

DATE: February 17, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10741

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Although his family ties to Peru and Columbia raise a security concern, Applicant has successfully mitigated the concern because the totality of the facts and circumstances show his family ties do not pose an unacceptable risk of foreign influence. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On October 22, 2003, DOHA issued a Statement of Reasons (SOR)⁽¹⁾ detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) of the Directive. Applicant answered the SOR in writing on November 14, 2003, and elected to have a hearing before an administrative judge. The case was assigned to me on February 20, 2004. On April 8, 2004, I convened a hearing by video-teleconference to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The government offered four documents, which were admitted without objection as Government Exhibits (GE) 1 through 4. The Applicant offered 24 documents, which were admitted without objection as Applicant Exhibits (AE) A through X. I left the record open after the hearing to afford Applicant the opportunity to submit additional documents. The Applicant timely submitted three additional documents, which were admitted without objection as AE Y through AE AA. DOHA received the transcript on April 20, 2004.

FINDINGS OF FACT

Applicant is a 46-year-old unmarried man. He is employed as a senior communications engineer for a defense contractor and seeks a security clearance. He and his younger sister were born in Peru of a Peruvian mother and an American⁽²⁾ father and consequently held dual citizenship from birth. When Applicant was very young, his parents emigrated back to the United States. Before leaving Peru, Applicant's mother obtained a Peruvian passport for him.

When Applicant was seven years old, his parents were killed in a plane crash. Adult family members determined that Applicant and his younger sister would be raised by their maternal grandparents in Peru. Consequently, Applicant and his sister returned to Peru. While Applicant was growing up, he maintained frequent contact with his relatives in the United States to include a half sister, a half brother, several cousins, and extended families and "visited them as much as possible." Tr. 43. He attended a prominent university in Peru from March 1977 to December 1986 and earned a degree in industrial engineering.

After graduating from university, Applicant was employed by a Peruvian company from January 1986 to September 1992. From September 1992 to April 2000, Applicant was employed as a computer systems analyst by an American company and was assigned to locations in the United States, Bolivia, and Columbia. It was during his posting to Columbia that Applicant met his fiancée and mother of his son. Tr. 57. His son is three years old. AE M.

While Applicant was posted to Columbia, his company underwent a reduction in force. He was let go and began a period of unemployment that lasted from April 2000 to November 2000. In August 2000, Applicant left Columbia and returned to the United States seeking employment. He held two short-term jobs until he secured his present position.

It was not until after Applicant received his SOR that he was informed Department of Defense Policy [\(3\)](#) viewed possession and/or use of a foreign passport as a disqualifying condition for individuals seeking a security clearance. Consequently, Applicant surrendered his Peruvian passport and renounced his Peruvian citizenship to the Peruvian Consulate on April 7, 2004. AE AA. Tr. 36-37, 40-42.

Applicant's sister lives in Peru with her husband and three children. Her husband works for a large Peruvian company that is affiliated with an American company and has been posted to Peru since 1995. Tr. 52. Before being assigned to Peru, Applicant's sister and her family lived in the United States. Applicant's sister and her three children are American citizens. She has been a housewife and has not worked outside the home since she arrived in Peru. Applicant's sister and her husband are not politically affiliated with nor do they work for the Peruvian government. AE Y. Applicant has seen his sister on average once a year during the last four-to-five years. He maintains contact with her through e-mail, birthday cards, and telephone calls on "an irregular basis." Tr. 61.

Since September 2003, Applicant started a small business in the United States, in addition to holding down his full-time job. He is financially and otherwise completely vested in the United States. AE A through K.

In 2000, Applicant was visiting Peru during an election. As required by Peruvian law, he voted, which is mandatory for all Peruvian citizens under the age of 70. Applicant has not voted in a Peruvian election since then nor at any time while outside Peru. AE O. Tr. 55-56.

Applicant's fiancée and son are resident citizens of Columbia. Applicant submitted an application for a Consular Report of Birth Abroad on behalf of his son, born February 16, 2002 in Columbia. Applicant's request was denied. Although he had resided in the United States the period of time required to transmit citizenship to his son, he was not able to submit the appropriate evidence. AE M.

On July 28, 2003, Applicant submitted a Petition for Fiancée to bring his fiancée to the United States. AE N. While Applicant is waiting for his fiancée and son to join him, he sends them support money. His fiancée is an artisan, who does paintings, engravings, and other miscellaneous art work, which she sells. His fiancée is not politically affiliated with nor does she work for the Columbian government. Applicant maintains frequent telephone contact with his fiancée. Tr. 57-60.

Applicant is registered to vote and exercises all rights of American citizenship.

Applicant submitted 14 character references from friends, family, and professional associates attesting to his good character and patriotism. Additionally, four character witnesses testified and echoed the same sentiments. In short, all character evidence was very favorable and convincing.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

Upon considering of all the facts in evidence, and after applying all appropriate legal precepts, factors, and conditions, including those described above, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline C. Applicant's dual citizenship, possession of a Peruvian passport, and having voted in a Peruvian elections raised a foreign preference concern. The concern as noted in Directive E2.A3.1.1. states: *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.*

The circumstances surrounding Applicant's dual citizenship are somewhat unique. Applicant's American father met and married his Peruvian mother in Peru. Shortly after Applicant was born in Peru, his parents moved to the United States.

Hence, Applicant's dual citizenship came about as a result of being born in Peru to a Peruvian mother. Applicant's mother obtained a Peruvian passport for him while he was a toddler before leaving Peru. Tragically, his parents were killed in a plane crash when Applicant was seven, and Applicant and his sister were returned to Peru to live with their maternal Peruvian grandparents. His having voted in Peru in 2000 occurred during a visit. As noted, in Peru voting is mandatory. Such factors trigger Foreign Preference Disqualifying Condition (FC DC) E2.A3.1.2.1. (*The exercise of dual citizenship*); FC DC E2.A3.1.2.2. (*Possession and/or use of a foreign passport*); and FC DC E2.A3.1.2.8 (*Voting in foreign elections*).

After being apprised of the Money Memo contents, Applicant renounced his Peruvian citizenship and surrendered his Peruvian passport to the Peruvian Consul. Applicant has cured this concern by the very definite and final action of formally renouncing his Peruvian citizenship and surrendering his passport effective April 7, 2004. Applicable Foreign Preference Mitigating Condition (FP MC) include full compliance with the Money Memo, FP MC E2.A3.1.3.1 (*Dual citizenship is based solely on parents' citizenship or birth in a foreign country*); and FP MC (*Individual has expressed a willingness to renounce dual citizenship*). Applicant happening to visit Peru in 2000 during an election and complying with the mandatory voting requirement can hardly be viewed as an event he sought out. In any event, Applicant is no longer a Peruvian citizen bound by Peruvian law requiring him to vote in future elections. Allegations 1.a. through 1.c. are concluded for Applicant.

The government has established its case under Guideline B. Applicant's fiancée and son are resident citizens of Columbia, and his sister is a dual citizen of Peru and the United States and resides in Peru. The concern as noted in Directive E2.A2.1.1. states: *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.*

Common sense suggests the stronger the ties of allegiance or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service. Concerning family ties, the language of Guideline B does not require a conclusion that an unacceptable security concern exists based solely on a applicant's family ties in a foreign country.⁽⁴⁾ An administrative judge must consider the record evidence as a whole in deciding if the facts and circumstances of a applicant's family ties pose an unacceptable security concern under Guideline B.⁽⁵⁾

Applicant's family situation gives rise to Foreign Influence Disqualifying Condition (FI DC) 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*). Applicant's sister, like him, is a dual citizen of the United States and Peru by virtue of her having a Peruvian mother and American father and by birth in Peru. Applicant's sister is a stay-at-home housewife and mother of three children, accompanying her husband whose employer has posted him to Peru. Neither she nor her husband are affiliated with the Peruvian government.

Applicant's fiancée and son are resident citizens of Columbia. Applicant has submitted the necessary paperwork to bring his fiancée and son to the United States. There is little else he can do in this regard except allow the process to continue. Applicant's fiancée is an artisan, who makes various crafts and is not affiliated with the Columbian government. Foreign Influence Mitigating Condition (FI MC) E2.A2.1.3.1. (*A determination that the immediate family member(s), (. . . sons . . .), cohabitant(s), or associates 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) and the United States*) applies. Applicant's contact with his fiancée and son are consistent behavior with a person in his situation. Allegations 2.a. through 2.c. are concluded for Applicant.

Applicant's ties and connections to the United States are substantial and deserving of consideration in mitigation. Applicant has renounced his Peruvian citizenship, surrendered his Peruvian passport, participates in the American electoral process, set up a part-time business in the United States, centered his professional life in the United States, maintains frequent contact with his American relatives, and has done everything required to bring his fiancée and son to the United States.

In summary, the record evidence demonstrates Applicant has all the indicators of an industrious, mature, responsible, and trustworthy individual. After weighing the record evidence as a whole, it is my commonsense determination that the facts and circumstances show Applicant's ties to Peru and Columbia do not pose an unacceptable risk or concern of foreign influence. In reaching my decision, I have considered the whole-person concept and the appropriate factors and guidelines in the Directive. And I have weighed the record evidence as a whole, and conclude the favorable evidence outweighs the unfavorable evidence. Under the totality of the facts and circumstances, I conclude Applicant has met his burden.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline C: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2. Guideline B: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

DECISION

In light of all of 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 Applicant. Clearance is granted.

Robert J. Tuider

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
2. The use of the term "American" refers to the United States.
3. Assistant Secretary of Defense Memorandum for Secretaries of the Military Departments, et al, Subject: Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guidelines, dated August 16, 2002. The Memorandum is commonly referred to as the "Money Memo."
4. ISCR Case No. 98-0419 (April 30, 1999) at p. 5.
5. *Id.*