

DATE: October 19, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-09605

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Sabrina Redd, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was married to a Cuban citizen, and she traveled to Cuba to visit her spouse and his family. Her mother, stepfather, and siblings were citizens and residents of Honduras. She separated from her Cuban spouse in May 2005, divorced him in December 2005, and had no further contact with his family. Her Honduran mother and stepfather died in 2004. She has had virtually no contact with her siblings since 1986. She has refuted the allegations regarding her spouse and parents and mitigated the security concern based on the citizenship and residences of her siblings. Clearance is granted.

STATEMENT OF THE CASE

On November 25, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 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 (Directive). The SOR alleges security concerns under Guideline B (Foreign Influence). It alleges Applicant's spouse is a citizen of Cuba currently residing in Honduras (¶ 1.a); she traveled to Cuba in 2001, 2002, and 2003 to visit her spouse and his family (¶ 1.b); she is attempting to sponsor her spouse for entry into the U.S. (¶ 1.c); her mother and stepfather are citizens and residents of Honduras (¶ 1.d); and her five siblings are citizens and residents of Honduras (¶ 1.e).

Applicant answered the SOR in writing on January 17, 2006, denied the allegation in SOR ¶ 1.a, admitted the remaining allegations, and requested a hearing. The case was assigned to an administrative judge on May 18, 2006, and reassigned to me on July 20, 2006, based on workload. On August 1, 2006, DOHA issued a notice of hearing setting the case for August 21, 2006. The case was heard as scheduled. DOHA received the transcript (Tr.) on August 29, 2006.

FINDINGS OF FACT

Applicant's admissions in her answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant was born in Honduras in June 1950. She came to the U.S. in 1986 (Tr. 47), and she became a U.S. citizen in July 1999 (Government Exhibit (GX) 1 at 1; Tr. 35). She has assembled electronic circuit boards for a defense contractor since 1993. She was a temporary employee until May 1995, when she became a full-time permanent employee (Tr. 46-47). She was granted an interim clearance but has never held a final security clearance. She is regarded by friends and associates as an honorable, responsible person (Applicant's Exhibits (AX) B, C, D, and E).

Applicant's mother and stepfather were citizens and residents of Honduras until they both died about two years ago (Tr. 44). Her four brothers are citizens and residents of Honduras. Two of her brothers are pastors, and two are not permanently employed (Tr. 43). Her sister resides in the U.S., but Applicant does not know where (Tr. 44). After coming to the U.S., Applicant's only contact with her family was with her mother, and she has had virtually no contact with her siblings (Tr. 44).

In April 2001, Applicant traveled to Cuba and married a Cuban citizen. Her husband moved to Honduras in July 2003, in order to make his eventual entry into the U.S. easier (Government Exhibit (GX) 2 at 4; Tr. 33). She traveled to Cuba in 2002 and 2003 to visit her spouse and his family. At the time of her marriage, she intended to sponsor her husband for entry into the U.S. They quarreled and separated in May 2005, and they had no contact after that time (Tr. 36). In December 2005, she divorced her husband (Applicant's Exhibit (AX) A). Applicant believes her ex-husband now resides in the U.S., but she does not know his whereabouts (Tr. 36-37). She had no contact with her former in-laws after she and her ex-husband separated.

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 has 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), as amended and modified. 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 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, 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.

Initially, the government must establish, by substantial evidence, conditions 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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline B (Foreign Influence)

The concern under Guideline B is that a security risk may exist when an applicant's immediate family, or other persons to whom he or she 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. A disqualifying condition (DC 1) may arise when "[a]n immediate family member [spouse, father, mother, sons, daughters, brothers, sisters], 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." Directive ¶ E2.A2.1.2.1.

When Applicant applied for her security clearance, she was married to a Cuban citizen residing in Honduras; and her mother, stepfather, and five siblings were citizens and residents of Honduras. After the SOR was issued, her mother and stepfather died, and she divorced her Cuban husband. After she and her ex-husband separated, she had no further contact with his family. Her travel to Cuba had been solely to visit her husband and his family. Based on this evidence, I conclude Applicant has refuted the allegations in SOR ¶¶ 1.a (Cuban spouse), 1.b (travel to Cuba), 1.c (sponsoring spouse for entry into U.S.), and 1.d (Honduran mother and stepfather). However, DC 1 is raised by evidence, in that all five of her siblings are Honduran citizens and four still reside in Honduras.

Since the government produced substantial evidence sufficient to raise DC 1, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Applicant has rebutted the presumption in this case. The evidence establishes she has had virtually no contact with her siblings since she came to the U.S. in 1986, twenty years ago.

"Whole Person" Analysis

In addition to considering the specific disqualifying and mitigating conditions under Guideline B, I have also considered the general adjudicative guidelines in the Directive ¶ E2.2.1. I have considered: (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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

I have specifically noted that the nature and extent of Applicant's foreign contacts were greatly attenuated after her divorce and the deaths of her mother and stepfather. She has worked for her current employer for more than 11 years and enjoys a reputation for being an honorable, responsible person. She has had virtually no contact with her siblings since coming to the U.S. 20 years ago, and no contact with her ex-husband and his family since their separation in May 2005. She is a mature, adult who has spent almost half of her adult life in the U.S. Currently, her only exposure to foreign influence is through her siblings, with whom she has no contact.

Department Counsel presented no evidence regarding Honduras and Cuba. However, in light of my conclusions that Applicant refuted or mitigated all the allegations, I found it unnecessary to take administrative notice on my own motion of any adjudicative facts about those countries.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted most of the allegations in the SOR and mitigated the security concerns based on based on foreign influence from her siblings. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with the national interest to grant her a security clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline B (Foreign Influence): FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: 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 Applicant a security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge