KEYWORD: Foreign Preference; Foreign Influence

DIGEST: Applicant is married to a woman who was born and raised in Argentina. She is a permanent U.S. resident. Her parents and siblings are citizen residents of Argentina. After Applicant retired from the U.S. Navy, he lived in Argentina for more than seven years while completing his master's degree and trying to find employment in international business. Applicant mitigated the foreign influence and foreign preference security concerns. Clearance is granted.

CASENO: 04-01079.h1

DATE: 11/15/2005

DATE: November 15, 2005

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 04-01079

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is married to a woman who was born and raised in Argentina. She is a permanent U.S. resident. Her parents and siblings are citizen residents of Argentina. After Applicant retired from the U.S. Navy, he lived in Argentina for more than seven years while completing his master's degree and trying to find employment in international business. Applicant mitigated the foreign influence and foreign preference security concerns. 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 24 May 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision[(1)]-security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing on 3 June 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 8 July 2005. On 16 August 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 23 August 2005.

FINDINGS OF FACT

Applicant is a 47-year-old data warehouse architect for a defense contractor. He was born in the U.S., but traveled extensively as a child, as his father was a U.S. Air Force officer. Tr. 17. Applicant served in the U.S. Army from 1976-80 as an enlisted armored crewman, attaining the grade of E-5. Tr. 19. He was honorably discharged and started college in the U.S. After graduation, he became a U.S. Navy aviator from 1985-96, retiring in the grade of O-3. Tr. 19. Applicant held a Top Secret security clearance while in the Navy.

In 1988, during his Navy career, Applicant married a citizen of Argentina. Ex. 1 at 4; Tr. 17. He suffered no adverse consequences to his security clearance as a result of his marriage. Applicant's wife is still a citizen of Argentina, but holds permanent residence status in the U.S. Tr. 46. They have two children who are U.S. citizens by reason of their birth in the U.S.

During his last years in the Navy, Applicant studied for a master's degree in international business. Tr. 18. After he retired from the Navy, he had the opportunity to spend a semester studying in Argentina. Applicant and his family lived with his wife's parents in Argentina. After the semester was completed, Applicant received a three-month position with a business. When the contract was extended, Applicant shipped his household goods to Argentina and purchased a home. He bought the home for $80,000 with some assistance from his father-in-law. Ex. 2 at 13;Answer at 1.

After the contract terminated, Applicant's father-in-law introduced him to the chief information officer (CIO) of a local hospital who contracted with Applicant to work on a computer software program for the hospital pharmacy. Later, Applicant and the CIO formed a business partnership to protect the product of their work. After the Argentine economy imploded in 2001, Applicant was forced to seek other employment and found work with an American company at a military installation in the U.S. Ex. 2 at 14. He returned to the U.S. in June 2003. Ans. at 3. Before doing so, he turned over all assets of the partnership to his Argentine partner. *Id.* He visited his family in Argentina over the Christmas holidays in 2003. His family followed him to the U.S. in March 2004 after the completion of the school year.

With the collapse of the Argentine economy, Applicant was unable to sell his house. He is not sure what his house is worth under the country's current economic conditions, but opines that it is probably significantly less than they paid for it. They paid cash for the house, so there is no mortgage liability. Applicant's wife runs the house. She finds people to rent it, negotiates the rents, finds repairmen when necessary, and pays the taxes on it through their bank account in Argentina. He believes that if his wife can sell it they would get less than $40,000 for it today. Because of Argentina's currency export controls, Applicant doubts he would be able to get money out of the country even if they could sell the house. Tr. 38. The couple's Argentine bank account currently holds $230 and is used to facilitate the collection of rent and the payment for repairs on the house.

While in Argentina, Applicant obtained a national identification card. This card is required for those who seek to reside and work in Argentina. Applicant equates it to a permanent residency status that would be conferred upon an individual in the U.S. who obtains a Green Card. He says he needs to retain it so he can sell his house in Argentina. Tr. 46. Applicant never intended to become an Argentine citizen. He never sought Argentine citizenship or voted in any election. He never obtained an Argentine passport. He registered his family with the U.S. Embassy in Argentina and continued to vote in U.S. elections. He maintained his bank accounts in the U.S.

Applicant's foreign relatives by marriage include his wife's parents, brother, and three sisters. His wife's parents are in their 70s and are retired. Her brother is a grain consolidator-he purchases grain from farmers and then exports the grain. Her three sisters are married and do not work outside their homes. None of their husbands work in the government. They are associated with grain, construction, or mosaic industries. Tr. 34. Applicant's wife and daughter visited Argentina in July 2005 for three weeks to visit family. Tr. 51. Applicant made friends with some Argentines while he

lived there, but his contact with them has become quite infrequent.

Applicant explains that once in Argentina, it was difficult to come back to the U.S. He did not have any job offers in the U.S., he owned a home in Argentina that had been paid for and couldn't be readily sold, and although his pay was meager by U.S. standards, with the addition of his Navy retirement pay they could live comfortably. Tr. 42-43.

Applicant's employer gives him high praise for his skills and dedication to the mission.

Argentina is a constitutional democracy. Ex. 5 at 1. After the economic collapse of 2001, the country made impressive and robust gains. Ex. 3 at 6. In recognition of Argentina's contributions to international security, the U.S. Government designated it as a major non-NATO ally in January 1998. Ex. 3 at 8. Over the past ten years, Argentina's human rights record has improved substantially. There is no evidence any terrorist organizations are targeting U.S. visitors, but street crime is a serious problem in larger cities. As in other Latin American countries, kidnapping for ransom remains a serious problem. Ex. 4 at 2-3.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline C-Foreign Preference

In the SOR, DOHA alleged Applicant possesses an Argentine national identification card (¶ 1.a), resided in Argentina from 1996-2003 (¶ 1.b), was a partner in a software development firm in Argentina (¶ 1.c), and owns a home, valued at $80,000, and a bank account, valued at $690, both in Argentina (¶ 1.d). Applicant denied the security significance of each of the allegations, but his explanations basically admit the facts alleged. When an applicant acts in such a way as to indicate a preference for a foreign country over the U.S., then he may be prone to provide information or make decisions that are harmful to the interests of the U.S. Directive ¶ E2.A3.1.1.

The Government's evidence and Applicant's admissions establish each of the allegations in SOR ¶ 1, with the exception of the value of Applicant's home in Argentina and the size of his Argentine bank account. But the Government failed to establish any of the disqualifying conditions listed under Guideline C. Although Applicant lived in Argentina for more than seven years, he did not do so in order to meet citizenship requirements. *See* DC E2.A3.1.2.5. He did so to gain experience in international business. Although Applicant admits he was living comfortably in Argentina, it appears he never intended to become an Argentine citizen or to serve any foreign government. He maintained contact with his family and friends in the U.S. and his investments.

Nevertheless, the absence of a listed disqualifying condition is not dispositive. *See* ISCR Case No. 01-08565 at 5 (App. Bd. Mar. 7, 2003). One could certainly argue that Applicant's presence in Argentina for more than seven years shows a preference for that country. However, after considering all of the facts and circumstances surrounding his stay there, I conclude Applicant's continued presence in Argentina after he completed his degree did not show a preference for that country over the U.S., but only his inability to find suitable employment in the U.S. I find for Applicant on ¶ 1.

Guideline B-Foreign Influence

In the SOR, DOHA alleged Applicant's parents-in-law (¶ 2.a) and friends (¶ 2.b) are citizen residents of Argentina; he owns a home in Argentina (¶ 2.c); he has a bank account in Argentina (¶ 2.d); and he was a partner in a computer software firm in Argentina (¶ 2.e). Applicant denied the security significance of each allegation, but his explanations basically admit the facts alleged. A security risk may exist when an applicant's immediate family, or other persons to whom he may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Directive ¶ E2.A2.1.1.

The Government's evidence and Applicant's admissions establish potentially disqualifying conditions under Guideline B. The evidence raises a security concern because Applicant's wife's family are citizen residents of a foreign country. DC E2.A2.1.2.1. There is a rebuttable presumption

an applicant has ties of affection or obligation to members of his wife's immediate family. *See* ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Feb. 20, 2002). Applicant failed to rebut this presumption. He lived with his in-laws for a period of time and they helped Applicant and his wife pay for there house. I find Applicant has ties of affection for, or at least obligation to, the members of his wife's immediate family in Argentina.

While the mere possession of family ties with persons in a foreign country is not automatically disqualifying, it raises a prima facie security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to establish that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 at **33-34 (App. Bd. Feb. 8, 2001). As the evidence established potentially disqualifying conditions, Applicant had the burden to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

Security concerns raised by an applicant's foreign associates may be mitigated when it is determined they are not agents of a foreign power and are not 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 involved and loyalty to the U.S. MC E2.A2.1.3.1. Applicant's foreign associates are not "agents of a foreign power."

The term "agent of a foreign power" is a legal term of art-a technical term whose meaning is "locked tight." *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 872 (2d ed. 1995). Congress defined "agent of a foreign power" as any person who knowingly engages in clandestine intelligence gathering or other clandestine intelligence activities for a foreign power, or knowingly engages in sabotage or international terrorism. 50 U.S.C. § 1801(b). A "foreign power" includes foreign governments, factions of foreign nations, groups engaged in international terrorism, and entities that are directed or controlled by a foreign government. 50 U.S.C. § 1801(a).

Administrative judges have invoked the statutory definition of "agents of a foreign power" on many occasions. In reviewing those cases, the Appeal Board has avoided discussing the applicability of 50 U.S.C. § 1801. The Board has not defined the term "agent of a foreign power" or even "foreign power." But it has held that an employee of a foreign government need not be employed at a high level or in a position involving intelligence, military or other national security duties to be an agent of a foreign power. ISCR Case No. 02-24254, 2004 WL 2152747 (App. Bd. Jun. 29, 2004). Although I am convinced the drafters of the Directive were aware of 50 U.S.C. § 1801 and meant administrative judges to apply it in resolving security clearance cases, I am required to follow the Appeal Board's opinion. ISCR Case No. 03-16516 at 4 (App. Bd. Nov. 26, 2004). Under either definition, Applicant's foreign associates are not agents of a foreign power.

In assessing the second prong of the mitigating condition-vulnerability to exploitation of Applicant's associates-it is helpful to consider several factors, including the nature of the foreign government, its relationship with the U.S. and with other entities that have aims or objectives contrary to the U.S., and its human rights record. Even friendly nations can have profound disagreements with the U.S. over matters they view as important to their vital interests or national security. We know friendly nations have engaged in espionage against the U.S., especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). The risk the foreign associates are vulnerable to exploitation is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, the country harbors "foreign powers" hostile to the U.S., or the country is known to conduct intelligence operations against the U.S.[(2)]

After considering all of the facts of this case, I am convinced Applicant has mitigated concerns about his family. Applicant held a security clearance while on active duty with the Navy and is fully cognizant of the rules and regulations governing the unauthorized disclosure of classified information and the reporting requirements when an unauthorized person seeks classified information from him. I have also carefully considered the vulnerability to exploitation of his foreign associates in light of the information presented about them and the government of Argentina.

The Government also established that Applicant and his wife had financial interests in Argentina. DC E2.A2.1.2.8. They owned a house and a small bank account in Argentina, and Applicant was a partner in a business venture there. Applicant terminated the partnership and no longer has any financial interest in it. Because of the economic conditions in Argentina, Applicant's home is now worth only $40,000 and some of the money would have to be paid to Applicant's father-in-law to repay his loan. Because of currency restrictions, Applicant does not believe he could get the money out of Argentina even if he were able to sell the house. Under the circumstances, I conclude Applicant's foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities. MC E2.A2.1.3.5.

After considering Applicant's ties to Argentina, both individually and in their totality, I am convinced they do not pose a risk to national security. I find for Applicant.

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

Subparagraph 1.d: For Applicant

Paragraph 2. Guideline B: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: For Applicant

Subparagraph 2.e: For Applicant

DECISION

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

James A. Young

Administrative Judge

1. As required by Exec. Or. 10865 (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended and modified (Directive).

2. I am mindful the Appeal Board has determined it is arbitrary and capricious to find significant that a country is

friendly to the U.S. ISCR Case No. 02-22461 at 5 (App. Bd. Oct. 27, 2005).

First, the United States, Great Britain, Canada, Australia, and other countries with stable, democratic or representative forms of government engage in intelligence gathering. Totalitarian regimes and dictatorial governments are not the only ones engaging in espionage. Accordingly, the Judge articulated no rationale for his conclusion that the stability of Taiwan's democratic form of government reduces the security risk in Applicant's case.

Id. Although not dispositive of the issue, I believe it is certainly a factor that must be considered in evaluating a foreign influence case. Determining an applicant's suitability for a security clearance requires a predicitive judgment-it is an attempt to determine who might pose a security risk. It is unquestionably riskier if the foreign associates are subject to the control of a state or power that has no qualms about coercing them to do its bidding.