



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 08-04273
)
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro Se*

October 14, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated the security concerns raised by his family members in Cuba and his possession of a current Cuban passport. Eligibility for access to classified information is denied.

On July 22, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline B, Foreign Influence and Guideline C, Foreign Preference. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on August 13, 2008, and requested a hearing before an Administrative Judge. The case was assigned to another Administrative Judge on August 25, 2008, and reassigned to me on September 16,

2008. DOHA issued a notice of hearing on September 9, 2008. I convened the hearing as scheduled on September 23, 2008. DOHA received the transcript of the hearing (Tr.) on September 30, 2008.

Procedural and Evidentiary Rulings

Notice

I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice.

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Cuba. Applicant did not object and the request was approved. The request and the attached documents were not admitted into evidence but were included in the record as Hearing Exhibit (HE) I. The facts administratively noticed are set out in the Findings of Fact, below.

Evidence

The Government offered Exhibits (GE) 1 and 2, which were received without objection. Applicant testified on his own behalf and submitted Exhibit (AE) A, which was received without objection.

Findings of Fact

Applicant is a 38-year-old employee of a defense contractor. He was born in Cuba. He attended college in Cuba for a period but did not graduate. While in college his eyes were opened to the nature of the Cuban government and the opportunities and freedom that the United States offered. He attempted to escape Cuba on a raft in 1988. He was unsuccessful and returned to Cuba. He left college and went to work. He eventually met his ex-wife in Havana. She is a United States citizen. She visited him in Cuba on several occasions and they married in 1994. She sponsored him to immigrate to the United States. Applicant came to the U.S. in 1995. They divorced in 1997. He became a U.S. citizen in 2000.¹

Applicant's parents and one brother are citizens and residents of Cuba. His family members are farmers with no direct connection to the Cuban government. He also has extended family members, including cousins, who are citizens and residents of Cuba. He has another brother that is a Cuban citizen who lives in the U.S. with Applicant as a permanent resident. He also has other cousins who are Cuban citizens living in the United States.²

¹ Tr. at 17-21, 26-27; GE 1, 2.

² Tr. at 23-24, 27-30; Applicant's response to SOR; GE 1, 2.

Applicant visited Cuba on four occasions between 2001 and 2007. He started dating a Cuban citizen during his trips to Cuba. He has known her since they were in school. They married in Cuba during his trip there in 2007. Applicant has no children. He has sponsored his wife to immigrate to the United States and he hopes that she will be able to arrive here by the end of 2008. She was an office worker with no association with the Cuban government, but she is currently not working.³

Applicant is a dual citizen of the United States and Cuba. He continued to maintain and use a Cuban passport after he became a U.S. citizen. He used his Cuban passport on all his trips to Cuba, but has never used it in a third country. He possesses a current Cuban passport that was issued in 2006, and is valid until 2012. He intends to maintain the Cuban passport in case he has to travel to Cuba on short notice if there is any kind of emergency.⁴

Applicant does not own any foreign assets. He sends his wife about \$100 a month and his parents about \$300 every six months. He also sends clothes and medicine. He calls his wife about once a week and his mother about once a month. He calls his brother about every three months. He has a stable employment history and his performance appraisal indicates that he is an excellent employee.⁵

Cuba

Cuba is a totalitarian state. The government controls all aspects of life through the Communist Party and its affiliated organizations. It has a poor human rights record including unlawful killings; beatings, and abuse of detainees and prisoners; harsh prison conditions; arbitrary arrest and detention of human rights advocates; denial of fair trial; pervasive monitoring of private communications; limitations on freedom of speech and press; denial of peaceful assembly and association; and restrictions on freedom of movement, including selective denial of exit permits. The government and its agents are not known to engage in politically motivated killings or disappearances, but dissidents risk being jailed.

Cuba is a state sponsor of terrorism and maintains close relationships with other state sponsors of terrorism such as Iran and Syria. The Cuban government has long targeted the U.S. for intensive espionage. Cuba's modus operandi in espionage operations is to use spies to infiltrate U.S. activities and U.S.-based anti-government organizations. The U.S. and Cuba have had a strained relationship since the early 1960s. U.S. policy has been to isolate Cuba through comprehensive economic sanctions. At the same time, the U.S. has supported humanitarian efforts and continues to work for a "Free Cuba."

³ Tr. at 28; Applicant's response to SOR; GE 1, 2.

⁴ Tr. at 33, 35-39; Applicant's response to SOR; GE 1, 2.

⁵ Tr. at 34-35; AE A.

Policies

When evaluating an applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, Administrative Judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 7:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. Three are potentially applicable in this case:

- (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;
- (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information; and
- (d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

Applicant's wife, parents, and brother are citizens and residents of Cuba. He has visited his family in Cuba on four occasions between 2001 and 2007. Another brother lives with Applicant. He is a Cuban citizen, but a U.S. permanent resident. Cuba has an authoritarian government, dominated by the Communist Party. It is a state sponsor of terrorism, and the government of Cuba has committed numerous, serious human rights abuses against its people. It also targets the U.S. for espionage. His family members' presence in Cuba creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion, both through him and through his brother in the U.S. It also creates a potential conflict of interest. AG ¶¶ 7(a), (b), and (d) have been raised by the evidence. Applicant's contacts and connections to his extended family members in Cuba are not enough to create a conflict of interest, or a heightened risk of

foreign exploitation, inducement, manipulation, pressure, or coercion. SOR ¶ 1.f is concluded for Applicant.

Conditions that could mitigate Foreign Influence security concerns are provided under AG ¶ 8:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

Applicant has been in this country for about 13 years and has been a U.S. citizen since 2000. His brother lives with him and he has a good job where he is a valued employee. However, because of his close family ties to Cuba and the nature of the Cuban government, I am unable to find any of the mitigating conditions to be fully applicable.

Guideline C, Foreign Preference

The security concern relating to the guideline for Foreign Preference is set out in AG ¶ 9:

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 guideline notes several conditions that could raise security concerns under AG ¶ 10. Two are potentially applicable in this case:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen.

Applicant possesses a current Cuban passport, which is a right and privilege of foreign citizenship. AG ¶ 10(a) is applicable. The renewal of his Cuban passport while a U.S. citizen could also raise concerns under AG ¶ 10(b), as an action to obtain recognition of his Cuban citizenship.

SOR ¶ 2.c alleges that Applicant was “unwilling to surrender [his] Cuban passport.” This is true. However, the possession of the Cuban passport is already alleged in SOR ¶ 2.b. SOR ¶ 2.c does not allege a separate disqualifying fact; it alleges that Applicant does not meet a mitigating condition, as addressed below. A failure to meet a mitigating condition should not be the basis of a separate allegation. SOR ¶ 2.c is concluded for Applicant.

Conditions that could mitigate Foreign Preference security concerns are provided under AG ¶ 11. Three are potentially applicable:

(a) dual citizenship is based solely on parents’ citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship; and

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Applicant actively sought recognition of his Cuban citizenship by renewing his Cuban passport after he became an American citizen. He is maintaining the passport to visit his family and for use in an emergency. As such, he is unwilling to renounce the dual citizenship that accompanies the Cuban passport. No mitigating condition is completely applicable.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant was born in Cuba. He realized when he was in college that he wanted the freedoms we enjoy in the United States. He attempted to escape Cuba on a raft but was unsuccessful. He eventually married a U.S. citizen and fulfilled his dream of coming to America. He became a U.S. citizen in 2000. He was obviously sincere, open, and honest at his hearing. He has thrived in the United States and is recognized by his company as an excellent employee.

I considered the totality of Applicant's family ties to Cuba, The nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, the country is known to conduct intelligence operations against the United States, or the foreign country is associated with a risk of terrorism. Cuba has an authoritarian government, a bad human rights record, is a state sponsor of terrorism, and conducts espionage against the United States. Applicant has a significant amount of close family members who are citizens and residents of Cuba. He has maintained his Cuban citizenship and passport because it is necessary if he wants to visit them. There is no evidence that Applicant is anything other than an intelligent, honest, trustworthy, and loyal U.S. citizen. He just was unable to mitigate the considerable security concerns raised by his ties to Cuba.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I

conclude Applicant has not mitigated the Foreign Influence and Foreign Preference security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	Against Applicant
Paragraph 1, Guideline C:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge