

DATE: June 18, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-13477

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Marc Curry, Department Counsel

#### **FOR APPLICANT**

Robin C. Lemonidis, Esq.

### **SYNOPSIS**

Applicant, a US citizen by birth, has encountered two alcohol-related incidents in 2000 and 2001, respectively, which he has mitigated by a successful overall showing the incidents are unlikely to be repeated in the foreseeable future. Another claimed security risk is Applicant's sister who resides in Costa Rica. However, Applicant's sister is not an unmanageable risk to coercion, pressure or compromise by virtue of any continued ties to Costa Rico: a country with a constitutional democracy whose legal traditions include respect for human rights and the rule of law. Clearance is granted.

### **STATEMENT OF THE CASE**

On February 5, 2003, 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 March 4, 2003, and requested a hearing. The case was assigned to this Administrative Judge on March 28, 2003. The hearing was scheduled for April 23, 2003, and convened on that date 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 four exhibits; Applicant relied on two witnesses (including himself) and ten exhibits. Transcripts (R.T.) of the proceedings were received on May 2, 2003.

### **PROCEDURAL ISSUES**

Before the close of the hearing, the Government requested official notice be taken of a State Department consular information sheet covering Costa Rica. There being no objections, and good cause being shown, official notice was taken of the consular information sheet.

## STATEMENT OF FACTS

Applicant is a 38-year old software engineer for a defense contractor who seeks to retain his security clearance, which he has held since 1987.

### **Summary of Allegations and Responses**

Applicant is alleged to have been involved in two alcohol-related arrests: one in January 2000 on charges of DuI (a misdemeanor), speeding, and spinning tires, to which he pleaded no contest to reckless driving, was fined and ordered to attend alcohol awareness and victim's awareness programs, and a second in June 2001 on charges of DuI and speeding, on which he was convicted of DuI, and sentenced to 30 days of house arrest and 12 months of probation, as well as having his license suspended for 6 months and being subjected to various orders: performance of 50 hours of community service, impounding of his vehicle for 10 days, attendance of other alcohol and victim's awareness programs and submission to random alcohol/drug screening.

Additionally, Applicant is alleged to have a sibling residing in Costa Rica to which she is bound by affection.

For his response to the SOR, Applicant admitted each of the covered allegations while denying any of the conduct attributable to him reflects questionable judgment, unreliability and untrustworthiness, or increased vulnerability to coercion, exploitation, or pressure. Applicant claimed no ongoing drinking problems, completion of all ordered treatment programs, a positive prognosis from a licensed psychologist, and outstanding work performance. Further, Applicant claimed infrequent contact with his sister in Costa Rica, but no legal, fiscal or other legal obligations to her.

### **Relevant and Material Factual Findings**

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

Following his separation from his spouse and young daughter in 1999, Applicant began socializing with work colleagues in bars after work. During a session of night sailing with friends (in celebration of his birthday) in the evening of January 29, 2000, he consumed between three and four beers. While driving home from the event, he was pulled over by local police for speeding. When the officer smelled alcohol on Applicant's breath, he asked him to submit to a field sobriety test. Applicant performed the test and failed the portion of the test requiring him to walk in a straight line and return. Asked by the investigating officer to submit to a Breathalyzer, Applicant refused and was arrested for DuI (*see* R.T., at 35). At his court hearing in March 2000, Applicant pleaded innocent to his DuI offense. He pleaded no contest to a charge of reckless driving, was fined and ordered to attend alcohol and victim's awareness programs. Applicant is credited with satisfying the court's conditions. Even though he pleaded no contest to a reckless driving charge, his pre-arrest drinking was sufficient to classify the incident as alcohol-related.

In June 2001, Applicant was arrested again: this time for a DuI offense, in which he was charged with both DuI and speeding. He was later found guilty by the convening jury and, in turn, was sentenced to thirty days of house arrest and 12 months of probation. The court also fined him in the amount of \$545.50, suspended his license for six months, ordered him to perform 50 hours of community service, ordered his vehicle impounded for ten days, ordered him to attend another alcohol awareness program, and ordered him to submit to random alcohol/drug screening. Applicant is credited with successfully completing each of his probation conditions and receiving an early release from probation (*see* exs. H, I and J). During his four months of ordered alcohol counseling, he regularly attended psycho-educational groups and weekly AA meetings, without ever identifying with any of the AA members in his chapter. Applicant's counselor could identify no substance abuse problem or other psychological or interpersonal problem of his.

Since his June 2001 arrest, Applicant has encountered no further problems with law enforcement authorities and confines his drinking to occasional drinking at home (*see* exs. C and D; R.T., at 45, 78-81, 95-97), never receiving any complaints of excessive drinking. He no longer attends bars and spends most of his evenings at home with his girlfriend. With his relationship with his daughter and former wife much improved, he spends his weekends now with his daughter (*i.e.*, every other weekend), often taking her horseback riding and to events. Having a very heavy work-related travel

schedule, Applicant devotes most of his off-duty time with his daughter and girlfriend. His alcohol counselor characterizes Applicant as a low risk for future alcohol abuse (*see ex. A*). He credits his prognosis to Applicant's life-style changes, which includes increased focus on his parenting responsibilities for his young daughter (*see ex. A; R.T., at 46-47*).

Applicant is a highly regarded software engineer with his employer. Since his original company merged with his current employer in 1994, he has regularly received outstanding evaluations and promotions and has been cited with certificates of excellence.

Applicant (himself a US citizen by birth) has a sister who resides in Costa Rica. He does not have a particularly close relationship with his sister and has little contact with her: He communicates with her two to three times per year by either e-mail or telephone. He has no legal or fiscal relationship with her and has visited her just twice since she moved to Costa Rica: last in September 2000 for her wedding. Costa Rica is a constitutional democracy with a long history of respect for human rights and the rule of law (*see US State Department Consular Information Sheet* (January 2003)).

### **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) require that each decision be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2. In making their decisions, judges must 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 E2.2 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:

#### **Criminal Conduct**

*The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability or trustworthiness

#### **Disqualifying Conditions:**

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

#### **Mitigating Conditions:**

MC 6 There is clear evidence of rehabilitation.

#### **Personal Conduct**

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 5 A pattern of dishonesty or rule violations.

**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.

### **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.

### **Burden of Proof**

By virtue 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 decision, appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's suitability 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 by substantial evidence any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing on the applicant's eligibility to obtain or maintain a security clearance. The required showing of materiality, 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 accessible 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 proof 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 is a highly regarded software engineer who became involved in two alcohol-related arrests and convictions following separation from his wife and young daughter in 1999. With colleagues from work, he began frequenting local drinking establishments after work. His two alcohol-related arrests and charges came in January 2000, and again in June 2001. With no prior history of alcohol abuse in his record, these two alcohol-related incidents were characterized as criminal incidents in the SOR; although, they represent criminal actions and alcohol-related incidents.

Because the underlying alcohol-related incidents reflect both criminal conduct and judgment lapses, they raise security concerns under both the criminal conduct and personal conduct guidelines of the Directive's Adjudicative Guidelines. Both Disqualifying Condition (DC) 1 (alleged or admitted criminal conduct) and DC 2 (single serious crime or multiple lesser offenses) of the criminal conduct guidelines apply to the facts of this case. While neither of these offenses reflect classic rule violations as they are commonly understood in the private and public domains, they do reflect material judgment lapses of the nature covered by the predicate security concerns of Guideline E, and to this extent are covered by this personal conduct guideline.

Assessment of Applicant's alcohol-related criminal conduct must be made on the basis of a review of the entire evidentiary record developed to date, not merely the information developed with respect to his identified alcohol abuse and ensuing counseling and abstinence efforts. In making an overall assessment of Applicant's clearance eligibility, major emphasis must be accorded his most recent drinking history, job performance and support he receives from his supervisor and work colleagues. In Applicant's case, his support base remains very strong among those who know him professionally and personally.

By his actions and improved understanding, Applicant demonstrates he has taken the necessary restorative and corrective measures in his personal affairs to ensure that he does not repeat the same or similar judgment lapses associated with his prior problems with alcohol abuse. His mitigation efforts not only reflect important curtailing of his drinking (without any further reports of legal problems), but some sustaining positive steps (such as devoting his off-work time to his daughter and girlfriend) to ensure that he does not experience any recurrent alcohol abuse relapses in the future.

Applicant's demonstrated efforts to remedy his judgment lapses associated with DuI arrests enable him to take advantage of one mitigating condition (MC) of the Adjudication Guidelines for criminal conduct: MC 6 (clear evidence of successful rehabilitation). Although there are no specific mitigating conditions under the Administrative Guidelines for personal conduct applicable to his arrests, his judgment elapses are mitigated by his demonstrated good judgment and responsibility in the performance of his professional responsibilities, as well as the care he has taken to avert any recurrent alcohol-related incidents in the future.

Altogether, Applicant provides sufficient demonstrative indications of sustained mitigation of his past alcohol-related incidents to overcome any residual security risks associated with his past alcohol-related judgment lapses. Considering the record as a whole, Applicant makes the convincing showing that he has both the maturity and resource support at his disposal to avert any recurrent problems with judgment lapses related to alcohol to warrant safe predictions that he is no longer at risk to judgment impairment associated with such conduct. Favorable conclusions warrant with respect to the criminal conduct allegations covered by Guidelines J and E.

Government finds security risks associated with Applicant's sister's (W) taking up residence in Costa Rica. As a resident of Costa Rica, the Government believes W to be vulnerable to pressure and coercion by virtue of her holding residence in this still developing Central American country. Applicant assures any such potential concerns are either non-existent or significantly mitigated.

The Adjudicative Guidelines governing collateral clearances do not dictate *per se* results or mandate particular outcomes for any chosen set of guidelines covering risks of foreign influence. What is considered to be an acceptable risk in one foreign country may not be in another. Available source information confirms Costa Rica to be a country with democratic traditions and respect for human rights and the rule of law (*see US State Department Consular Information Sheet* (January 2003)). Still, Government may invoke two disqualifying conditions of the Adjudicative guidelines for foreign influence: DC 1 (immediate family member or person to whom the individual has close ties of affection or obligation, is a citizen or resident or present in a foreign country) and DC 6 (conduct that may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government).

On its current track, Costa Rica can now be classed as a promising new democracy in the Americas whose security risks to the US are manageable ones. While the foreign influence provisions of the Adjudicative Guidelines are ostensibly neutral as to the character of the subject country, they should not be construed to ignore the geopolitical aims and policies of the particular foreign regime involved. Costa Rica is a constitutional democracy that does not exhibit hostility to the US and relatives of US citizens residing within its borders.

Because of the recognized stable political and economic climate in Costa Rica, security concerns over the status of Applicant's sister's either residing in or being linked to Costa Rica's government are considerably reduced. Mitigation of these concerns now permit safe predictive judgments about Applicant's ability to withstand risks of exploitation and pressure attributable to his familial relationship and contacts with his sister domiciled in Costa Rica. With security risks surrounding his sister considered manageable, Applicant may claim the mitigation benefits of MC 1 (presence of immediate family or associates in host country does not pose an unacceptable security risk) of the Adjudicative

Guidelines. Overall, favorable conclusions warrant with respect to sub-paragraph 2.a of Guideline B of the Adjudicative Guidelines.

In reaching my 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 J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

GUIDELINE B (FOREIGN INFLUENCE): FOR APPLICANT

Sub-para. 3.a: FOR APPLICANT

### **DECISION**

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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge