

DATE: November 12, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-01987

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Catherine Engstrom, Esquire, Department Counsel

FOR APPLICANT

Anthony A. Fatemi, Esquire

SYNOPSIS

Applicant is a naturalized U.S. citizen. He was born in Cuba, but came to the U.S. at age 12. Applicant's immediate family are U.S. citizens, and he has an elderly aunt who recently became a permanent resident alien here. In 1997, he obtained a Cuban passport so he could visit his aunt. However, heeding a travel advisor that it was not then safe for U.S. citizens to go to Cuba at the time, he cancelled the trip. The Cuban passport expired, but he renewed it in 1999 and made a five-day trip to Cuba. He has since returned the Cuban passport and renounced his Cuban citizenship. Applicant has mitigated the security concerns under Guideline B (Foreign Influence) and Guideline C (Foreign Preference). Clearance is granted.

STATEMENT OF THE CASE

On April 17, 2003, the Defense Office of Hearings and Appeals (SOR) issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns under Guideline B (Foreign Influence) and Guideline C (Foreign Preference). The SOR further informed Applicant that, based on information available to the Government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to continue Applicant's security clearance. [\(1\)](#)

On May 2, 2003, Applicant answered the SOR (Answer) and requested a hearing. The case was assigned to me on June 3, 2003. On June 9, 2003, DOHA issued a Notice of Hearing setting this case to be heard on June 27, 2003. All parties appeared as scheduled, the government presented documentary evidence, and the Applicant testified in his own behalf. DOHA received the transcript (Tr) on July 9, 2003.

FINDINGS OF FACT

With the exception of the allegation at subparagraph 1.a, Applicant has admitted the allegations in the SOR. Additionally, after a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 34-year-old senior network operations manager for a large telecommunications company. He first received a security clearance in

1988. The clearance was administratively terminated when he went to work for a different company, but he received another clearance in 1997 when he was hired by his current employer.

He was born in Cuba in 1964, but came to the United States when in 1977 when he was 12-years-old. Applicant was educated in U.S. high schools and a technical school. He is currently pursuing a college degree. He married a naturalized U.S. citizen from El Salvador in 1994. They have two children, both born in the U.S.

Before he came to the U.S., Applicant, his mother and his three sisters lived with a maternal aunt. His father had gone to the U.S. ahead of the rest of the family in 1970. Applicant, his mother, and his sisters came to the U.S. via Spain in 1977, but his aunt did not come here until December, 2000. His aunt is the only family member living in the U.S. who is not a U.S. citizen. Applicant's only remaining relatives in Cuba are cousins and other distant relatives who he does not know very well and with whom he has no contact. Applicant has no property or financial interests in Cuba.

In July 1997, before he went to work for his current employer, Applicant obtained a Cuban passport so he could visit his aunt in Cuba in accordance with procedures outlined by the State Department. He then made arrangements to travel to Cuba, but cancelled the trip after a State Department travel warning recommended against travel to Cuba because of bomb threats by Central American insurgents. In 1999, Applicant renewed his Cuban passport and traveled with his mother and a sister to Cuba for five days. Before taking these actions, Applicant consulted with his company's security officer and made his intentions known.

Applicant has renounced officially his foreign citizenship, and he has relinquished his foreign passport, which expired in 2001. He has said that he would willingly bear arms for the United States against Cuba or any other foreign country.

Applicant has earned high marks for his job performance. He has intelligently expressed a full awareness of and appreciation for the freedom and prosperity he enjoys as an American, especially in contrast to Cuba's poverty and oppressive government.⁽²⁾

POLICIES

The Directive sets forth adjudicative guidelines⁽³⁾ to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, specifically, that Applicant has close ties of affection to foreign citizens, I conclude the relevant adjudicative guidelines to be applied here are Guideline B (Foreign Influence) and Guideline C (Foreign Preference).

BURDEN OF PROOF

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁴⁾ for an Applicant to either receive or continue to have access to classified information. The Government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽⁵⁾ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the Government.⁽⁶⁾

CONCLUSIONS

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.⁽⁷⁾

The Government has established its case under Guideline B by showing that Applicant has close ties of affection to a foreign citizen, namely, his maternal aunt. As alleged in SOR subparagraphs 2.a, Applicant's aunt, to whom he has been close since his childhood, is still a citizen of Cuba.

Guideline B disqualifying condition (DC) 1⁽⁸⁾ applies here. I do not agree, however, that he has close ties of affection to his distant relatives still in Cuba. They are not immediate family members within the meaning of this guideline. Further, he has seen them once since he was 12-years-old, and does not appear to have any on-going contact with them. As for his aunt, she is an elderly woman with no ties to the Cuban government, who is seeking U.S. citizenship after coming to this country two years ago. Applicant's contacts with this foreign citizen have no security significance. Guideline B mitigating condition (MC) 1⁽⁹⁾ applies here. In light of the foregoing, and in consideration of the lack of any significant contacts in Cuba or any other foreign country, I conclude Guideline B for Applicant.

Guideline C (Foreign Preference). A security concern arises when an individual acts in a way that may indicate a preference for the interests of a foreign country over those of the United States, raising the possibility he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.⁽¹⁰⁾ Here, the government's concerns stem from Applicant's acquisition and use of a foreign passport, conduct which constitutes exercise of dual citizenship. Guideline C DC 1⁽¹¹⁾ and DC 2⁽¹²⁾ apply here. Cuba considers anyone born there who left after 1970 to still be a Cuban citizen and imposes its own entry requirements on those persons if they want to travel to Cuba.⁽¹³⁾ Whether he realized it or not, Applicant exercised his Cuban citizenship when he decided to obtain, then renew a Cuban passport so he could visit his aunt. It does not appear he could have visited Cuba without complying with Cuban laws governing travel by Cuban-born Americans. The choice to do so, however, was his to make, but he did not do so lightly. Before going to Cuba in 1999, he researched the State Department guidelines for limited travel to Cuba by U.S. citizens, and he consulted his security officer, who required only that he be debriefed after his trip.

Applicant possessed but did not renew the Cuban passport after it expired in 2001. After receiving the SOR and being informed of the DoD policy against granting or continuing a security clearance for persons who possess a foreign passport, he relinquished his passport. He also has renounced officially his Cuban citizenship.⁽¹⁴⁾ Guideline C MC 4⁽¹⁵⁾ applies. Further, when he obtained, then renewed his Cuban passport, the current DoD policy on foreign passports as contained in the August 2000 OASDC3I memorandum (known as the "Money memo" after its author) was not yet available. I credit Applicant with complying with that part of the Money memo that provides for mitigation if an Applicant relinquishes his foreign passport.⁽¹⁶⁾ I conclude Guideline C for Applicant.

I have carefully weighed all of the evidence in this case, and I have applied the aforementioned disqualifying and mitigating conditions as listed under each applicable adjudicative guideline. I have also considered the whole person concept as contemplated by the Directive in Section 6.3, and as called for by a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. Despite the exercise of dual citizenship by Applicant, the security significance of his conduct is diminished by the fact he has lived in the U.S. since childhood. His and his family's lives are clearly and fully vested in America, with no interests in Cuba or contacts there that might reasonably be used as leverage by the Cuban government. His isolated exercise of Cuban citizenship is not likely to recur, and I am convinced that Applicant's foreign connections do not undermine his suitability for clearance.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Foreign Preference (Guideline C): FOR THE APPLICANT

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: For the Applicant

Paragraph 2, Foreign Influence (Guideline B): FOR THE APPLICANT

Subparagraph 2.a: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Applicant's Exhibit F; Tr., p. 41 - 45.
3. Directive, Enclosure 2.
4. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
5. *See Egan*, 484 U.S. at 528, 531.
6. *See Egan*; Directive E2.2.2.
7. Directive, E2.A2.1.1.
8. Directive, 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;
9. Directive, 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;
10. Directive, E2.A3.1.1.
11. Directive, E2.A3.1.2.1. The exercise of dual citizenship;
12. Directive, E2.A3.1.2.2. Possession and/or use of a foreign passport;
13. Applicant's Exhibit D.
14. Applicant's Exhibit B.
15. Directive, E2.A3.1.3.4. Individual has expressed a willingness to renounce dual citizenship.
16. "...[C]onsistent application of [Guideline C] requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." *Office of the Assistant Secretary of Defense for Commend, Control, Communications and Intelligence (OASDC3I) emorandum*, dated August 16, 2000.