

DATE: December 7, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-11943

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Erin C. Hogan, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

Lori S. Rothfeld, Esq.

Michael L. Subin, Esq.

**SYNOPSIS**

Applicant participated in a marriage ceremony with an illegal immigrant and then lived with her. When she moved to another state, he aided her in misleading the INS by failing to correct her statement that she was living with Applicant. Clearance is denied.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 9 June 2003, DOHA issued a Statement of Reasons [\(1\)](#) (SOR) detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 30 July 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 1 October 2004. On 23 November 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 2 December 2004.

**FINDINGS OF FACT**

Applicant is a 29-year-old U.S. citizen employed by a defense contractor. He graduated from high school and attended technical school for one year. Applicant's father was born in the U.S. His mother was born in Trinidad and Tobago, but is now a U.S. citizen.

In October 1997, Applicant's mother put him in touch by telephone with S, the daughter of a friend. S was a citizen of Trinidad and Tobago living in Canada. Applicant met S in person during June 1998 in the U.S. In August 1998, Applicant told S's father that he wanted to marry her. Applicant knew S was in the U.S. illegally. He assured S's father that he would make her legal. The couple had a marriage ceremony in October 1998 in a mosque in the U.S. They never

obtained a marriage license. Tr. 30.

The couple lived together until August 2001 and had a son. Applicant sponsored S for legal immigrant status. In August 2001, the couple separated and S moved to another city. Applicant has custody of their son. On occasion, S returns to visit their son.

On 17 October 2001, Applicant completed a security clearance application (SCA). Question 9 asked Applicant to list his relatives and associates. Applicant listed his mother and father, but did not list his son or his "in-laws."

In February 2002, the couple was interviewed by an Immigration and Naturalization Service (INS) agent concerning S's application for immigrant status. The agent asked Applicant where he lived. He gave the agent the address. The agent turned to S and asked her where she lived. Although she no longer lived with Applicant, she gave his address. Tr. 32. Applicant did not attempt to correct the statement.

In March 2002, Applicant met with a Defense Security Service (DSS) agent about his application for a security clearance. In a signed, sworn statement, Applicant claimed he did not tell the INS agent that S did not live with him because he felt threatened by S and her brother for his and his son's safety. Ex. 2 at 3. He did not list S's parents on his SCA because he "did not have the information required at the time." *Id.* at 4. He did not make any effort to obtain the information because he feared "they could have used the information to manipulate [him]. They could call [him] up and try to extort something from [him]." *Id.*

In his Answer to the SOR, Applicant claimed "he was not fearful of [S's] brother, but if he were then he would claim that he was acting under duress." Answer at 2. He also asserted "he had separated at the time he completed his paperwork for the clearance and he felt that there was no hope for reconciliation. Consequently, he did not feel that it was necessary or relevant to list [S's] parents as Relatives and Associates." *Id.*

In his testimony at the hearing, Applicant claimed he failed to list S's parents in his SCA because of a glitch in the computerized security clearance program. Tr. 34.

## POLICIES

"[N]o 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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that 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 disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines 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. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* 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 his security clearance." ISCR Case No. 01-20700 at 3.

## CONCLUSIONS

### **Guideline B--Foreign Influence**

In the SOR, DOHA alleged Applicant married S, a citizen of Trinidad and Tobago (¶ 1.a) and aided S in staying in the U.S. under fraudulent circumstances (¶ 1.b). A security risk may exist when an applicant's immediate family, or other persons to whom he may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Directive ¶ E2.A2.1.1.

Department Counsel conceded that the allegation in ¶ 1.b was not correctly alleged under the foreign influence security concern and recommended a finding for Applicant. The Government's evidence and Applicant's admissions concerning the allegation in ¶ 1.a constitute substantial evidence of a potentially disqualifying condition under Guideline B--an immediate family member or person to whom Applicant has close ties of affection or obligation--S--is a citizen of a foreign country. DC E2.A2.1.2.1.

Applicant claims he was never legally married to S. He asserts that, when he tried to file for divorce, he discovered the marriage ceremony was performed by someone who was not authorized to do so under the law of the state in which the ceremony was performed. He provided no evidence to substantiate the claim. Even if S was never married to Applicant, he admits he loved her. Thus, he had close ties of affection for and obligation to her. The depth of their relationship is demonstrated by the fact they had a son together and, after she left him and moved to another state, Applicant allowed her to mislead the INS into believing she was still living with him. Although they have since separated, under the circumstances, Applicant failed to mitigate the security concerns raised by his relationship with S and her family.

### **Guideline E--Personal Conduct**

In the SOR, DOHA alleged Applicant aided his spouse in remaining in the U.S. by deceiving the INS (¶ 2.a) and falsified material facts on his SCA by failing to list his in-laws (¶ 2.b). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government established by substantial evidence that Applicant aided S in deceiving the INS by failing to advise the INS agent that S no longer lived with him. This is reliable evidence of Applicant's questionable judgment and lack of candor. DC E2.A5.1.2.1. Such conduct increased Applicant's vulnerability to coercion or exploitation. DC E2.A5.1.2.4.

Applicant claims he felt threatened by members of S's family because they were not in the U.S. legally and did not have "traceability." Tr. 32. He testified he thought they knew every move he made.

Applicant claims he telephoned and wrote the INS to tell them S did not live with him. Possible mitigating conditions are MC E2.A5.1.3--the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts--and MC E2.A5.1.3.5--the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress. But Applicant provided no corroboration of his reported attempts to contact the INS. Telling the INS would have been a positive step to reduce or eliminate his vulnerability. Although he claims to have done so before he was confronted by the INS, it is not clear when he did so or what his motive was. The evidence suggests that, if he did contact INS, it was only after being confronted by the DSS agent. After considering all of the evidence I conclude Applicant has not mitigated the personal conduct security concern. Applicant demonstrated he is subject to duress such that he would choose his own personal safety over the protection of classified information.

Applicant provided three different reasons for not listing his "in-laws" in his SCA. He told the DSS agent he "did not have the information required at the time." In his answer to the SOR, he claimed he had separated from S and "did not

feel it was necessary or relevant" to list them. Yet at the hearing he testified it was a computer glitch that would not let him list his "in-laws." After carefully reviewing all of the evidence in this case, I conclude Applicant's explanations are not credible. He failed to mitigate the security concern raised by his failure to list his "in-laws" in his SCA.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: For Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

### **DECISION**

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).