

DATE: August 21, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26347

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Bradley M. Lown, Esq.

SYNOPSIS

In July 1999, Applicant married a native citizen of the Philippines. While his spouse became a United States citizen by naturalization in March 2003, her parents and siblings are resident citizens of the Philippines. Her father has had political difficulties in the past and is currently facing embezzlement-related criminal charges from when he served as an elected official in his local district in the Philippines. Applicant's spouse is close to her family and sends her brothers money on request. Applicant does not share the same closeness with his in-laws, but there exists an unacceptable risk of foreign influence through his spouse. Clearance is denied.

STATEMENT OF THE CASE

On January 8, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on foreign influence (Guideline B) concerns.

On January 23, 2003, Applicant, acting *pro se*, executed an Answer to the SOR and requested a hearing before a DOHA Administrative Judge. The case was assigned to me on March 17, 2003. Pursuant to formal notice dated April 9, 2003, a hearing was scheduled for April 28, 2003. At the hearing held as scheduled, the Government submitted one exhibit and requested administrative notice of two US Department of State publications: a Public Announcement of arch 7, 2003, on security in the Philippines, and a Consular Information Sheet on the Philippines, dated October 11, 2002. Administrative notice was granted over Applicant's objections. Applicant submitted five exhibits which were admitted, and testimony was taken from him as well as from his spouse and a coworker on his behalf. Counsel for Applicant submitted a Memorandum of Law to which the Government elected not to respond. A transcript of the hearing was received by

DOHA on May 7, 2003.

FINDINGS OF FACT

The SOR alleges foreign influence concerns related to the Philippines citizenship of his spouse and the Philippines citizenship and residency of his spouse's parents and siblings. In his Answer, Applicant admitted the factual allegations, including his father-in-law's past political difficulties, but indicated his spouse had applied for US citizenship and intends to petition for US permanent residence for her parents. After a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following findings of fact:

Applicant is a 45-year-old task manager who has been employed by a defense contractor since October 2000. Applicant requires a secret security clearance for his duties. He held a Department of Defense security clearance without adverse incident in the past, when he served as a petty officer (E6) machinist mate in the military from 1976 to 1981. From the mid-1980s until his hire by the defense contractor, Applicant worked in the nuclear industry--fourteen years as a temporary contract employee--where he was cleared for access to several nuclear sites. While under contract to examine submarine reactor components for the Government in 1992, Applicant held a Department of Energy clearance.

Applicant's work as a consultant performing quality control inspections of nuclear power facilities took him to geographically distant locales. In October 1996, he was divorced from his spouse of seven years. Circa mid-1997, Applicant began to correspond as a pen pal with a female student in the Philippines. Born and raised in the Philippines, she had never been to the US. Applicant met her for the first time in December 1998, when he went to Manila to see her. Following this visit, Applicant applied for a fiancée visa for her. Applicant and his fiancée corresponded by mail every two weeks while awaiting approval of her application. In April 1999, she earned her degree in physical therapy from a university in the Philippines. Her visa was subsequently approved, and in mid-July 1999, she came to the US for the first time, entering the US on a Philippines passport issued in 1999 and valid until 2004. Applicant and his fiancée married later that month in the US. In February 2001 they had a daughter.

Also in February 2001, Applicant's spouse was licensed to practice physical therapy in the state where they reside. In 2002, Applicant's spouse had four jobs as a physical therapist. Since mid-2002, she has worked seven days per week, almost every week.

On application filed with the Immigration and Naturalization Service in December 2002, Applicant's spouse became a US citizen in March 2003. As of April 2003, she continued to possess a Philippines passport, but had applied for a US passport. [\(U\)](#) Applicant's spouse intends to remain in the US and intends to travel only on her US passport once it is obtained.

Applicant's spouse is the only daughter of five children born to a relatively prosperous (by Philippines standards) Christian family in the Philippines. Owners of agricultural interests and property in the east-central part of the Philippines, Applicant's parents operate a coconut plantation, rice fields and mill, as well as a pig farm. They also own some commercial lots. Circa 1986/87, with the change of presidential regime in the Philippines, the New People's Army (NPA), the military arm of the Communist Party of the Philippines, demanded money from the local business leaders in the community, including Applicant's father-in-law. When he refused to pay extortion money, the rebels shot him. He survived and fled to Manila. After school finished for the year, the rest of the family joined him. Philippines militia forces subsequently drove the rebels from the area, and after three years in Manila, Applicant's in-laws returned home to operate the family businesses.

In about 1996, when Applicant's spouse was pursuing university studies, her father ran and was elected to the position of "Barangay Captain," the equivalent of a city councilor for their local district in the Philippines. After the election, a political opponent, filed charges against Applicant's father-in-law for embezzling from the government about 3,000 pesos. Applicant's father-in-law was jailed for about a week and released. The case had not been resolved as of late April 2003. A few weeks before Applicant's father-in-law's arrest, a political enemy--a very distant relation--forced Applicant's in-laws out of the home they had recently built. Under financial constraints due to the costs of funding college for their five children, Applicant's in-laws were either under threat of, or in foreclosure, and this political enemy bought the house out from under them by paying the debt so he could ensure himself of the votes of the tenants residing

on the property. Applicant's in-laws moved within the same neighborhood, to the family ancestral home owned by Applicant's spouse's grandmother. Fearing Applicant's family would enact revenge, this political opponent has never lived in the home. A former city councilor who recently lost the election for mayor, he continues to wield some political influence in the community through congressmen and other political associates.

Applicant's father-in-law, who continued to have political aspirations, has been persuaded by family members to refrain from running for public office in the Philippines. He is active in running their agricultural investments, while his spouse, who speaks English with some fluency, serves as the business manager. Applicant's spouse has an aunt who is the local mayor in another community in the Philippines.

Applicant has not been to the Philippines since his trip in December 1998; his spouse has not been back since she came to the US on her fiancée visa in July 1999. Applicant's spouse contacts her parents telephonically once or twice per month, although she speaks primarily with her brothers when she calls. Applicant has spoken to his father-in-law, who has limited facility in English, only twice since July 1999. He does not speak with his mother-in-law on a regular basis, although she stayed for ten months with Applicant and his spouse in the US following the birth of their daughter in February 2001. She returned from the Philippines again in September 2002 and stayed with them until late February 2003 to take care of her granddaughter, as Applicant's spouse works two jobs as a physical therapist.

Applicant's four brothers (all older than she) are resident citizens of the Philippines. The eldest of her brother's works on a cruise ship with the US west coast as a port of call. Applicant made the acquaintance of this brother-in-law in December 1998 during his trip to the Philippines. Contact between Applicant's spouse and her eldest brother was once every two months until the past year, when she spoke to him only once. Applicant's spouse sent him \$500 in 2001 to pay for his application to emigrate to Canada.

Of her siblings, Applicant's spouse has the closest relationship with the second born, who is 29-years-old. A graduate of a law school in the Philippines, this brother is currently studying for the bar examination in the Philippines. Applicant's spouse sent her brother the money to cover the cost of his bar review course. Applicant's spouse communicates via electronic mail with this brother once to twice per week and via telephone once per month.

As of April 2003, the two brothers closest in age to Applicant's spouse were working in the family business in the Philippines. The 27-year-old brother, a criminology graduate, operates the agricultural business. Applicant's spouse has not spoken to this brother in the six months preceding Applicant's security clearance hearing. Her 26-year-old brother is a computer engineer who quit his job at their father's urging as he was not earning enough to support himself. This brother applied to emigrate to Canada in 2000, and Applicant's spouse sent him \$4,000 to cover the costs of his application. Applicant's spouse last spoke with him in late 2002. She exchanges electronic mail with her mother or these brothers about once every other month. Applicant has not met either of the brothers-in-law who work on the family's farms.

Over the 1999 to 2000 time frame, Applicant's spouse sent about \$3,000 to family members (primarily her brothers) in the Philippines. With her licensure as a physical therapist in the US, Applicant's spouse could afford to send more money and over the next two years (2001-2002) she sent about \$20,000, which includes the \$4,500 sent to her two brothers seeking to emigrate to Canada and the costs of another brother's bar review course, through a Philippine-owned agency located in the US.

In October 2000, Applicant commenced employment with the defense contractor where he was granted an interim Confidential clearance. Applicant has proven to be an outstanding employee at the defense firm. After his first 90 days and at the end of his first year, he was given performance ratings of exceptional. As of April 2003, Applicant was pursuing graduate studies in organizational leadership with tuition costs of \$5,000 to \$10,000 reimbursed by his employer.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully

considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Foreign Influence

E2.A2.1.1. 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.

E2.A2.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A2.1.2.1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country

E2.A2.1.2.2. Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists

E2.A2.1.3. Conditions that could mitigate security concerns include:

E2.A2.1.3.3. Contact and correspondence with foreign citizens are casual and infrequent

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment,

reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of those who testified, I conclude the Government has established its case under Guideline B. Applicant's spouse has close ties of affection and/or obligation to her parents and siblings, who are resident citizens of the Philippines, and Applicant has not met his burden of proving he is not vulnerable to foreign influence through these foreign relations.

Under Guideline B, a security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he is bound by affection, influence or obligation are not citizens of the United States or may be subject to duress. Applicant is married to a native-born Filipino who became a US citizen through naturalization in March 2003. Her parents and siblings are all resident citizens of the Philippines. Applicant's mother-in-law lived with Applicant and his spouse for a total of sixteen months since February 2001, most recently from September 2002 to late February 2003, to care for her granddaughter. Applicant's contact with his in-laws has been otherwise very limited--he does not initiate contact with them, has not visited them in the Philippines since his marriage; has spoken to his father-in-law twice since the marriage and has brief, infrequent conversations with the two oldest of his brothers-in-law and no contact with the others; has personally met only the eldest of his spouse's four brothers. Casual and infrequent correspondence with foreign citizens is potentially mitigated under the Directive (*see* E2.A2.1.3.3.).

Yet, Applicant's spouse clearly has a bond of affection and/or obligation to her parents and siblings. She sent about \$23,000 to them since she came to the US, contacts her parents once or twice per month (speaking on occasion with those brothers at home working in the family's agricultural businesses), and exchanges electronic mail messages with the law graduate brother once or twice weekly and with her other brothers once every other month or so. In its decision in ISCR 01-02452, decided on November 21, 2002, the DOHA Appeal Board held it was reasonable for the Administrative Judge to consider the significance of an applicant's spouse's ties to a foreign country and the possible effect they may have on an applicant's conduct under Guideline B. In determining Applicant's security suitability, consideration is therefore warranted of disqualifying conditions E2.A2.1.2.1., an immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country, and E2.A2.1.2.2., sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists. While there is a disqualifying factor if relatives are connected to a foreign government (*see* E2.A2.1.2.3.), and his spouse's aunt serves a mayor of a municipality in the Philippines, it was not established that either Applicant or his spouse maintains any contact or ongoing relationship with this aunt.

The security concerns engendered by the foreign citizenship and residency of Applicant's in-laws may be mitigated where it can be determined that they are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force him to choose between loyalty to the person(s) involved and the United States (*see* E2.A2.1.3.1.). Applicant's spouse's parents and two of her brothers are actively engaged in running the family's agricultural businesses in the Philippines. There is no evidence his spouse's family members are agents of a foreign power, but their history of political difficulties, which include an unresolved criminal charge against her father, raise a very real potential for adverse foreign influence or duress. In about 1987, Applicant's father-in-law resisted NPA demands for extortion, but the rebels managed to drive the family out of their home and the local community and into Manila for the ensuing three years. While there is no evidence the NPA has targeted Applicant's in-laws or their holdings in the Philippines since the 1980s, a US State Department public announcement on security in the Philippines as of March 7, 2003, was issued in part because of the continued operation of the known terrorist NPA throughout the country with public threats against US citizens and interests in the Philippines. It is conceivable that Applicant's family could again be targeted due to their financial holdings or because of Applicant's spouse's ties to the US.

The potential for undue influence or pressure exists also from those who are seen as operating within the law, such as

the political opponent who levied criminal charges (which Applicant's spouse testified were "trumped up") against Applicant's father-in-law when he was a "Barangay Captain" in 1996, and the distant relative who forced Applicant's family out of their residence around that same time. The criminal charges have not yet been resolved. The distant relative, who planned to run for vice mayor in the next election, was described by Applicant's spouse as a political enemy who paid the debt on the home so that he could assure himself of the votes of the tenants who lived on the property. Although this political opponent never lived in the home and is not presently serving in public office, Applicant's spouse admitted at the hearing that he remains in a position of influence or authority in the community where her family resides ("he has a lot of politician friends, things like that, like congressmen or associates." Tr. p. 127). While the Philippines is a developing democratic republic with favorable relations and strong economic ties to the US, the potential for foreign influence cannot be completely discounted.

By all accounts of record, Applicant is a person of good character and integrity. He and his spouse testified credibly that should undue influence be placed on her family members in the Philippines, they would report the improper activities to the authorities. However, the DOHA Appeal Board has consistently held that a statement of intention about what an applicant will do in the future under some hypothetical set of circumstances is not entitled to much weight, unless there is record evidence that the applicant has acted in an identical or similar manner in the past under identical or similar circumstances. *See* ISCR Case No. 99-0501 (December 19, 2000); ISCR 01-26893 (October 16, 2002). Furthermore, as articulated by the Board in ISCR 01-26893:

Evidence of good character and personal integrity are relevant and material under the whole person concept. See Directive, Section 6.3 and Item E2.2.1.1. However, a finding that an applicant possesses good character and integrity does not preclude the government from considering whether the applicant's facts and circumstances still pose a security risk. Stated otherwise, the government need not prove an applicant is a bad person before it can deny or revoke access to classified information. Even good people can pose a security risk because of facts and circumstances not under their control.

By all accounts, Applicant is a dedicated worker and father, with commendable ethics and integrity. In electing to wed a then Philippine national with no tie to the US other than their relationship (developed through written correspondence and little in person contact) prior to their marriage, Applicant did nothing to impugn his character, but he did establish security significant bonds with foreign nationals. In the past four years, his spouse has established substantial ties to the US, having acquired US citizenship, pursued her career here, and given birth to their daughter. Although her citizenship no longer presents a security concern, she continues to share close bonds of affection and/or obligation with immediate family members who are potentially vulnerable to undue foreign influence by coercive or non coercive means. Adverse findings are warranted with respect to subparagraphs 1.a. (because of his spouse's continued financial support for her siblings), 1.b., and 1.c. of the SOR.

FORMAL FINDINGS

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

Paragraph 1. Guideline B: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

DECISION

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 a security clearance for Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. It is not at all clear whether her Philippines passport is still valid, given her recent acquisition of US citizenship which required the taking of an oath to renounce all foreign allegiances. The Government presented no evidence to indicate that the Republic of the Philippines recognizes dual citizenship.