DATE: October 25, 2001

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In Re:

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

Applicant for Security Clearance

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ISCR Case No. 01-03083

**DECISION OF ADMINISTRATIVE JUDGE**

**CLAUDE R. HEINY**

**APPEARANCES**

**FOR GOVERNMENT**

Arthur A. Elkins, Department Counsel

**FOR APPLICANT**

***Pro Se***

**SYNOPSIS**

The Applicant gave false information when he completed his National Agency Questionnaire and during DSS interviews. He failed to provide data on his siblings who were born in a foreign country, his in-laws living in foreign countries, and nine foreign trips. Because of these material omissions, clearance is denied.

**STATEMENT OF THE CASE**

On June 4, 2001, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding[(1)] it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. In a response dated June 17, 2001, the Applicant answered the SOR and elected to have his case decided on the written record, in lieu of a hearing.

On July 18, 2001, the Applicant received a complete copy of the file of relevant material (FORM) dated July 13, 2001, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. The Applicant responded to the FORM on August 2, 2001. Department Counsel had no objections to the Applicant's response to the FORM. I was assigned the case on September 6, 2001. The Department Counsel presented eleven exhibits (Items) in the FORM. The record in this case closed on August 28, 2001.

**FINDINGS OF FACT**

The SOR alleges personal conduct (Guideline E) and criminal conduct (Guideline J). The Applicant neither admits nor denies the allegations of SOR subparagraphs 2 and 2.a., admits some of the allegations and denies the remainder.

The Applicant is 59 years old and has worked for a defense contractor since October 1989. He is seeking to maintain a secret security clearance.

In 1985, the Applicant left defense contractor C1 for a promotion to be a supervisor at defense contractor C2. In April

1988, the Applicant was terminated (Item 11) from defense contractor C2. The 6b(1) letter of termination (Item 11) states, "This facility has learned that the above mentioned subject was terminated due to unethical behavior and conflict of interest." The Applicant and a coworker were planning to create their own company.[(2)] During off hours,[(3)] the Applicant used company C2's computers and test equipment to test their designs on a possible product. (Item 5, page 1) The use of the equipment and testing did not involve company time or money. While working for Company C2, the Applicant stated he "did retain some proprietary technical information from [company C1.] in [his] files." (Item 5, page 2) In his response to the SOR (Item 3) the Applicant stated the material may or may not have been proprietary.

During a December 1996 interview with a Defense Security Service[(4)] (DSS) Special Agent, the Applicant made a false statement that he had left Company C2 because of a loss of contracts and a reduction in force. This comment was not included in a sworn statement made of the DSS interview, but the Applicant, in his answer to the SOR, admitted this allegation.

Since coming to the US from Taiwan in 1969, the Applicant has visited Taiwan 10 times: In 1972 for one month following the completion of his master's degree; in 1976 for one month following his marriage for one month; in the Summer of 1979, for two weeks to visit his sick mother; for two weeks in October 1981, July 1982, October 1983, October 1990, and December 1990 through mid January 1991; approximately one week or less in Taiwan from late December 1991 to early January 1992 and late November and early December 1992.

Between 1979 and 1992, while employed by defense contractors, the Applicant failed to report eight of his trips to Taiwan, as required. In response to the SOR, the Applicant admitted he failed to report his trips to Taiwan to the security office, but denies his action was deliberate. The Applicant states he did not know he had a duty to report his trips (Item 3, page1).

The Applicant in response to question 13 (concerning foreign travel) on his National Agency Questionnaire (NAQ) DD Form 398-2, the Applicant indicated his only foreign travel was one week in December 1991, when he visited his ailing parents. He failed to indicate he had traveled to Taiwan on nine other occasions. (Item 7) During a December 1996 interview with a DSS Special Agent, the Applicant indicated he had traveled to Taiwan on only two occasions since 1969, once in 1976 following his marriage and in 1990 to visit his siblings and his ill father-in-law. (Item 5, page 2) During a July 1997 interview with a DSS Special Agent the Applicant made a false statement stating he had traveled to Taiwan on two or three occasions since he entered the US in 1969. This comment was not included in a sworn statement made of the DSS interview, but the Applicant, in his answer to the SOR, admitted this allegation. The Applicant said he was not truthful concerning his foreign travel in previous interviews. (Item 7, page 1)

In question 12, of the NAQ, the Applicant was asked about his family and associates. He was requested to provided data concerning his father, mother, cohabitant, and children; all brothers and sisters not born in the US; and all relatives or friends of the Applicant, his spouse, or cohabitant are bound by affection or obligation if such persons are residing in, are citizens of, or are employed by or otherwise acting as representatives of any foreign government. The Applicant completed the six lines provided on the form for question 12 (Item 4) which listed his parents (deceased), spouse, son, daughter, and a brother-in-law, but failed to provide data about his brother and two sisters (Items 5 and 6) who were not born in the US and about his spouse's parents who resided in Taiwan. (Item 6) The Applicant did not realize the importance of providing the information. Due to a lack of contact for many years, the Applicant did not know his siblings' addresses or birth dates. The Applicant did not consider his in-laws to be part of his family but of his spouse's family only. (Item 3, page 2)

The Applicant rents a room near to his work, where he resides Mondays through Fridays. In the same house are three individuals the Applicant believes were born on mainland China and who have not yet obtained US citizenship. (Item 7, page 2) When the Applicant first rented the room is unknown. The Applicant's July 1997-sworn statement states, "I now rent a room . . ." When the three individuals became the Applicant's roommates is unknown. In July 1997, he listed one individual as a "present" roommate, one as a "new" roommate, and the other as an "old" roommate. During a December 1996 interview with a DSS Special Agent, the Applicant made a sworn statement he did not maintain contact with foreign nationals.

## POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

**PERSONAL CONDUCT (Guideline E)** The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying also include:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities. (E2.A5.1.2.2.)

3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination. (E2.A5.1.2.3.)

Conditions that could mitigate security concerns include:

None Apply.

**CRIMINAL CONDUCT (Guideline J)** The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. E2.A10.1.1.

Conditions that could raise a security concern and may be disqualifying include:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged. (E2.A10.1.2.1.)

2. A single serious crime or multiple lesser offenses. (E2.A10.1.2.2.)

Conditions that could mitigate security concerns include:

None Apply.

## BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

## CONCLUSIONS

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. Complete honesty and candor on the part of applicants for access to classified information is essential to make an accurate and meaningful security clearance determination. Without all the relevant and material facts, a clearance decision is susceptible to error, thus jeopardizing the nation's security. The nature of Applicant's actions and activities raise serious questions about his judgment and reliability.

In September 1995, when the Applicant completed his Standard Form 86, he gave false answers about his foreign travel and about his family not born in the United States. In response to question 12., the Applicant listed his parents (deceased), his spouse, son, daughter, and brother-in-law but failed to provided the names of his brother and two sisters who were in Taiwan, nor did the Applicant list his father-in-law and mother-in-law. The Applicant's explanation failed to list these individuals is not persuasive and fails to mitigate the government's case. I find against the Applicant as to 1.e.

Since coming to the US in 1969, the Applicant visited Taiwan 10 times and did not report these trips to his employer's security office. I find against

the Applicant as to SOR subparagraph 1.a. When he completed his Standard Form 86 (Item 4) he listed a single trip to Taiwan in December 1991. I find against the Applicant as to SOR subparagraph 1.f. When he discussed his foreign travel with DSS special agents on two occasions, he provided false answers. In December 1996, he wrongfully stated he had traveled to Taiwan on only two occasions since 1969, once in 1976 and again in 1990. In July 1997, he wrongfully stated he had traveled to Taiwan on two or three occasions since coming to the US. The December 1996 DSS sworn statement does not address the Applicant's foreign travel. There is no written evidence concerning foreign travel discussions between the DSS special agent and the Applicant which might have transpired during the December 1996 interview. In the July 1997-sworn statement (Item 7), the Applicant states he told agents in previous interviews he had traveled to Taiwan only two or three times. Again there is no written evidence that the Applicant falsified material facts during the interview about his foreign travel. However, the Applicant has admitted this allegation in his response to the SOR.

There is no written evidence that during a December 1996 interview with the DSS Special Agent, the Applicant said he had left his job at company C2 due to a reduction in force when the company lost contracts. The sworn statement (Item 5) completed on that date does not address the Applicant leaving his job at company C2. However, the Applicant has admitted this allegation in his response to the SOR.

Since the information requested on the form was pertinent to a determination of judgment, trustworthiness, or reliability, MC 1[(5)] does not apply. Although the Applicant later revealed to a DSS special agent the full extent of his foreign travel, foreign born siblings, and why he left company C2, these admissions were not a prompt, good-faith efforts to correct the falsification before being confronted with the facts. The Applicant failed to provide accurate accounts of his foreign travel and foreign born siblings until his second interview and sworn statement (Item 7). Therefore, MC 3[(6)] does not apply. This omission of material facts was not caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided, MC 4,[(7)] or a refusal to cooperate based on legal advice, MC 5.[(8)] The Applicant's falsifications occurred on his NAQ, interviews with DSS, and in two sworn statements. MC 2[(9)] does not apply because the falsifications were not isolated, were recent, and the individual did not subsequently provide correct information until questioned by the DSS. SOR Subparagraphs 1.g., 1.i., and 1.j., are resolved against the Applicant.

The record does not establish whether the material the Applicant retained from company C1 was proprietary information. In a sworn statement (Item 5, page 2) the Applicant states the material was proprietary technical information but in his response to the SOR (Item 3) he stated the material may or may not have been proprietary. No additional evidence was presented by the government on this issue. Since it is unclear if the material was or was not proprietary, I find for the Applicant as to SOR Subparagraph 1.b.

The Applicant was planning on creating his own company and used company C2's computers, testing equipment and copiers but the record is unclear the use of this equipment was authorized. The Applicant was terminated from company C2 (Item 11) for "unethical behavior and conflict of interest," but that termination notice, standing alone, does not prove his use of equipment was unauthorized. I find for the Applicant as to SOR Subparagraphs 1.c. and 1.d.

The record is unclear when the Applicant started residing in the same house with foreign nationals. In a December 1996 DSS interview the Applicant stated he did not maintain any contact with foreign nationals and during a July 1997 interview (Item 6) the Applicant gave the names of three foreign nationals living in the same house he occupies Monday through Friday.) When the Applicant first rented the room is unknown. Although alleged the Applicant rented his room in 1994, no proof has been presented as to when the Applicant first rented the room. The Applicant's July 1997 sworn statements states, "I now rent a room . . ." When the three individuals became the Applicant's roommates is also unknown. In July 1997, the Applicant lists one individual as a "present" roommate, one as a "new" roommate, and the other as an "old" roommate. Because it has not been proven the three individuals were roommates of the Applicant when he completed his December 1996-sworn statement, I find for the Applicant as to SOR Subparagraphs 1.h.

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. The Applicant gave false answers on his NAQ, in a December 1996-sworn statement and during two separate interviews with the DSS in December 1996 and July 1997. By certifying falsely that his responses were true, complete and correct to the best of his knowledge and belief, and made in good faith, the Applicant violated Title 18, Section 1001[(10)] of the United States Code. His false answers are felonious conduct under the laws of the United States.

Because of this serious misconduct, there should be compelling reasons before a clearance is granted or continued. Candor is important, and the Applicant was unable or unwilling to be candid about his background. The period of time from the most recent falsification--July 1997--to the closing of the record, is insufficient to mitigate the Government's case. Accordingly, subparagraphs 2. and 2.a. are resolved against the Applicant.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

## FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7. , of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For Against the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: For the Applicant

Subparagraph 1.i.: Against the Applicant

Subparagraph 1.j.: Against the Applicant

Paragraph 2 Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

## DECISION

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 the Applicant.

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**Claude R. Heiny**

**Administrative Judge**

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.

2. The Applicant registered a company name, had letter head printed, made a business plan (Item 10), and sought venture capital. (Item 8, page 2) The Applicant alleges company never worked out, but in October 1987 a $3,000.00 check (Item 10)was issued to one of the employees for partial

payment on 88 hours of accumulated consultation fees..

3. The Applicant would stay late or come in on the weekends. (Item 8, page 4)

4. Defense Investigative Service (DIS) is now known as the Defense Security Service (DSS). Through out this decision reference will be to the DSS and not as DIS, which it was at the time of the interviews.

5. E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability.

6. MC 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. E2.A5.1.3.3.

7. E2.A5.1.3.4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided.

8. E2.A5.1.3.6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information.

9. E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily.

10. Title 18, Section 1001 of the United States Code provides: (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false; fictitious or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than five years or both. Such an offense is classified as a Class D felony in accordance with 18 U.S.C. §3359(a); with regard to the maximum fine authorized ($250,000), see 18 U.S.C. §3571.