

DATE: April 9, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-01327

DECISION OF ADMINISTRATIVE JUDGE

ROGER E. WILLMETH

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Department Counsel

FOR APPLICANT

Jose A. Raffucci, Jr., Esq.

SYNOPSIS

Twenty-eight year old Applicant mitigated foreign preference concerns but she was unable to totally mitigate foreign influence concerns or to establish that her false answers on a security clearance application were unintentional. Clearance is denied.

STATEMENT OF THE CASE

On October 10, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement Reasons (SOR) to Applicant. The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant her access to any classified information and recommends that his case be submitted to an Administrative Judge. On October 29, 2002, the Applicant provided a response to the SOR and requested a hearing. This case was assigned to the undersigned Administrative Judge on January 9, 2003. A notice of hearing was issued on February 14, 2003, and the hearing was held on March 7, 2003. During the hearing, four Government exhibits, two Applicant exhibits, and the testimony of the three Applicant witnesses, including the Applicant, were received. The transcript (Tr.) Was received on March 18, 2003.

FINDINGS OF FACT

Having thoroughly considered the evidence in the record, I make the following findings of fact:

Applicant is a 28-year-old female employed as a document technical specialist by a defense contractor and is seeking to obtain a security clearance. She was born in El Salvador and immigrated to the United States at the age of 11 in 1986 to join her mother and brothers (Ex. 2). Applicant possessed a Salvadoran passport that was reissued in April 1999 (Ex. 3). Applicant became a naturalized citizen of the United States in September 2000 (Ex. 1).

Applicant attended school in the United States beginning with the sixth grade. Since at least her senior year in high school, Applicant has taken classes only in English. Her post high school education includes a technical school and courses at a community college (Tr. 58-61; Ex. 1).

Since her arrival in the United States in 1986, Applicant has returned to El Salvador on four occasions (Tr. 41). These visits occurred in 1992, 1993, 2000 (Ex. 2) and 2002 (Tr. 46). She worked in the Dominican Republic for six months in 1998 (Ex. 2).

Applicant's mother resides with her. Applicant's mother is a citizen of El Salvador who has resided in the United States since 1979. Her mother failed the test to become a citizen of the United States because she is not fluent in the English language (Ex. 2).

Two of Applicant's male cousins reside with her. They are citizens of El Salvador who are in the United States on work permits (Ex. B).

Applicant's sister became a naturalized citizen of the United State in November 2002 (Ex. B).

One of Applicant's brothers became a naturalized citizen of the United States in February 2002 (Ex. B). Her other brother is a citizen of El Salvador and is a resident alien in the United States (Ex. B).

Applicant filed an application with the Salvadoran Government to renounce her citizenship in January 2003 (Ex. A). At that time, she turned in her Salvadoran passport (Ex. A; Tr. 34).

On the security clearance application that she executed on July 31, 2001 (Ex. 1), Applicant provided two answers that were false. Applicant responded "no" to question 15: "In the last 7 years, have you had an active passport that was issued by a foreign government?" At that time, Applicant possessed an active passport issued by El Salvador that she had renewed in April 1999. (Ex. 3). Applicant also responded "no" to question 16: "Have you ever traveled outside the United States on other than official U.S. Government orders in the last 7 years?" During that time frame, Applicant had returned to El Salvador for a three week vacation in 2000 and had worked in the Dominican Republic for a U.S. company for approximately six months in 1998 (Ex. 2).

POLICIES

Eligibility for access to classified information is predicated upon an individual meeting adjudicative guidelines discussed in Enclosure 2 of the Directive. An evaluation of whether an applicant meets these guidelines includes the consideration of a number of variables known as the "whole person concept." Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a decision. This assessment should include the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Enclosure 2 provides conditions for each guideline that could raise a concern and may be disqualifying, as well as further conditions that could mitigate a concern and support granting a clearance. The following guidelines are applicable to this case.

Guideline B - Foreign Influence: 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.

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 (Disqualifying Condition 1).

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 (Disqualifying Condition 2).

Conditions that could mitigate security concerns include:

E2.A2.1.3.1. A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters) cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States (Mitigating Condition 1).

Guideline C. - Foreign Preference: When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

Conditions that could raise a security concern and may be disqualifying include:

E2.A3.1.2.1. The exercise of dual citizenship (Disqualifying Condition 1);

E2.A3.1.2.2. Possession and/or use of a foreign passport (Disqualifying Condition 2).

Conditions that could mitigate security concerns include:

E2.A3.1.3.1. Dual citizenship is based solely on parents' citizenship or birth in a foreign country (Mitigating Condition 1);

E2.A3.1.3.4. Individual has expressed a willingness to renounce dual citizenship (Mitigating Condition 4).

Guideline E - Personal Conduct: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying include:

E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment, qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities (Disqualifying Condition 2).

Conditions that could mitigate security concerns include:

E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts (Mitigating Condition 3).

CONCLUSIONS

Guideline C. - Foreign Preference

The Government's evidence establishes two disqualifying conditions on the part of Applicant:

the exercise of dual citizenship and possession of a foreign passport (Ex. 2; Ex. 3). However, Applicant has successfully mitigated both of these disqualifying conditions. First of all, Mitigating Condition 1 applies to Disqualifying Condition 1 in that Applicant's Salvadoran citizenship resulted from her birth in that country. Furthermore, Applicant has done

even more than Mitigating Condition 4 specifies - expressing a willingness to renounce dual citizenship - by having actually submitted an application to renounce her citizenship to the Salvadoran Government (Ex. A). With regard to Disqualifying Condition 2 the record establishes that Applicant obtained her Salvadoran passport before becoming a naturalized citizen of the United States. Moreover, Applicant has turned in her Salvadoran passport to the Salvadoran Government (Ex. A; Tr. 34). Applicant's actions mitigate the bases for attributing to her a foreign preference.

Guideline B - Foreign Influence

Applicant has also partially refuted and mitigated the Government's allegations under para. 2. of the SOR. Specifically, Applicant has shown that her sister became a naturalized citizen of the United States after the issuance of the SOR (Ex. B). Therefore, Disqualifying Condition 1 no longer applies with regard to para. 2.c. since it was based solely on her sister's foreign citizenship. Applicant has partially refuted the allegations under para. 2.d. by establishing that one of her brothers became a naturalized citizen of the United States prior to the issuance of the SOR (Ex. B). Here again, Disqualifying Condition 1 was based solely on that brother's foreign citizenship.

Although not as compelling, the evidence with regard to Applicant's mother also appears sufficient to mitigate Disqualifying Condition 1 under Mitigating Condition 1. Apparently, Applicant's mother would have become a citizen of the United States were it not for her difficulty with the English language (Ex. 2). The fact that Applicant's mother has been a resident alien in the United States for 23 years indicates that her mother is not in a position to be exploited by a foreign power (Tr. 32-33; Ex. B).

Applicant has not refuted nor mitigated the remaining SOR allegations. With regard to para. 2.b. of the SOR, Applicant confirms that her two cousins reside with her and they are in the United States pursuant to temporary work permits, both of which are due to expire in 2003 (Tr. 32-34; Ex. B). No additional evidence has been presented with respect to these cousins, such as their specific employment, activities, and whether they are likely to remain in the United States. Therefore, the known facts establish Disqualifying Condition 2, if not Disqualifying Condition 1, and they have not been mitigated.

With regard to para. 2.d. of the SOR, Applicant testified that one of her brothers is a resident alien in the United States and he does not live with her (Tr. 36-37). She provided a copy of his identification card issued by the U.S. Immigration and Naturalization Service that on its face expired in July 2002 (Ex. B). Neither Applicant nor the evidence of record address this discrepancy. Therefore, the evidence of record is not clear as to the current location or status of her brother. As a result, the evidence is not sufficient to mitigate the applicability of Disqualifying Condition 1 to the Applicant with respect to this brother.

When allegations that constitute a disqualifying condition are admitted by the applicant or established by the evidence, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the disqualifying condition. Directive section E3.1.15. Although Applicant has done this with respect to her mother, sister, and one brother, she has not done so with her other brother and cousins. Once a party has the burden of proof on a particular point, the absence of evidence on that point requires the Judge to find or conclude that point against the party that has the burden of proof. ISCR Case No. 99-0511 at p. 8 (App. Bd. Dec. 19, 2000). In light of the applicable guidance in the Directive, Applicant has failed to carry her burden of proof with regard to all of the allegations in para. 2 of the SOR. [\(U\)](#)

Guideline E - Personal Conduct

With regard to para. 3.a. and para. 3.b. of the SOR, the evidence presented by the Government supports Disqualifying Condition 2 (Ex. 1; Ex. 2). Applicant's testimony on direct examination suggested that she voluntarily provided the information to correct her false answers (Tr. 43-44). This raises the possible applicability of Mitigating Condition 3. However, Applicant provided the information to a security investigator during a follow up interview three months after Applicant submitted her application (Ex. 2). Moreover, Applicant admitted on cross examination that she did not discuss the information until the investigator specifically asked her if she had a Salvadoran passport (Tr. 54-55). Therefore, Mitigating Condition 3 is not applicable because Applicant did not act promptly and did not provide the information before being confronted with the facts.

The thrust of Applicant's response to the Guideline E allegations was to offer evidence that she did not deliberately submit false answers in the first place. In an effort to rebut the Government's case of falsifying her security clearance application, Applicant presented persuasive character evidence. This included the testimony of her supervisor (Tr. 19) and the wife of her minister (Tr. 27-28). In addition to confirming the honesty of Applicant, the minister's wife also testified to Applicant's active role in the church, including being church secretary.

With regard to answering, "no," to question 15, Applicant testified that she did so because she did not view her El Salvador passport as being issued by a foreign government since she was a citizen of El Salvador as well as the United States (Tr. 35-36).⁽²⁾ Standing alone and in light of the evidence of good character for honesty and trustworthiness, Applicant's explanation of her answer to question 15 did not appear implausible. However, I reached a different conclusion when I considered her testimony regarding question 16 and all the other evidence of record.

Applicant's testimony concerning the false answer to question 16 was not convincing.⁽³⁾ Rather than offering a specific reason for her false answer, as she had with regard to question 15, she was uncertain, suggesting several possible explanations. However, the bottom line of her testimony was that she did not know the reason for the false answer: "Most likely I'm sure that knowing, you know, how I am probably that maybe I misread it, like I tell you, or maybe I click, you know, the wrong button or hit continue without really careful, or you know - or maybe misunderstood. I don't know what happened, you know, on that question" (Tr. 57).

Applicant could not have offered the same interpretation of question 16 that she offered of question 15 since her foreign travel included six months in the Dominican Republic, as well as a trip to El Salvador (Ex. 2) Applicant went to some length to offer evidence to suggest that her answer to question 16 may have resulted from security clearance application software that was not user friendly She also stressed that she had no help in using the software program. However, there is no evidence of any other "errors" in her application that might be expected if the software was responsible. In addition, Applicant failed to address why she did not discover the false answers on the printed copy of her application that she signed.

The effort made to attribute the false answers to the Applicant having difficulty with English is not compelling in light of the articulate response to the SOR that she was able to prepare without any assistance (Tr 64-65). In her response to the SOR, Applicant contended she had no reason for not revealing her travels. Had she done so, however, it would have revealed that her answer to question 15 could not have been correct. In light of all the evidence, I was unable to conclude that Applicant's false answers on the security clearance application were the result of error and not deliberate.

FORMAL FINDINGS

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline C: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Paragraph 2. Guideline B: AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: Against Applicant

Paragraph3. Guideline E: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

DECISION

In light of all the evidence in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Signed

Roger E. Willmeth

Administrative Judge

1. Applicant argued that El Salvador is a "strong ally" of the United States and there is no coercion except for the criminality in El Salvador, based on the U.S. State Department Consular Information Sheet on El Salvador (Tr. at 69). However, the DOHA Appeal Board has cautioned against making distinctions between "friendly " and "hostile" nations when adjudicating cases under Guideline B: "Any analysis that relies on the distinction "must articulate a rational explanation for why the distinction is relevant when Guideline B fails to articulate such a distinction." ISCR Case No. 00-0317 at pp. 4-5 (App. Bd. Mar. 29, 2002).
2. Under the heading, "Your Foreign Activities - Passport," question 15 asks: "In the last 7 years, have you had a passport that was issued by a foreign government?"
3. Under the heading, "Foreign Countries You Have Visited," question 16 asks: "Have you traveled outside the United States on other than official U.S. Government orders in the last 7 years?"