



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



In the matter of:)	
)	
)	ISCR Case No. 07-02690
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: Vincent Almodovar, Personal Representative

January 31, 2008

Decision

LAZZARO, Henry, Administrative Judge

Applicant failed to mitigate the foreign preference concerns that exist in this case due to her family ties to Cuba.

On September 27, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR, which is in essence the administrative complaint, alleges security concerns under Guidelines B (foreign influence) and C (foreign preference). Applicant submitted an undated response to the SOR that was notarized on October 10, 2007. Applicant admitted the SOR allegations contained in subparagraphs 1.b, 2.c and 2.d, denied the allegations contained in subparagraphs 1.a, 2.a, and 2.b, and requested a hearing.

¹ This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

The case was assigned to me on November 20, 2007. A notice of hearing was issued on November 29, 2007, scheduling the hearing for December 18, 2007. The hearing was conducted as scheduled.

The government submitted eight documentary exhibits that were marked as Government Exhibits (GE) 1-8. GE 1 was admitted into the record without objection. Admission of GE 2 into the record was rejected based on my objection. Administrative notice was taken of the contents of GE 3-8 without objection. Department Counsel submitted a document containing written comments on the contents of GE 3-8 for my consideration which was marked as Appellate Exhibit (App. Ex. I) and made part of the record without objection. Applicant testified and submitted one documentary exhibit that was marked as Applicant Exhibit (AE) 1 and admitted into the record without objection. The record was held open to allow Applicant time to submit additional documentation in support of her case. Twenty-nine additional documents were timely received, marked as AE 2-30, and made part of the record without objection. Department Counsel's forwarding memorandum of AE 2-30 was marked as App. Ex. II and made part of the record. The transcript was received on January 4, 2008.

Procedural Matters

At the conclusion of the hearing, Department Counsel moved to amend the SOR by adding a subparagraph 2.e to read "Your step-father is a citizen and resident of Cuba." That amendment was allowed. Applicant thereafter admitted the allegation and stated she did not require additional time to respond to the newly added allegation. The requested amendment was made on the face of the SOR.

Findings of Fact

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is a 28-year-old single woman who has been employed as a technician by a defense contractor since March 2005. Her previous reported employment history consisted of working for different employers as: 1) a circuit assembler from June 1999 to February 2000; 2) an assembler from February 2000 to April 2002; 3) an assembler from February 2004 to October 2004; and 4) an electronics assembler from September 2004 to March 2005. She also reports periods of unemployment from January 1998 to February 2000, and from February 2002 to February 2004. She has never possessed a security clearance.

Applicant graduated high school in Cuba in 1999. She attended college for several years in that country majoring in veterinary studies but did not obtain a degree. She has attended college since immigrating to the United States in 1998, but again has not earned a degree. Although Applicant has never been married, she cohabitated with a native born United States citizen for a period of time in a domestic relationship. She has two sons from that relationship, ages 4 and 3, who reside with her and who receive child support from their father.

Applicant's father immigrated to the United States in or about 1979 during what has become known as the Muriel Boat Lift. He left his family, consisting of his wife and Applicant, in Cuba at the time. He became a United States citizen in April 1994. Applicant's mother began a domestic relationship with a man in Cuba after her husband immigrated to the United States although they never married. Applicant has a half-brother who was born in July 1981 from that relationship. Applicant was raised by her mother's boyfriend, who she considers her step-father, until she immigrated to the United States in 1998. Applicant's mother and this man separated about 5 years ago.

Applicant's entry into the United States was sponsored by her father in 1998. She resided with him for awhile before moving out on her own. She has resided in five different residences, all in the same general area, since immigrating to the United States. Applicant became a United States citizen in June 2004, and obtained a U.S. passport in February 2005.

Applicant sponsored her mother's entry into the United States in 2004. Her mother has permanent resident alien status in the U.S. and intends to become a U.S. citizen when eligible. Applicant's brother has been living in the United States since 2004 on a work permit, but has applied for permanent resident alien status. Applicant's mother is 48 years old, her brother is 26 years old, and both are Cuban citizens. Applicant's mother works for a staffing agency part-time while her brother is employed full-time. They reside with Applicant and her children.

Applicant's maternal grandmother, who is approximately 80 years old, is a citizen and resident of Cuba. Applicant's mother calls Applicant's grandmother about once a month and Applicant speaks with her grandmother when she is present during those calls. Applicant's mother sporadically sends relatively small amounts of money to her grandmother. Applicant's step-father remains a citizen and resident of Cuba. Applicant's brother calls his father about once a month and Applicant also talks to him when she is around during those calls. Applicant has three maternal aunts and one maternal uncle who are citizens and residents of Cuba. She also has one paternal aunt who is a citizen and resident of Cuba.

Applicant visited her relatives in Cuba in 2001, 2003 and 2004. She used a Cuban passport, as required by Cuban law, to enter Cuba during each of those visits. The visit to Cuba in 2004 occurred just a few days after she became a U.S. citizen. Applicant visited with her mother, brother, step-father, her step-father's parents, and her maternal relatives during those visits. She did not visit her paternal aunt. She has not visited Cuba since her mother and brother immigrated to the United States in 2004. Applicant visited the Dominican Republic in 2004 and, not having obtained a U.S. passport until February 2005, apparently used her Cuban passport for that trip.

Applicant renewed her Cuban passport in March 2004, and retained it after becoming a United States citizen because she would need it if she decided to visit Cuba. Cuba considers all Cuban-born U.S. citizens, who left Cuba after 1970, to be solely Cuban citizens, and those persons are required to enter and depart Cuba using Cuban passports. (AE 1) Applicant's Cuban passport does not expire until March 2010. She still possessed the Cuban passport at the time of the hearing but indicated at the hearing she was seeking

guidance on how to dispose of it to obtain a security clearance. After the hearing she submitted a letter from her employer's Facility Security Officer (FSO) (AE 2) verifying she had surrendered the passport to him, that he would retain it in his custody, and he would notify DOHA if the passport is ever returned to Applicant.

Applicant's gross weekly salary is \$852.50. Her mother is paid \$7.15 per hour and, as of December 8, 2007, had earned \$1,833.42 in 2007. Applicant's brother's gross weekly salary is \$440.00. Both pay rent to Applicant. Applicant estimated at the hearing that she had several hundred dollars in a savings account and several hundred dollars more in a checking account. She also estimated she has approximately \$10,000 in retirement accounts and \$1,500 in savings accounts for each of her sons. She does not own any real estate or have any other substantial assets in the United States. Applicant, her mother and her brother do not own any property in Cuba.

Administrative notice is taken of the following information about Cuba:

Cuba is a totalitarian police state, which relies on repressive methods to maintain control. These methods, including intense physical and electronic surveillance of Cubans, are also extended to foreign travelers. Americans visiting Cuba should be aware that any encounter with a Cuban could be subject to surreptitious scrutiny by the Castro regime's secret police, the General Directorate for State Security (DGSE). Also, any interactions with average Cubans, regardless of how well intentioned the American is, can subject that Cuban to harassment and/or detention, and other forms of repressive actions, by state security elements. The regime is strongly anti-American. . . . (GE 7)

The government's human rights record remained poor, and the government continued to commit numerous, serious abuses. The government denied citizens the right to change the government. There were at least 283 political prisoners and detainees at year's end (2006). Thousands of citizens served sentences for "dangerousness," in the absence of any criminal activity. The following human rights problems were reported: beatings and abuse of detainees and prisoners, including human rights activists, carried out with impunity; harsh and life-threatening prison conditions, including denial of medical care; frequent harassment, beatings, and threats against political opponents by government-recruited mobs, police, and state security officials; frequent arbitrary arrest and detention of human rights advocates and members of independent professional organizations; denial of fair trial, particularly to political prisoners; and interference with privacy, including pervasive monitoring of private communications. (GE 8)

Cuba continued to publicly oppose the U.S.-led Coalition prosecuting the War on Terror. . . . The Government of Cuba provided safe haven to members of ETA, FARC, and the ELN, and maintained close relationships with other states sponsors of terrorism such as Iran. . . .

The Cuban government continued to permit U.S. fugitives to live legally in Cuba and is unlikely to satisfy U.S. extradition requests for terrorists harbored in the country. The United States periodically requested that the government return wanted fugitives, and Cuba continued to be non-responsive. (GE 4)

The Castro regime has long targeted the United States for intensive espionage activities. Castro himself told CNN in an interview in 1998, “Yes, we have sometimes dispatched Cuban citizens to the United States to infiltrate counter-revolutionary organizations, to inform us about activities that are of great interest to us. I think we have the right to do this.”

- Ana Montes, a Defense Intelligence analyst, confessed to spying for Cuba for 16 years (from 1985 to the time of her arrest on September 21, 2001). . . .
- Seven Cuban spies, the so-called Wasp Network, were convicted of or confessed to espionage or related crimes in June and September 2001. . . . (GE 3)

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person’s eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guidelines B (foreign influence) and C (foreign preference), with their disqualifying and mitigating conditions, are most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.² The government has the burden of proving controverted facts.³ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁴ although the government is required to present substantial evidence to meet its burden of proof.⁵ “Substantial evidence is more than a scintilla, but less than a preponderance of the

² ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

³ ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

⁴ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁵ ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

evidence.”⁶ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁷ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁸

No one has a right to a security clearance⁹ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁰ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹¹

Analysis

Guideline C, Foreign Preference

Foreign preference is a concern because 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.

Applicant traveled to Cuba three times after she immigrated to the United States in 1998. The last trip occurred in June 2004, just a few days after she became a naturalized U.S. citizen. She used a Cuban passport on each trip as required by Cuban law. Applicant renewed her Cuban passport in March 2004, for use on future trips to Cuba. She did not obtain a U.S. passport until February 2005. Applicant visited the Dominican Republic in 2004, and apparently used her Cuban passport for that trip also. Applicant has not returned to Cuba since her mother and brother immigrated to the U.S., and she does not have any plans on visiting Cuba in the future.

Possession and use of a foreign passport constitute the exercise of a right of foreign citizenship. However, although Applicant still possessed the Cuban passport at the time of the hearing, she subsequently surrendered it to her employer’s FSO. The FSO has agreed on behalf of the employer to retain possession of the passport and notify DOHA immediately if the passport is returned to Applicant.

Disqualifying Condition (DC) 10(a): *exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a*

⁶ ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

⁷ ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

⁸ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

⁹ *Egan*, 484 U.S. at 528, 531.

¹⁰ *Id* at 531.

¹¹ *Egan*, Executive Order 10865, and the Directive.

family member. This includes but is not limited to: (1) possession of a current foreign passport applied at the time of the hearing. Since Applicant has now surrendered the passport to her employer's FSO, she is entitled to application of Mitigating Condition (MC) 11(e): the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated. Additionally, she credibly testified she has no future plans on visiting Cuba now that her mother and brother have immigrated to the United States. Considering all available information, Guideline C is decided for me.

Guideline B, Foreign Influence

Foreign contacts and interests may be a security concern if the individual has divided loyalties or 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.

Applicant's maternal grandmother, step-father, and more distant relatives such as aunts and uncles are citizens and residents of Cuba. Her mother and brother remain citizens of Cuba. Applicant's mother contacts the maternal grandmother by telephone on a regular basis and sends her relatively small amounts of money on occasion. Applicant's brother contacts his father, Applicant's step-father, by telephone on a regular basis. Applicant speaks with her grandmother and step-father when she is present when they are contacted. Applicant visited with her Cuban relatives when she traveled there after immigrating to the United States. Although Applicant has no plans to travel to Cuba in the future, it is probable her mother and brother will find it necessary to go there as their respective Cuban relatives age.

Cuba under the Castro regime has been a totalitarian police state with a lengthy history of human rights abuses almost since the day he took power. It has an almost 50-year history of anti-Americanism that has manifested itself in many ways, including intensive espionage activities, sometimes lethally successful, to infiltrate American organizations and gain sensitive information to be used to the detriment of the United States. The numerous documents submitted for administrative notice by Department Counsel provide every reason to believe the Castro regime would exploit any person, including Cuban citizens and residents, through acts of violence and otherwise in an effort to gain information that might be used against American interests. Applicant's relatives in Cuba, and she and her relatives in the United States through them, are potential targets of that exploitation because of their continuing inter-personal relationships. Applicant's past travel to Cuba does not create any continuing security concern.

DC 7(a): contact with a foreign family member . . . or other person who is a citizen of or resident in a foreign country it that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion; and DC 7(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 apply.

I have considered all mitigating conditions and find that none apply. Specifically, MC 8(a): *the nature of the relationships with foreign persons, the country in which these persons are located . . . 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 . . . and the interests of the U.S.* does not apply because of the obvious close relationship between Applicant and her mother and brother, and their equally obvious close relationship with their respective parents in Cuba, and the nature and history of the Castro regime. Likewise, MC 8(b): *there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person . . . 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.* does not apply for these same reasons along with the relatively short time her mother and brother have been in the United States and the fact her brother has yet to gain permanent resident status.

Although Applicant has minimal contact with her relatives in Cuba, she resides with her mother and brother who have regular contact with their respective parents in Cuba. The vicarious risk of duress, coercion, or exploitation being exerted against Applicant through her mother and brother continues to exist and negates application of MC 8(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.*

Section 7 of Executive Order 10865 provides that 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.” In this case, there is absolutely no reason to doubt that Applicant is a loyal American citizen or suspect she would ever consider doing harm to the interests of the United States. Likewise, there is no reason to suspect that her mother or brother would do anything to harm the interests of the United States. Still, their continuing contacts with Cuba through their remaining relatives in that country, coupled with the nature and history of the Castro regime, create a security concern that has not been overcome.

The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the “whole person” concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying conditions, Applicant has failed to mitigate the foreign influence security concern that exists in this case. She has failed to overcome the case against her in this regard or satisfy her ultimate burden of persuasion. Guideline B is decided against Applicant. It is not clearly consistent with the national interest to grant Applicant a security clearance.

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 C:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraphs 2.a-c:	Against Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	Against Applicant

Conclusion

In light of all 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.

Henry Lazzaro
Administrative Judge