DATE: December 10, 2001

In re:

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

Applicant for Security Clearance

ISCR Case No. 01-07053

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a US citizen whose resident spouse is a citizen of Trinidad, and whose mother-in-law and father-in-law residents are citizens of Trinidad, knowingly and wilfully concealed his felony arrest history in a second security clearance application, after being credited with mistake in making like omissions in an earlier security clearance application. Besides his deliberate felony arrest omissions, he misstated the foreign citizen status of his spouse in his latest security clearance application and overall fails to mitigate security concerns associated with his demonstrated lapses in judgment and trustworthiness and risks of foreign influence arising in connection with his father-in-law's holding a high ranking defense post in the government of Trinidad. Clearance is denied.

STATEMENT OF THE CASE

On July 12, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on August 6, 2001 and requested a hearing. The case was assigned to this Administrative Judge on September 20, 2001and was scheduled for hearing. A hearing was convened on October 23, 2001, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of six exhibits; Applicant relied on one witness (himself) and no exhibits. The transcript (R.T.) of the proceedings was received on October 31, 2001.

STATEMENT OF FACTS

Applicant is a 32-year old locksmith who owns and operates a lock and safe company having defense contracts with the Government and seeks to retain his clearance, which he has held since 1997.

Summary of Allegations and Responses

Applicant is alleged to have falsified his Security Clearance Application (SF-86) of May 5, 1996, by omitting his two arrests, one in March 1981on charges of grand larceny and seven counts of criminal possession of a forged instrument, to which he pleaded guilty to petit larceny and was placed on three years of probation, and the other in August 1988 for assault with a dangerous weapon (a felony) and destruction of property over $200.00 (also a felony), which were no-papered. Also, Applicant is alleged to have falsified his SF-86 of May 15, 1999, by (1) again omitting his subject 1981 and 1988 arrests and later explaining in a follow-up DSS interview in January 1997 that he misread the felony question, and (2) misrepresenting his spouse's citizenship as US, instead of being a non-naturalized US citizen of Trinidad and Tobago citizenship.

Additionally, Applicant is alleged to have (a) a spouse who is a citizen of Trinidad residing in the US, (b) a mother-in-law and father-in-law who are citizens of Trinidad residing in Trinidad and (c) a father-in-law who is a high-ranking defense official for the government of Trinidad.

For his response to the SOR, Applicant denied most of the allegations; he claimed to believe his spouse's having an issued green card was the same as being a US citizen. He claimed, too, that his in-laws, while citizens and residents of Trinidad at all times, were not his in-laws in 1997 when he spoke with the DSS agent.

Relevant and Material Factual Findings

The allegations covered in the SOR and admitted to by Appellant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

When completing his SF-86 in May 1996, Applicant omitted his two felony arrests in 1981 and 1988 when responding to question 23a of the security form. He attributes mistaken understanding to his failure to list the arrests, claiming he misread the question to call for convictions, not merely arrests and, alternatively, he needed only to list arrests within the previous seven years. While apologizing for his mistake in omitting the arrests, he continues to deny any attempt to mislead the Government about them (*see* R.T., at 23-26, 35).

When initially confronted by a DSS agent in January 1997 about his 1981arrest omission, Applicant replied that he had mistakenly misread the felony question in his 1996 SF-86 application and had mistakenly thought he only had to list felony arrests within the past seven years (*see* R.T., at 38-39). Even in this interview, he continued to omit his 1988 altercation arrest, again attributing his omission to memory lapse. When afforded another opportunity to list his prior felony arrests of 1981 and 1988 (some thirty months later, in May 1999), Applicant again omitted the same two felony arrests: this time in the updated SF-86 he was asked to complete electronically and submit. He assigned virtually the same explanations for his omissions of these covered felony arrests: He either forgot about them or assumed the question applied to convictions and/or arrests more than seven years old (*see* R.T., at 38-39).

Recognizing that misunderstandings can arise when it comes to identifying and discerning SF-86 questions, Applicant's repeated explanations following his virtually identical omissions and explanations concerning his respective 1981 and 1988 arrest convictions cannot be fully reconciled with tenets of common sense and reason. He is both educated and experienced in the handling of security clearance applications with his defense-related company and could not reasonably be expected to make the same omission mistakes again after being properly corrected by a DSS agent in January 1997 as to the 1981arrest (but apparently not as to the 1988 arrest).

Credited with making innocent omission mistakes the first time he was asked to complete an SF-86 (in 1996), Applicant cannot be absolved of falsification for making the same omissions in his updated SF-86. By the time he was asked to complete a second SF-86 (this one in May 1999) he had been fully briefed by DSS on the coverage reach of the question inquiring about his prior felony arrests (*see* R.T., at 34, 54). Failing again to list his felony arrests in his May 1999 SF-86 (both his 1981 and 1988 arrests), Applicant cannot avert drawn inferences of knowing and willful (to include reckless disregard for the truth) omissions. DSS confronted Applicant about his omitted felony arrests in a follow-up

DSS interview a year later (*i.e.,* in May 2000) before he acknowledged his omissions of them.

Applicant's failure to list his spouse as a citizen of Trinidad and Tobago, and not the US, in his submitted security clearance application (SF-86), cannot be reconciled either with his explanations in his answer to the SOR that he assumed his spouse's holding a green card to access a touring dance troupe in the US equated to her holding US citizenship. With Applicant's college education and experience in owning a local locksmith business at his disposal, his explanations about his wife's country status defy reason and common sense. When asked at hearing, he admitted to his being wrong about the green card comparison and to knowing at the time she was not a US citizen (R.T., at 46-47). So, on the basis of his collective accounts, education and experience, he cannot be credited with any probative basis for accepting his claims that his misrepresentation of her citizenship was innocent, and inferences of knowing and wilful (to include reckless disregard for the truth) omission are necessarily drawn. Only when confronted by a DSS agent in his follow-up May 2000 interview did Applicant acknowledge his spouse's Trinidad citizenship and membership in a US dance troupe that required a green card (*see* R.T., at 31).

Applicant married his girlfriend, a citizen and resident of Trinidad, in 1998 following a brief courtship (*see* R.T., at 41). Though a permanent resident of the US, she has retained her Trinidad citizenship and has made no known effort to become a naturalized US citizen. Applicant's mother-in-law and father-in-law are also Trinidad citizens who continue to reside in Trinidad. His father-in-law is a high-ranking defense official for the government of Trinidad, who expects to retire in June 2002 (*see* R.T., at 40, 47). Before assuming his current defense post, he held a post with the Trinidad Embassy. Aware that Applicant is involved with DoD contracts and security clearances, Applicant's father-in-law never inquires into Applicant's business or discusses politics with the latter. Applicant last visited his in-laws in 2000, and speaks infrequently to them telephonically. By contrast, his spouse speaks to her parents weekly (*see* R.T., at 41). Applicant knows of no reason why either his spouse or in-laws could be at risk to pressure or influence to elicit classified information from Applicant (*see* R.T., at 52-53).

With his lock business, Applicant is responsible for completing his own SF-86 forms. Both he and his brother (who is the company president) own and run the business, which by all accounts has provided good service to federal agencies having locksmith needs.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Personal Conduct

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Disqualifying Conditions:

DC 2 The deliberate omission, concealment, falsification or misrepresentation 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.

Mitigating conditions: None.

Foreign Influence

The Concern: A security risk may exist when an individual's immediate family, including co-habitants, and other persons to whom he or she may be bound by affection, influence, or are obligation *are not* citizens of the United States *or may* be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Disqualifying Conditions:

DC 1: An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.

DC 3: Relatives, co-habitants, or associates who are connected with any foreign government.

Mitigating Conditions:

MC 1: A determination that the immediate family members are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the persons involved and the United States.

MC 3: Contact and correspondence with foreign citizens are casual and infrequent.

Burden of Proof

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant comes to these proceedings with a number of security-significant omissions in the security clearance applications he completed in 1996, and again in 1999, as well as foreign influence concerns over the foreign citizenship status of both his spouse and father-in-law: a high ranking defense official for the government of Trinidad.

Applicant's SF-86 omissions

In both of his security clearance applications, Applicant omitted any references to his prior felony arrests in 1981 and 1988, respectively. Notwithstanding his being interviewed by a DSS agent in 1997 and confronted with one of the arrests, he repeated the omissions in his updated 1999 SF-86 and offered the same explanations for his omissions. Only with respect to his 1996 SF-86 were his explanations convincing enough to avert inferences of knowing and wilful concealment.

Besides his prior felony arrest omissions, Applicant concealed the real citizenship status of his spouse, and inferentially the foreign status and senior political station of his father-in-law: a foreign citizen of Trinidad who holds a high ranking defense post with the government of Trinidad when Applicant executed his updated SF-86 in 1999. Given his level of education and experience, his furnished explanation that he equated his spouse's holding of a green card to work in the US with US citizenship is simply not credible: a comparison Applicant himself acknowledged to be wrong at hearing. What is more, Applicant had considerable incentive to conceal his spouse's Trinidad. For were he to acknowledge her true citizenship, he would be confronted with answering inquiries about the status of her father: a high ranking defense official in the Trinidad government.

Motivation is the key here and provides the all too critical backdrop by which Applicant's omission explanations must be assessed, both in the way he approached his 1996 SF-86 and his ensuing 1999 SF-86, after having been previously confronted with his 1981 arrest in a 1997 DSS interview. Both reason and motivation converge here to impute deliberate concealment of his spouse's citizenship status, Applicant's insistent denials notwithstanding.

Even obvious omissions of material facts (to include felony arrests and the citizenship status of an applicant's spouse) may be extenuated where circumstances indicate the declarant was under some mistaken impression or understanding when he executed a government form (such as an SF-86) or signed off on a deficient signed, sworn statement. *Cf. Raybourne v. Gulf Atlantic Towing Corp.*, 276 F.2d 90, 92 (4th Cir. 1960). Both the E.2.2 factors of the Directive's Change 3 amendments and relevant case authorities underscore the importance of motive and subjective intent considerations in gauging knowing and wilful behavior. *Cf. United States v. Chapin*, 515 F.2d 1274, 1283-84 (DC Cir. 1975); *United States Steinhilber*, 484 F.2d 386, 389-90 (8th Cir. 1973); *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963). Applicant's omissions herein reveal manifest mistaken impressions only with respect to his 1996 SF-86; mistake cannot be attributed to his making the same omissions all over again in his updated SF-86. His education and intelligence provide him no reasonable cover for his claiming misunderstandings about the nature or timing of his arrests, or his spouse's citizenship, when completing his updated SF-86.

Mitigation is not available to Applicant either under the facts determined in this record. While deliberate omissions might be mitigated under the Adjudicative Guidelines for personal conduct by MC 2 (showing of isolated, non-recent omissions have since been corrected) and MC 3 (prompt, good faith corrections), Applicant can not reasonably claim any of the mitigation benefits made available by these two mitigating conditions. His omissions were neither isolated nor dated. Credited with being mistaken initially when he omitted his 1981 and 1988 arrests from his 1996 SF-86, he acknowledged only one of the arrests (the 1981 arrest) when initially confronted in 1997.

Further, after being confronted by the interviewing DSS agent in 1997, Applicant repeated his arrest omissions in his updated SF-86 three years later, in addition to misstating his spouse's true citizenship. None of these ensuing omissions were corrected before his interview by DSS in May 2000, and none of his corrections in this ensuing interview qualify as either prompt or free of confrontation. With no indications in the record of Applicant's coming forward in a prompt fashion to voluntarily correct his material omissions and misstatement, he can take no advantage of any of the available mitigating conditions covered by the Adjudicative Guidelines for personal conduct. Although, he is able to surmount the Government's claims of deliberate concealment with respect to the omissions he made in his 1996 SF-86, by convincingly demonstrating mistake.

Taking into account all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to sub-paras. 1.b through 1.c of Guideline E. Only as to sub-paragraph 1.a, where Applicant is credited with mistake in omitting his felony arrests from his 1996 SF-86, does he avert adverse conclusions under Guideline E.

Foreign Influences Issues

Besides falsification concerns, Government claims security concerns over the foreign citizenship/residence risks posed by the status of Applicant's spouse, mother-in-law and father in-law: each either a citizen of Trinidad, or citizen/resident of Trinidad. While his spouse resides with Applicant in the US under a green card that enables her to work with a US dance troupe, his mother-in-law and father-in-law are citizens and residents of Trinidad. Most important, his father-in-law is a high ranking defense official for the Trinidad government. Even though, the father-in-law has not taken any interest in Applicant's business to date, he remains in a position to influence Applicant about matters classified. That Applicant's father-in-law could exert influence or be perceived to pose such a risk was inferentially reason for Applicant to misstate his spouse's citizenship in the SF-86 he completed in May 1999.

Applicant's spouse and in-laws are considered to present potential security risks covered by Disqualifying Conditions (DC) of the Adjudicative Guidelines for foreign influence: DC 1 (close ties of affection with citizen or resident of a foreign country) and DC 3 (relative associated with or connected with foreign government). This is because of not only the current foreign citizenship status of Applicant's spouse, and foreign citizenship/residence status of his in-laws, but also because of his father-in-law's high ranking political status in Trinidad. This high status in a foreign government (regardless of size or strategic importance in the world) creates potential for risks of coercion or influence that could compromise classified information under Applicant's possession and/or control.

Foreign influence security security risks extant as the result of Applicant's having a spouse and her parents of demonstrated affection in Trinidad are very real ones, even if they cannot be clearly identified by quantitative means. While Trinidad is a small Caribbean country with no recent known history of hostage taking or disposition for exerting pressure or influence to obtain classified information, its identity as either a friendly or hostile (while relevant) state is not dispositive of the existence or not of extant security risks posed by having a family member in a key foreign government post.

Because of the citizenship status of Applicant' s spouse and residence/citizenship status of his mother/father-in-laws in Trinidad, and current political standing of his father-in-law, associated security risks are made especially difficult to carefully qualify or discount. Potential risks of pressure or influence of Applicant become unacceptable ones under the current circumstances, for so long as Applicant's father-in-law remains a high ranking defense official in the Trinidad government and perforce susceptible to pressuring or influencing Applicant directly or indirectly through his spouse or by independent means. Applicant, accordingly, may not claim the mitigation benefits of either MC 1 (presence of immediate family in host country poses no unacceptable security risk) or MC 3 (contact is casual and infrequent) of the Adjudicative Guidelines. Overall, any potential security concerns attributable to Applicant's having a spouse with Trinidad citizenship and in-laws who are citizens and residents of Trinidad (with the father's holding a high ranking defense post in the government of Trinidad) are insufficiently mitigated at this time to permit safe predictive judgments about Applicant's ability to withstand risks of exploitation and pressure attributable to his Trinidad-related familial relationships. Unfavorable conclusions warrant with respect to the allegations covered by Guideline B.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance.

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

GUIDELINE B: (FOREIGN INFLUENCE): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

Sub-para. 2.c: AGAINST 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge