprised of citizens of the PRC. Given these considerations, examination under this guideline must be conducted with high scrutiny.

Applicant's father is a citizen and resident of Hong Kong, and his stepmother is a citizen of China residing in Hong Kong. He speaks with them about twice a month. Applicant's step-sister is a citizen of China and permanent resident of Canada. While Applicant depicts their relationship as slight, he failed to describe his step-sister's relationship with his father and stepmother. Applicant's mother-in-law is a citizen of Hong Kong currently residing in Hong Kong. There is no information regarding her relationship with Applicant or his wife. Inasmuch as the burden in the proceedings is on the Applicant, it must be concluded that they at least maintain normal familial relations and communications. In light of these considerations, Foreign Influence Disqualifying Conditions AG ¶ 7(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 exploitation, inducement, manipulation, pressure, or coercion) and AG ¶ 7(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) apply.

While Applicant may have a casual relationship with his step-sister, his bi-monthly contact with his father and step-mother reflects a typically close or warm relationship. In failing to address his wife's relationship with her mother or his own relationship with his mother-in-law, Applicant failed to address security concerns regarding his wife's mother. Therefore, security concerns remain with regard to Applicant's parents and mother-in-law. Foreign Influence Mitigating Conditions AG ¶ 8(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.) and AG ¶ 8(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) do not apply.

In failing to provide a fuller description of himself, his work, his leisure time activities, investments, or any other facts which could paint a clearer picture of his life or better depict his activities between the time he came to the United States and became a U.S. citizen, Applicant provided insufficient facts upon which AG ¶ 8(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) can be examined for applicability. In view of the limited facts presented, none of the available mitigating conditions apply. Foreign influence security concerns remain unmitigated.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole-person" factors. Applicant is a mature and educated man who has built a career in the information technology field. He is married. He arrived in the United States in or before 1994 and became a U.S. citizen about 13 years later. He provided some facts

concerning his step-sister to demonstrate a casual relationship. The same cannot be said with regard to his relationships with his father, stepmother, or mother-in-law. Those individuals, their relationships with Applicant, and Applicant, himself, remain undefined. Without more, an assessment of the risks they could present cannot be made. This is particularly true given the fact that the country at issue is the PRC, known for its interest in acquiring United States technology and information, and its administrative region, Hong Kong. In failing to meet his burden in providing sufficient facts or materials that could mitigate security concerns, foreign influence security concerns remain unmitigated. Clearance denied.

### **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
Subparagraph 1.a:	Withdrawn
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant access to classified information. Clearance denied.

ARTHUR E. MARSHALL, JR.  
Administrative Judge