



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



In the matter of:)
)
) ISCR Case No. 15-00930
)
Applicant for Security Clearance)

Appearances

For Government: Douglas Velvel, Esq., Department Counsel
For Applicant: *Pro se*

08/09/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns under Guideline B (foreign influence).
Clearance is granted.

Statement of the Case

On April 4, 2014, Applicant submitted a Questionnaire for National Security Positions (SF 86). On February 6, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline B. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant a security clearance for Applicant, and it recommended that

her case be submitted to an administrative judge for a determination whether her clearance should be granted or denied.

On March 9, 2016, Applicant responded to the SOR. On April 19, 2016, Department Counsel was ready to proceed. On May 2, 2016, DOHA assigned Applicant's case to me. On May 19, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for June 8, 2016. Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 and 2 and Hearing Exhibits (HE) I and II, which were received into evidence without objection. Applicant testified and offered Applicant Exhibit (AE) A, which was received into evidence without objection. On June 16, 2016, DOHA received the hearing transcript (Tr.).

Request for Administrative Notice

Department Counsel submitted a Request for Administrative Notice (HE II), requesting that I take administrative notice of the summary of facts pertaining to Cuba contained in HE II as well as seven source documents. Without objection, I took administrative notice as requested. (Tr. 14-15)

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from Government reports. See Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Various facts pertaining to Cuba were derived from HE II and its source documents and are contained, in whole or in part, *infra* under the subheading "Cuba" of this decision.

Findings of Fact

Applicant admitted the allegations in the SOR. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 47-year-old general office worker employed by a defense contractor since February 2013. She seeks a secret security clearance as a requirement of her continued employment. (GE 1; Tr. 17-20)

Applicant was born in Cuba in 1969. She was educated in Cuba, and was awarded a *licenciada en educacion* in July 1993. Applicant described her degree in Cuba as comparable to a master's degree in elementary education. (GE 1; Tr. 25-26) In

June 1994, at age 25, Applicant immigrated to the United States via Peru and was given asylum under the “wet-foot, dry-foot policy.” She received her “green card” in 1995 and became a U.S. citizen in September 2007. Applicant was issued her U.S. passport in March 2008 that expires in March 2018. (GE 1; Tr. 20-24, 47-48)

She married in December 2004, although she and her now husband have been a couple since 1997. Her husband is a U.S. born citizen and is employed full-time as a high voltage lineman for a utility company. Applicant has a 17-year-old daughter who recently graduated from high school and plans to attend college, and a 12-year-old son who is in middle school. (GE 1; Tr. 26-30)

Foreign Influence

Security concerns were identified under this Guideline as a result of Applicant having a father, brother, and sister who were resident citizens of Cuba. (SOR ¶ 1.a) The status of Applicant’s relatives has changed substantially since the SOR was issued in February 2016, and those changes are discussed *infra*.

Applicant is one of five children – three live in the United States and two live in Cuba. Applicant’s parents as well as Applicant and her siblings were born and raised in Cuba. (GE 1) Applicant has two brothers, ages 52 and 50, and has three sisters, ages 53, 49, and 45. (GE 1)

Immediate Family Members Living and Deceased in Cuba (alleged in SOR) - Since these proceedings were initiated, Applicant’s father passed away in Cuba in March 2016, at age 80. He was a retired brick mason and was not associated with the Cuban government. (Tr. 31; AE A)

Applicant has a 52-year-old brother who lives in Cuba and is a carpenter by trade. He is a dual citizen of Spain and Cuba, holds a Spanish passport, and travels freely back and forth between the United States and Cuba. He is not associated with the Cuban government. (GE 1; Tr. 33-34, 37-40) Applicant has a 45-year-old sister who lives in Cuba and is a physician. Applicant communicates with her 45-year-old sister by telephone “maybe one time a month.” (Tr. 38-40, 53) Applicant’s physician-sister has been on a leave of absence since shortly before her father died to care for him and as of the hearing date had not returned to work. (Tr. 54-56) Applicant’s brother and sister living in Cuba hope to immigrate to the United States to join the rest of her family. (Tr. 56, 60)

Immediate Family Members Living in the United States (not alleged in SOR) – Applicant has a 70 year-year-old mother, who was a career housewife and lives with Applicant and her husband. (Tr. 30-31) Applicant has a 53-year-old sister who lives in the United States. She is a housewife and lives with her significant other. Applicant has frequent contact with this sister and sees her about once a month. (Tr. 32, 34-35) Applicant has a 50-year-old brother who lives in the United States. He is employed as a truck driver, is married, and has two children. Applicant sees this brother and his family frequently. (Tr. 35-36) Applicant has a 49-year-old sister who lives in the United States.

She is employed as a grocery store assistant manager, is married, and has one child. Applicant sees her 49-year-old sister frequently. (Tr. 36-37)

Applicant's husband's mother, older brother, and a large extended family live nearby. Applicant and her husband see their respective families frequently and split their time shared between the two families "[a]bout 50-50." (Tr. 41-42)

Applicant and her husband own a home in the United States valued at \$300,000. They have three automobiles, a boat, checking and savings accounts, and retirement accounts, all of which are in the United States. Applicant's family assets approximate \$520,000 in contrast to having no assets in Cuba. Since Applicant arrived in the United States in 1994, she has only been to Cuba three times and the last time was in 2009 to visit her late grandparents. (GE 1; Tr. 42-46, 49) Applicant does not have a valid Cuban passport and has no plans to visit Cuba in the future. (Tr. 49-53) Applicant exercises all her rights of U.S. citizenship including the right to vote. (Tr. 46-47)

Character Evidence

In addition to working full-time, Applicant spends her discretionary free time with her family and caring for her mother. (Tr. 47) She testified that her loyalty is with the United States as opposed to Cuba. (SOR answer; Tr. 48) She has no political or economic ties to Cuba and she like millions of Cubans came to the United States to start a new life. (SOR answer; Tr. 47-48)

Cuba

Cuba is a totalitarian, communist state, now headed by General Raul Castro. Cuba's totalitarian regime is a one-party system, with the Cuban Communist Party being the only legal political party. For the first time since 1961, the United States re-established diplomatic relations with Cuba on July 20, 2015. The U.S. has long had a broad embargo against trading with Cuba, and Americans traveling to Cuba must first obtain a license to engage in any travel-related transactions involving travel to, from and within Cuba.

According to the U.S. State Department's current guidance on travel to Cuba, Cuba routinely employs repressive methods against internal dissent and monitors and responds to perceived threats to authority. These methods may include physical and electronic surveillance, as well as detention and interrogation of both Cuban citizens and foreign visitors. Human rights conditions in Cuba remain poor, as the Cuban government limits fundamental freedoms, including freedom of expression and peaceful assembly. U.S. citizens visiting Cuba should be aware that any on-island activities may be subject to surveillance, and their contact with Cuban citizens monitored closely.

In recent years, the Cuban government has detained U.S. citizens it suspects of engaging in activities perceived to undermine state security. U.S. citizens traveling to Cuba should be aware that the Cuban government may detain anyone at any time for

any purpose, and should not expect that Cuba's state security or judicial systems to carry out their responsibilities according to international norms.

According to the State Department's 2014 Human Rights Report on Cuba, the principal human rights abuses included those involving the abridgement of the ability of citizens to change their government and the use of government threats, extrajudicial physical assault, intimidation, violent government-organized counter-protests against peaceful dissent, and harassment and detentions to prevent free expression and peaceful assembly. Additional human rights abuses such as short-term, arbitrary unlawful detentions and arrests, selective prosecution, denial of fair trial and travel restrictions continue.

Authorities interfered with privacy, engaging in pervasive monitoring of private communications. The government also placed severe limitations on freedom of speech and press, restricted internet access, maintained a monopoly on media outlets, circumscribed academic freedom and maintained significant restrictions on the ability of religious groups to meet and worship. The government refused to recognize independent human rights groups or permit them to function legally. In addition, the government continued to prevent workers from forming independent unions and otherwise exercising their labor rights.

Most human rights abuses were official acts committed at the direction of the government. Impunity for the perpetrators remained widespread. Cuba has long targeted the United States for intensive espionage activities. Since the 1980's, there have been numerous reported cases of Cuban government-sanctioned and supported espionage against the United States. Most recently, in June 2009, a U.S. State Department official and his wife were arrested and indicted for conspiracy to provide classified information to the Cuban government. The official had access to U.S. Government top secret sensitive compartmented information for many years, and he and his wife served as clandestine agents for Cuba for 30 years, beginning in 1978. In November 2009, both defendants pled guilty to spying charges and were later sentenced to life and 81 months, respectively.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. 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 that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant 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 her security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Foreign Influence

AG ¶ 6 explains the Government's concern:

[I]f the individual has divided loyalties or foreign financial interests, [he or she] 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.

AG ¶ 7 sets out two conditions that could raise a security concern and may be disqualifying 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; and
- (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.

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contact with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001). As a result of superseding events since Applicant's SOR was issued, this concern has limited applicability given the fact that Applicant's father has since passed away. However, the fact that Applicant has a brother and sister living in Cuba with whom she has limited contact creates a potential risk of foreign exploitation, inducement, manipulation, pressure, or coercion meriting a close examination of all circumstances.

The Government produced evidence of these two disqualifying conditions under AGs ¶¶ 7(a) and 7(b) as a result of Applicant's admissions and other evidence presented. The Government established Applicant's brother and sister are resident citizens of Cuba, and that Applicant maintains some contact with them, albeit somewhat limited. The burden shifted to Applicant to produce evidence and prove mitigating conditions. The burden of disproving a mitigating condition never shifts to the Government.

Two foreign influence mitigating conditions under Guideline B ¶ 8 are potentially applicable to these disqualifying conditions:

(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.; and

(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.

Applying commonsense and life experience, there is a rebuttable presumption that a person has ties of affection for, and or obligation to his immediate family. ISCR Case No. 04-07766 at 4 (App. Bd. Sept. 26, 2006); ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002). Notwithstanding, Applicant has demonstrated minimum ties of affection for and or obligation to her brother and sister living in Cuba.

Applicant's brother is not employed by or associated with the Cuban government. In the case of Applicant's sister, she is a physician presumably employed by the Cuban government when she was working. However, Applicant's physician-sister has not worked since she took a leave of absence to care for her father before he passed away. The record does not identify what influence, if any, the Cuban government could exert on Applicant's brother and sister as a result of their being resident citizens of Cuba. However, their presence in Cuba creates concerns under this Guideline. As such, the burden shifted to Applicant to show her relatives in Cuba do not create security risks.

"[T]he nature of the foreign government involved in the case, and the intelligence-gathering history of that government are important evidence that provides context for all the other evidence of the record . . ." See, e.g., ISCR Case No. 04-0776 at 3 (App. Bd. Sept. 26, 2006); see also ISCR Case No. 02-07772 at 7 (App. Bd. Aug. 28, 2003). As noted *supra* under the subheading "Cuba," Cuba routinely employs repressive methods against internal dissent and monitors and responds to perceived threats to authority. These methods may include physical and electronic surveillance, as well as detention and interrogation of both Cuban citizens and foreign visitors.

Applicant denies having "divided loyalties" between the United States and any foreign country. It should be noted Applicant's allegiance to the United States was not challenged in this proceeding. The issue is rather a positional one. Guideline B hinges not on what choice Applicant might make if she is forced to choose between her loyalty to her family and the United States, but rather hinges on the concept that Applicant should not be placed in a position where she is forced to make such a choice. ISCR Case No. 03-15205 at 3-4 (App. Bd. Jan. 21, 2005).

On balance, Applicant has met her burden of showing there is little likelihood that her relationship with her remaining family members in Cuba could create a risk for

foreign influence or exploitation. Applicant's father is no longer alive and her brother and sister either have no or very limited connection with the Cuban government. Applicant's limited relationship with her brother and sister in Cuba do not, in all likelihood, place her in this position.

Applicant is able to receive full credit under AG ¶¶ 8(a) and 8(b). Her brother is not associated with the Cuban government and her physician-sister has not returned to work since she went on family medical leave to care for her late father. Applicant's relationship with her brother and sister in Cuba is minimal when compared and contrasted with her immediate relatives and extended family in the United States. Applicant has "such deep and longstanding relationships and loyalties in the U.S., [sh]e can be expected to resolve any conflict of interest in favor of the U.S." Applicant's brother and sister plan to move to the United States to join their family when feasible.

Applicant's husband, children, mother, two sisters, one brother, and in-laws reside in the United States. Applicant has lived in the United States since 1994, and is fully vested in the United States. She has worked for a defense contractor since 2013. Applicant has substantial property and investments in the United States, and no property or investments in Cuba. She has embraced her life in the United States and as such is a loyal, dedicated, and productive U.S. citizen.

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 (APF) 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) 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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The discussion in the Analysis section under Guideline B is incorporated in this whole-person section. However further comments are warranted.

Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation and behavior changes, etc., the eighth APF, "the potential for pressure, coercion, exploitation, or duress," Directive ¶ E2.2.1.8, is the most relevant of

the nine APFs to this adjudication.¹ In addition to the eighth APF, other “[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.” Directive ¶ E2.2.1. Ultimately, the clearance decision is “an overall common sense determination.” Directive ¶ E2.2.3.

The Appeal Board requires the whole-person analysis address “evidence of an applicant’s personal loyalties; the nature and extent of an applicant’s family’s ties to the U.S. relative to his [or her] ties to a foreign country; his or her social ties within the U.S.; and many others raised by the facts of a given case.” ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007). I have carefully considered Applicant’s family connections and personal connections to Cuba, discussed *supra*, which gave rise to foreign influence concerns.

There is significant mitigating evidence that weighs towards granting Applicant’s security clearance. Applicant immigrated to the United States in 1994 at age 25. Applicant has lived continuously in the United States for the past 22 years. The majority of her immediate family, to include her husband, children, mother, two brothers, and a sister all live in United States. Her family assets consisting of approximately \$520,000 in the United States are substantial in contrast to having no assets in Cuba. Applicant became a U.S. citizen in 2007, has a U.S. passport, and exercises her right to vote in the United States.

Applicant maintains much more frequent contact with her U.S.-based family members than she does with her brother and sister residing in Cuba. Her ties to the United States are far stronger than her ties to two siblings in Cuba. There is no evidence Applicant has ever taken any action which could cause potential harm to the United States. She takes her loyalty to the United States very seriously, and she has worked diligently contributing to the national defense since 2013. The evidence contains no derogatory record evidence about the Applicant.

I considered the totality of Applicant’s family ties to Cuba. Cuba and the United States have an evolving relationship that continues to improve. In the unlikely event that Applicant’s brother or sister in Cuba were subjected to coercion or duress from the Cuban government, I find that because of her deep and longstanding relationships and loyalties in the United States, that Applicant would resolve any attempt to exert pressure, coercion, exploitation, or duress in favor of the United States.

This case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. This analysis must answer the question whether there is a legitimate concern

¹ See ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006) (stating that an analysis under the eighth APF apparently without discussion of the other APFs was sustainable); ISCR Case No. 03-10954 at 5 (App. Bd. Mar. 8, 2006) (sole APF mentioned is eighth APF); ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (remanding grant of clearance because Judge did not assess “the realistic potential for exploitation”), *but see* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 5, 2007) (rejecting contention that eighth APF is exclusive circumstance in whole-person analysis in foreign influence cases).

under the facts presented that Applicant may have divided loyalties or act in a way adverse to U.S. interests or some attempt may be made to exploit Applicant's family members in such a way that this U.S. citizen would have to choose between his pledged loyalty to the United States and those family members. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole-person, I conclude Applicant has mitigated the security concerns pertaining to foreign influence.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met her ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole-person factors" and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude she is eligible for access to classified information.

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: FOR APPLICANT

Subparagraphs 1.a: For Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge