

DATE: April 28, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04564

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Katherine A. Trowbridge, Department Counsel

FOR APPLICANT

Jose A. Raffucci, Esq.

SYNOPSIS

Applicant, a US citizen by birth, is married to a citizen of Nicaragua who has been a permanent resident of the US since 1988. His wife and sister, as well as her long time family friend, fled together to the US in 1980 in search of political asylum from the oppressive regime of the Sandinistas. Applicant's wife, family and friend are not at any unmanageable risk to coercion, pressure or compromise by virtue of any ties continued ties to the Nicaraguan Government. State Department consular and embassy reports show considerable stabilizing economic and political progress in Nicaragua, which, on balance, makes any risks of coercion or compromise to the family members still residing in Nicaragua manageable ones. Clearance is granted.

STATEMENT OF THE CASE

On August 12, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which 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 Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on August 27, 2002, and requested a hearing. The case was assigned to this Administrative Judge on October 25, 2002. The hearing was initially scheduled for scheduled for December 10, 2002, but was continued because of a court conflict with Applicant's counsel. The hearing was rescheduled for January 31, 2003 and convened on that date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of two exhibits; Applicant relied on one witness (himself) and thirteen exhibits. Transcripts (R.T.) of the proceedings were received on February 7, 2003.

PROCEDURAL ISSUES

At hearing, Department Counsel requested official notice be taken of the following US State Department reports: Report of Political Environment of Nicaragua, issued by US Embassy in Nicaragua (undated), November 7, 2002 State Department Consular Information Sheet on Nicaragua, December 1993 State Department report on Nicaragua, and December 1993 State Department report on Nicaragua's relations with the United States. There being no objections from Applicant, and good cause being shown, official notice was taken of the reports requested pursuant to Rule 201 of F.R.Civ.P.

STATEMENT OF FACTS

Applicant is a 29-year old engineer for a defense contractor who seeks to retain his security clearance, which he has held since 1996 (*see ex. E*).

Summary of Allegations and Responses

Applicant is alleged to have (a) a wife who is a citizen of Nicaragua and resides in the United States (US), (b) a sister of his wife who works for a foreign relations department of the Government of Nicaragua and (c) a close of his wife who is a citizen of Nicaragua and resides with Applicant and his wife approximately six to nine months out of the year.

For his response to the SOR, Applicant admitted each of the allegations. In extenuation and mitigation, he claimed his wife has been a permanent US resident since 1988 and a resident since 1982, when her family was forced to move to the US in search of political asylum (fleeing the oppressive communist regime of the Sandinistas). He claimed two children by his wife who are US citizens by birth and current efforts by his wife to become a US citizen. He claimed his cited wife's sister came to the US with her wife's family in search of political asylum and also became a permanent resident of the US in 1988 through the US State Department, before moving back to Nicaragua, where she is employed by the Nicaraguan Government. Applicant claims very little contact with his wife's sister.

Further, Applicant claimed his wife's close friend has been a lawful resident of the US for 20 years, and a permanent resident since 1990, when she received her green card under similar circumstances that his wife and sister-in-law received theirs. Applicant claimed this friend also fled the oppressive Sandinista regime, and with the passing of his mother-in-law assumed the role of an aunt for Applicant's wife and sister. And Applicant claimed that his wife's friend, like his wife, is in the process of becoming a US citizen.

Relevant and Material Factual Findings

The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant and his Family

Applicant, a US citizen by birth, was raised in Puerto Rico. He received his undergraduate training in engineering from a prestigious American university. He has worked for the same defense contractor since 1996, doing design work in electrical engineering, for which he is highly regarded (*see ex. E*).

Applicant's father and mother are both architects who practice in Puerto Rico. His sister is a lawyer who also practices in Puerto Rico. Applicant married his current spouse (W) in 1997 (the first and only marriage for each). His wife and her family fled from the oppressive Sandinista regime of Nicaragua in 1982, fearing for their safety, as they sought political asylum in the US. Ms. A., a long time friend of W's family, emigrated to the US with W's family, and like W and her family, was granted political asylum, and later permanent residence status in this country.

During her growth years, Applicant's W attended private schools in the US and later earned a graduate degree from the same prestigious university as did Applicant. While enrolled at this university, Applicant met W and married her (in 1997). While a student at this university, W never involved herself in any political societies, only engineering organizations. W has never voted in an Nicaraguan election since emigrating to the US and has seldom traveled alone to

Nicaragua. She believes the Nicaraguan government to be a stable democracy today.

Applicant has two children by his wife, ages three and eighteen months. Neither he nor his wife have any property in Nicaragua or harbor any intention to acquire any (*see ex. 2; R.T., at 45*).

W has two sisters (each reportedly strongly supportive of American ideals and values), who emigrated with W and her family to the US in 1982. Each of these sisters was granted political asylum following their emigration to the US, and later permanent residence (in 1988). One has remained in the US; while the other moved back to Nicaragua in 1995, where she has continued to work and reside with her husband and young daughter (*see ex. G; R.T. 43-44*). While she does have a temporary consulting arrangement with the Nicaraguan foreign relations ministry (working on cultural issues), she never travels for business purposes and has no involvement in the political or intelligence affairs of Nicaragua. Applicant's telephone contacts with this sister are few, always casual and never about politics. When he accompanies his wife on trips to Nicaragua to see his father-in-law, he always reports his trips to his company's security officers in advance and returns to debriefs them on his return (*see R.T., at 61*).

Ms. A, who has lived with W's family continuously (for over 28 years) since obtaining political asylum in the US, currently lives with Applicant and his wife (*see ex. D; R.T., at 40-42*). Ms. A emigrated to the US with W and her family in 1982 and has been a permanent resident of the US since 1990, when she (along with W and her sister) received her green card. Modest in upbringing, she was a nanny for W and her sister since they were infants. Applicant first met s. A while dating his wife. Like W, Ms. A has since applied for naturalized US citizenship, is grateful for US assistance to her family and other Nicaraguans, and is devoted to American ideals and values. After W's mother passed away in 1990, Ms. A assumed an aunt's role with W and her two sisters. Since Applicant's marriage to W, Ms. A has lived in their home and helped in the raising of their two children (*see R.T., at 46-47*).

Before moving his family to the US in 1982 in search of political asylum, Applicant's father-in-law (a corporate lawyer by profession) opposed and collaborated against the Marxist Sandinista regime that had seized power through a violent revolution (his characterization). After establishing residence in the US and continuing his collaborative efforts against the Sandinista regime, the father-in-law returned to a politically and economically stabilized Nicaragua around 1995 to reclaim his confiscated home and property (*see ex. F and undated US Embassy Report on Nicaragua's political environment*). Upon his return, he worked with the US and the newly constitutionally reformed Nicaraguan government in reconstruction efforts. Just as he loves the US, he despises communism (the model pursued by the old Sandinista regime when it was in power) and has avoided any contact with the Sandinista's leadership (*see R.T., at 63*). Applicant's father-in-law is currently retired and residing in Nicaragua (*see ex. F; R.T., at 39-40*).

Nicaragua's Government

Current bilateral relations between the US and Nicaragua are strong. Since 1990, the US has provided more than \$1.3 billion in assistance and debt relief to Nicaragua. US aid has targeted balance of payments support for economic stabilization, primary education, health care reform, employment generation, food donations and the strengthening of democratic institutions (*see undated US Embassy Report on Nicaragua's political environment*). Applicant maintains that even the Sandinistas in recent years have committed to democratic reforms (*see R.T., at 58*). Pluralism is now much in evidence in Nicaragua with two major parties vying for control of the reins of government.

Under the new administration of President Enrique Bolanos (inaugurated in January 2002 on the strength of his party's receipt of 56 per cent of the vote), the new Nicaraguan government is of record in charting a path to improve its business climate and address longstanding grievances over land title uncertainties, confiscated properties by the Sandinista regime, security in the countryside, government corruption and a weak judicial sector (*see undated US Embassy Report on Nicaragua's political environment*). Improvements have been noted in Nicaragua's respect for human rights amidst a strengthened Supreme Court reform program for the judicial system. These positive developments must be tempered, however, by reports of serious law enforcement problems (to include allegations of police torture and killings and prison inmate abuse) and violence against women and children (*e.g., trafficking in women and girls for the purpose of sexual exploitation*). Embassy reports, though, identify no known political killings by government officials as of 2001, which bodes well for stilling security concerns over potential pressures that might be brought to bear on local family members of a US citizen believed to have access to classified information. (*see ex. A,*

Nicaragua Country Reports of US Embassy in Nicaragua (2001).

Democratic and economic stability in Nicaragua has not always been valued or achieved in Nicaragua. Throughout the 1980s, the ruling Sandinista regime received political and military support from the Soviet Union and oppressed those who opposed the regime. W's family is a prime example of a Nicaraguan family who was oppressed and endured suffering under the repressive practices of Daniel Ortega's Sandinistas. This exclusion and oppression left W's family with few options: either organize insurgent warfare (such as through the Contras) or flee and seek political asylum. W's family chose the latter option and has never regretted it.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) lists "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Foreign Influence

The Concern: A security risk may exist when an individual's immediate family, including co-habitants, and other persons to whom he or she may be bound by affection, influence, or are 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.

Disqualifying Conditions:

DC 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.

DC 2: Sharing living quarters with a person or persons, regardless of the citizenship status, if the potential for adverse foreign influence or duress exists.

DC 6: Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government.

Mitigating Conditions:

MC 1: A determination that the immediate family members 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 persons involved and the United States.

MC 4: The individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required.

MC 5: Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

Burden of Proof

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense decision. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant is a US citizen by birth and a highly regarded engineer for a defense contractor whose wife and family members have citizenship, and in some cases resident ties with their ancestral country: Nicaragua. Both Applicant, his wife and close family friend residing with them, claim their allegiance to the US, while just the same maintaining regular contact with W's family in Nicaragua.

Government finds security risks associated with one of W's sisters and their father living in Nicaragua, who the Government still believes to be vulnerable to pressure and coercion by virtue of their potentially known status as opponents of the old Sandinista regime. Applicant assures any such potential concerns are shown to be either assuaged or significantly mitigated.

The Adjudicative Guidelines governing collateral clearances do not dictate *per se* results or mandate particular outcomes for any chosen set of guidelines covering risks of foreign influence. What is considered to be an acceptable risk in one foreign country may not be in another. While foreign influence cases must by practical necessity be weighed on a case-by-case basis, guidelines are available for referencing. Available source information confirms Nicaragua to be a country with a repressive past, which prompted W and her family to flee the country in 1982 and seek political asylum in the United States. Because of this historical record of human rights repression under the Sandinistas and the latter's still active political presence in the country, potential security concerns are raised. In this vein, Government may invoke several disqualifying conditions: DC 1 (immediate family member or person to whom the individual has close ties of affection or obligation, is a citizen or resident or present in a foreign country); DC 2 (sharing living quarters with another if the potential for adverse influence or duress exists) and DC 6 (conduct that may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government).

Political and human rights conditions have changed considerably, though, since Nicaragua replaced the Sandinista-controlled regime in 1987 with a new administration (then under the leadership of Violeta Barrios Chamorro) committed to a constitutional democracy that embraced respect for human rights and the protection of private property (*see* December 1993 *State Department report on Nicaragua*). Now firmly committed to the rule of law under a new constitutional framework, Nicaragua may be considered a reform success: a politically and economically stabilized democracy that no longer oppresses its opponents and threatens its neighbors. *Cf. US Embassy Advisory and State Department's Consular Information Sheet on Nicaragua* (official notice taken). Nicaragua's newest president Enrique Bolanos Geyer is publicly committed to both improving its business climate and addressing political issues involving land title uncertainties, compensation for confiscated properties by the Sandinista regime, security in the countryside, government corruption and the lack of an effective judicial system. All of these commitments to the advancement of the rule of law in Nicaragua bode well for the new government's improvement of its economic and political standing with the US and its trade partners. On its current track, Nicaragua can now be classed as a promising new democracy in the Americas whose security risks to the US may now be considered manageable ones.

While the foreign influence provisions of the Adjudicative Guidelines are ostensibly neutral as to the character of the subject country, they should not be construed to ignore the geopolitical aims and policies of the particular foreign regime involved. Nicaragua is a constitutional democracy that is divided into four branches of government: an elected president, an elected national assembly, a Supreme Court, and a Supreme Electoral Council. *See US Embassy Advisory Reports*. Nicaragua can be considered to be on the road to reestablishing a democracy guided by the rule of law and respect for human rights, and that no longer exhibits hostility to the US and relatives of US citizens residing within Nicaragua's borders.

Because of the recognized improved political and economic climate in Nicaragua, security concerns over the status of Applicant's relatives either residing or linked to Nicaragua are considerably reduced. Mitigation of these concerns now permit safe predictive judgments about Applicant's ability to withstand risks of exploitation and pressure attributable to his familial relationships and contacts with his father and sister domiciled in Nicaragua. With security risks surrounding his family members considered manageable, Applicant may claim the mitigation benefits of MC 1 (presence of immediate family in host country does not pose an unacceptable security risk) and MC 5 (foreign financial interests are minimal and are not sufficient to affect the individual's security responsibilities) of the Adjudicative Guidelines. Overall, favorable conclusions warrant with respect to sub-paragraphs 1.a through 1.c of Guideline B of the Adjudicative Guidelines.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance.

GUIDELINE B: (FOREIGN INFLUENCE): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: FOR APPLICANT

Sub-para. 2.c: FOR 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge