KEYWORD: Foreign Influence

DIGEST: Applicant worked for a defense contractor in a position of trust and successfully held a security clearance for over 30 years. He presently lives with his fiancée, a Cuban citizen who is a permanent resident of the U.S. She maintains close ties with her immediate family members who are citizens and residents of Cuba. Applicant has not mitigated the security concerns relating to possible foreign influence. Clearance is denied.

CASENO: 04-06318.h1

DATE: 03/03/2006

DATE: March 3, 2006

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In re:

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

Applicant for Security Clearance

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ISCR Case No. 04-06318

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL J. BRESLIN**

**APPEARANCES**

**FOR GOVERNMENT**

Sabrina E. Redd, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

## SYNOPSIS

Applicant worked for a defense contractor in a position of trust and successfully held a security clearance for over 30 years. He presently lives with his fiancée, a Cuban citizen who is a permanent resident of the U.S. She maintains close ties with her immediate family members who are citizens and residents of Cuba. Applicant has not mitigated the security concerns relating to possible foreign influence. Clearance is denied.

## STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive"). On June 1, 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under the Directive, specifically, Guideline B, Foreign Influence.

Applicant answered the SOR in writing on June 27, 2005. He elected to have a hearing before an administrative judge.

I received the case assignment on October 6, 2005. With the concurrence of Applicant and Department Counsel, I convened the hearing on December 7, 2005. At the hearing, the government introduced Exhibits 1 through 6. Applicant provided Exhibits A through J, and testified on his own behalf. DOHA received the final transcript of the hearing (Tr.) on December 16, 2005.

## FINDINGS OF FACT

Applicant admitted the factual allegations in the SOR. (Applicant's Answer to SOR, dated June 27, 2005.) Those admissions are incorporated herein as findings of fact. He denied that the facts created a security risk. (*Id.*) After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant was born in March 1952. (Ex. 1 at 1.) He graduated from high school in 1970. (Tr. at 34.) He worked for a time as an apprentice for carpenters and ironworkers, and in other construction-related positions. (Tr. at 35.) Applicant received technical training as a welder in 1972. (Ex. 1 at 1.)

In 1974, he began working for his current employer, a defense contractor. (Ex. 1 at 1.) Currently, Applicant does welding, fabrication, and general maintenance on the large stands used to test jet engines. (Tr. at 25; Exs. A, H, and I.) He successfully held a Secret security clearance for over 30 years. (Tr. at 27.) He does not work on jet engines and has never been exposed to classified information all his years of service. (Tr. at 26.) His supervisor's praise his skill, dependability, and resourcefulness. (Exs. C, D, E, F, and G.)

He was married in 1975; the marriage ended in divorce in 1984. (Ex. 1 at 2.) Applicant has no children. He has substantial personal assets in the U.S.; he has no financial assets outside this country. (Tr. at 37.)

Applicant currently lives with his fiancée. They began dating in May 2001 and began living together shortly thereafter. (Ex. 2 at 1.) His fiancée was born in Cuba. While there, she worked as an accountant for various companies. (Tr. at 28.) She was an employee of the government given that almost everyone in Cuba works for the state. (Tr. at 29.) She was permitted to emigrate and came to the U.S. in June 2000. She is still a Cuban citizen, although she has obtained permanent residency in the U.S. She has no property in Cuba. (Tr. at 32.) She has been working for the state elementary school system, first in the cafeteria and now caring for a handicapped child. (Tr. at 25.) Applicant's fiancée applied for U.S. citizenship in June 2005. (Ex. J.)

Applicant's fiancée's family still lives in Cuba, including her father, mother, brother and sister. (Tr. at 25.) She maintains regular contact with her family by calling and e-mailing them about once a week, and sending funds monthly. (Tr. at 25, 30.) Applicant has not spoken to her parents because he does not speak Spanish. (Tr. at 33.) She also visits her family in Cuba about once every three years, as allowed under current U.S. law. Her last visit was in July 2003 (Ex. J at 4; Tr. at 37), and she intends to visit again when permitted. (Tr. at 38).

His fiancée's father worked in a sugar cane factory but is now retired. (Tr. at 30.) Her mother worked in a day care facility, and is also retired. (*Id.*) Her brother worked as a security guard, a construction worker, and as an automotive repairman. (Tr. at 29.) Her sister rents out part of her home to tourists. (Tr. at 31.) None of Applicant's fiancée's family members have ever been active in the Cuban military, the Communist party, or any other political group. (Tr. at 30, 32, 39, 40-41; Ex. J at 7.)

According to the U.S. State Department, Cuba is a totalitarian state controlled by Fidel Castro and the Communist Party. (Ex. 3 at 1, 4; Ex. 4 at 1.) The Cuban government is strongly anti-American. (Ex. 4 at 1.) Relations between the U.S. and Cuba have been hostile for decades; a U.S. embargo on Cuban trade from 1960 is still in effect. (Ex. 3 at 4.) In May 2002, the U.S. offered to ease restrictions on trade and travel if the Cuban government enacted political and economic reforms. The Cuban government made no reforms; rather, in March 2003 it began a crack-down on peaceful opposition and human rights initiatives. (Ex. 3 at 8-9, 11.) The U.S. State Department reports that the Cuban government abuses human rights, denying the free exercise of religion, political dissent, and the freedom of speech, assembly, and association. (Ex. 3 at 8; Ex. 5.) After losing Russian subsidies in the early 1990s, Cuba's economy faltered. (Ex. 3 at 5, 10.) Cuba has entered into extensive trade agreements with Venezuela and the People's Republic of China to keep the Cuban economy functioning. (*Id.*) The Cuban government provides support to some terrorist organizations, as well as safe-haven for terrorists. (Ex. 6 at 38.)

## POLICIES

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." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988)). In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guideline at issue in this case is:

Guideline B, Foreign Influence: A security risk may exist when an individual's immediate family, including cohabitants, or other persons to whom he 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. (Directive, ¶ E2.A2.1.1.)

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to this adjudicative guideline, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." (Directive, ¶ E2.2.1.) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. (*Id.*) An administrative judge should consider 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. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that may disqualify the applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, ¶ E3.1.15.) 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 (App. Bd. Dec. 19, 2002)). "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.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

## CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Paragraph E2.A2.1.2.1 of the Directive provides that it may be disqualifying if "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." Paragraph E2.A2.1.3.1 defines "immediate family members" to include a spouse, father, mother, sons, daughters, brothers, and sisters. Applicant's fiancée, a person to whom he has close ties of affection, is a citizen of Cuba, although she is a permanent resident of the U.S. The evidence raises this potentially disqualifying condition.

Under ¶ E2.A2.1.2.2 of the Directive, it may be disqualifying where an applicant is "[s]haring living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." Applicant lives with his fiancée, whose parents, sister, and brother are citizens and residents of Cuba, a totalitarian state. The evidence raises this potentially disqualifying condition.

The Directive also sets out factors or conditions that could mitigate such security concerns. The Government produced substantial evidence establishing potentially disqualifying conditions, thus Applicant had the burden to produce evidence to rebut, explain, extenuate, or mitigate the concerns. (Directive, ¶ E3.1.15.) The government never has the burden of disproving a mitigating condition. (ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).)

Paragraph E2.A2.1.3.1 of the Directive provides that it is potentially mitigating where the "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 involved and the United States." Notwithstanding the facially disjunctive language, applicants must establish: (1) that the individuals in question are not "agents of a foreign power," and (2) that they are not in a position to be exploited by a foreign power in a way that could force the applicant to choose between the person(s) involved and the United States. (ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004).)

In 50 U.S.C.A. § 438(6), the federal statute dealing with national security and access to classified information, the U.S. Congress adopted the definitions of the phrases "foreign power" and "agent of a foreign power" from 50 U.S.C.A. § 1801(a) and (b). In 50 U.S.C. § 1801(b), the phrase "agent of a foreign power" is defined to include anyone who acts as an officer or employee of a foreign power in the United States, engages in international terrorism, or engages in clandestine intelligence activities in the U.S. contrary to the interests of the U.S. or involving a violation of the criminal statutes of the United States. None of Applicant's relatives meet the definition of "agent of a foreign power" under 50 U.S.C.A. § 1801(b).

The Appeal Board, however, has adopted a broader definition of the phrase "agent of a foreign power." The Appeal Board 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 for purposes of Foreign Influence Mitigating Condition 1." (ISCR Case No. 02-24254, 2004 WL 2152747 (App. Bd. Jun. 29, 2004); *see also* ISCR Case No. 03-04090 at 5 (App. Bd. Mar. 3, 2005) (employee of the Israeli government is an agent of a foreign power) and ISCR Case No.02-29143 at 3 (App. Bd. Jan. 12, 2005) (a member of a foreign military is an agent of a

foreign power).) Applying this broader definition, Applicant's fiancée's relatives in Cuba would be "agents of a foreign power" because they were employees of the Cuban government.

The second prong of the test is whether the relatives in question are "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." The federal statute, 50 U.S.C.A. § 1801(a), defines "foreign power" to include: a foreign government; a faction of a foreign nation; an entity openly acknowledged by a foreign government to be controlled by that foreign government; a group engaged in international terrorism; a foreign-based political organization; or an entity directed and controlled by a foreign government. The Appeal Board also construes the term "foreign power" broadly.

In assessing whether an applicant is vulnerable to exploitation through relatives or associates in a foreign country, it is necessary to consider all relevant factors. As noted above, ¶¶ E2.2.1, E2.2.2, and E2.2.3 of the Directive specifically require each administrative judge to consider all the facts and circumstances, including the "whole person" concept, when evaluating each individual case. To ignore such evidence would establish a virtual *per se* rule against granting clearances to any person with ties to persons in a foreign country, contrary to the clear terms of the Directive.

An important factor for consideration is the character of any foreign power in question, including the government and entities controlled by the government, within the relevant foreign country. The Appeal Board has specifically held that it is error for an administrative judge to fail to consider a hostile relationship between the U.S. and a foreign country. (ISCR Case No. 02-13595 at 4 (App. Bd. May 10, 2005).) The Appeal Board has held that "a country's poor human rights record and its differences with the United States on important security issues such as terrorism are factors" that a judge must consider. (ISCR Case No. 04-05317 at 5 (App. Bd. June 3, 2005); *see also* ISCR Case No. 03-24933 at 7 (App. Bd. July 28, 2005).) This factor is not determinative; it is merely one of many factors which must be considered.

Of course, nothing in Guideline B suggests it is limited to countries that are hostile to the United States. (*See* ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002); ISCR Case No. 00-0489 at 12 (App. Bd. Jan. 10, 2002).) The Appeal Board repeatedly warns against "reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B." (ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002)). It is well understood that "[t]he United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." (ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).) Distinctions between friendly and unfriendly governments must be made with extreme caution. Relations between nations can shift, sometimes dramatically and unexpectedly. Moreover, even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, friendly nations have engaged in espionage against the United States, especially in economic, scientific, military, and technical fields. (ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002).)

Nevertheless, the relationship between a foreign government and the U.S. may be relevant in determining whether a foreign government or an entity it controls is likely to attempt to exploit a resident or citizen to against the U.S. through the applicant. The nature of the foreign government might also relate to the question of whether the foreign government

or an entity it controls would risk jeopardizing its relationship with the U.S. by exploiting or threatening its private citizens in order to force a U.S. citizen to betray this country. A friendly relationship is not determinative, but it may make it less likely that a foreign government would attempt to exploit a U.S. citizen through relatives or associates in that foreign country.

The government of Cuba is controlled by the Communist party, and has had poor relations with the U.S. for many years. Recent attempts at improving relations only served to broaden the divide. Additionally, the U.S. State Department determined that the government of Cuba has a poor record of protecting human rights. While not determinative, this suggests it is more likely that the Cuban government would attempt to exploit its residents or citizens to act adversely to the interests of the United States in the future.

Another factor which must be considered is Applicant's relatives' vulnerability to exploitation by foreign powers in Cuba. Applicant's parents are now retired, thus the extent of governmental influence is reduced. Applicant's sister and brother have some increased vulnerability because of their jobs. Most significantly, all these family members reside in Cuba and are subject to governmental control. Considering all the circumstances, I conclude the evidence does not raise this potentially mitigating condition.

Under ¶ E2.A2.1.3.3 of the Directive, it may also be mitigating where "[c]ontact and correspondence with foreign citizens are casual and infrequent." Applicant maintains close contact with her immediate family members in Cuba. I conclude this potentially mitigating condition does not apply.

Paragraph E2.A2.1.3.5 of the Directive states that it may be mitigating where "[f]oreign financial interests are minimal and not sufficient to affect the individual's security responsibilities." Applicant's fiancée has no property or financial interests in Cuba. I find this potentially mitigating condition is raised by the evidence.

I considered carefully all the potentially disqualifying and mitigating conditions in this case in light of the "whole person" concept, keeping in mind that any doubt as to whether access to classified information is clearly consistent with national security must be resolved in favor of the national security. Applicant is a mature individual with strong ties to this country. He worked for a defense contractor in a position of trust and successfully held a security clearance for over 30 years. He has substantial personal assets, all of which are located within the U.S. On the other hand, Applicant's fiancée is a Cuban citizen, and she has close ties to her immediate family members still living in Cuba. Cuba is a repressive, communist-controlled government, with strong anti-American policies. It has a poor record on human rights issues. I have no reservations about Applicant's patriotism or loyalty to the U.S., but his fiancée's vulnerability creates enough of a security concern that I cannot find it is in the best interests of the U.S. to continue a security clearance for Applicant. I conclude Applicant has not mitigated the potential security concerns arising from his fiancée's personal ties to relatives in Cuba.

## FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline B: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

## DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Michael J. Breslin

Administrative Judge