

DATE: September 20, 2005

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-21287

DECISION OF ADMINISTRATIVE JUDGE

DAVID S. BRUCE

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 29 years old and was born in Mexico. He has been employed in the U.S. for about seven years, but has continued to live in Mexico with his parents. Applicant stated on his Security Clearance Application (SF 86) that he and his parents resided in the U.S. He also failed to disclose five siblings on his SF 86, four of whom reside in Mexico. Applicant failed to mitigate security concerns regarding Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. Clearance is denied.

STATEMENT OF THE CASE

On February 10, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Review Program*, dated January 2, 1992, as amended and modified (Directive), issued a Statement of Reasons (SOR) to Applicant in response to his application for a security clearance. The SOR detailed why DOHA could not preliminarily determine under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's request for a security clearance.

On March 14, 2005, Applicant responded to each of the SOR allegations and elected not to present his case at a hearing. Department Counsel submitted the government's File of Relevant Materials (FORM) on June 6, 2005, which contained eight itemized documents in support of the allegations. The complete FORM was forwarded to Applicant and received by him on June 20, 2005. Applicant was given 30 days to file objections and to submit information in support of his position. No further response was submitted by Applicant and the case was assigned to me on August 3, 2005.

FINDINGS OF FACT

Applicant has admitted with explanations the factual allegations of subparagraphs 1.a.-1.e., and subparagraph 2.a. of the SOR. The admissions are incorporated herein by reference. After a thorough review of all the evidence in the record and the statements submitted by Applicant to support his position, I make the following additional findings of fact:

Applicant is 29 years old, has never been married, and has no children.⁽¹⁾ He was born in Mexico, and he has resided primarily with his parents in Mexico all of his life.⁽²⁾ He has a U.S. social security number and pays income taxes in the U.S. He does not own any property in Mexico and does not pay taxes there. Applicant has a valid U.S. passport.⁽³⁾

Applicant has been employed in the U.S. as an electronics technician since May 1998. He was unemployed for over six years before obtaining his current position.⁽⁴⁾ He has not served in the military forces of any country, but is registered with the U.S. Selective Service System. He has never had contact with any foreign government, and does not hold any foreign passports. Applicant has never held a government security clearance.⁽⁵⁾

In answer to Question 3. **Citizenship** - of his Office of Personnel Management (OPM) Security Clearance Application (SF 86) dated January 5, 2001, Applicant stated he was a U.S. citizen, and denied he has ever been a dual citizen of another country.⁽⁶⁾ Applicant's mother is 59 years old and has been a citizen and resident of Mexico all her life. She is also a registered U.S. Alien.⁽⁷⁾ Applicant's father was born in Mexico and is 84 years old, and is a naturalized U.S. citizen.⁽⁸⁾ Applicant was always told he was a U.S. citizen, "born abroad," because his father was a U.S. citizen when he was born.⁽⁹⁾ His birth certificate is from Mexico.⁽¹⁰⁾ Applicant has been issued a Port Pass by the U.S. Department of Homeland Security to facilitate his daily crossings of the U.S./Mexico border to commute to his work in the U.S.⁽¹¹⁾ The only 'proof' Applicant has of his U.S. citizenship is his U.S. passport.⁽¹²⁾ He also indicates he was brought to the U.S. 'legally' by his family in 1986.⁽¹³⁾ Applicant claims dual citizenship with Mexico by virtue of his birthplace, and because his father was a U.S. citizen at the time he was born. He has never renounced his Mexican citizenship, because, as he states, he is Mexican and lives in Mexico.⁽¹⁴⁾ He is not willing to renounce his Mexican citizenship.⁽¹⁵⁾

In response to Question 4. **Where You Have Lived** - Applicant listed four different addresses in the U.S. where he resided from July 1993 to January 2001.⁽¹⁶⁾ In subsequent statements provided to DSS Special Agents, he stated he primarily lived at his parents' home in Mexico from 1994 to October 2003,⁽¹⁷⁾ and that the U.S. addresses listed on his SF 86 were residences of his sisters where he received his mail in the U.S., but stayed infrequently.⁽¹⁸⁾

In answer to Question 9. **Your Relatives and Associates** - Applicant indicated he has two sisters as his only siblings. He stated both are in their 30's and were born in Mexico, but are now residents and naturalized citizens of the U.S.⁽¹⁹⁾ In his statement dated October 30, 2003, Applicant acknowledged he has five other siblings who were not listed on his SF 86.⁽²⁰⁾ Of the five additional siblings, two are sisters, both born in Mexico, one of whom resides in the U.S. and is a naturalized citizen. The other is a resident of Mexico who has a U.S. passport. All three of the unlisted brothers were born in Mexico and still reside there. Applicant states two of his brothers are naturalized U.S. citizens, while the third brother holds a U.S. passport.⁽²¹⁾

In response to Question 16. **Foreign Countries You Have Visited** - Applicant stated he has made many trips to Mexico to visit his family.⁽²²⁾ He admitted in a subsequent statement his primary residence has always been in Mexico, and that he regularly travels across the border to the U.S. as a part of his commute to work or for other personal purposes.⁽²³⁾

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines For Determining Eligibility For Access To Classified Information*, sets forth the criteria which must be evaluated when determining security clearance eligibility. The adjudicative guidelines specifically distinguish between those factors that are considered in denying or revoking an employee's request for access to classified information (Disqualifying Conditions), together with those factors that are considered in granting an employee's request for access to classified information (Mitigating Conditions). By acknowledging that individual circumstances of each case are always different, the guidelines provide substantive standards to assist an administrative judge in reaching fair and impartial common sense decisions.

The adjudicative process requires thorough consideration and review of all available, reliable information about the

applicant, past and present, favorable and unfavorable, to arrive at well- informed decisions. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the conduct of the applicant and the circumstances in any case, the factors an administrative judge should consider pursuant to the concept are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of the participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Protecting national security is the paramount concern in reaching a decision in any case, and is dependent upon the primary standard that issuance of a clearance must be clearly consistent with the interests of national security. Granting an applicant's clearance for access to classified information is predicated on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of such information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information in any aspect of his or her life. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. (24) The decision to deny a security clearance request to an individual is not necessarily a determination of the loyalty of the applicant. (25) It is merely an indication the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

In accordance with the Directive, the government bears the burden of proof in the adjudicative process to first establish conditions which indicate it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. (26) The legal standard for the burden of proof is something less than a preponderance of the evidence. (27) When the government meets this burden, the corresponding heavy burden of rebuttal then falls on the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the position of the government, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance. (28)

Upon consideration of all the evidence submitted in this matter, the following adjudicative guidelines are appropriate for evaluation with regard to the facts of this case:

Guideline E - Personal conduct is a security concern because conduct involving questionable judgment, trustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Guideline J - Criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

CONCLUSIONS

I have thoroughly considered all the facts in evidence in this case and the legal standards required by the Directive. The government has established a *prima facie* case for disqualification under Guideline E - Personal Conduct.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2. (*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.*) applies in this case.

Applicant was aware at the time he completed his SF 86 he may be considered a dual citizen of the U.S. and Mexico. Applicant claimed in March 2005 that he was not aware of the conditions that constitute dual citizenship. (29) In his statement provided seven months earlier, however, he acknowledged being a citizen of exico, admitting he has never renounced his Mexican citizenship, and that he did not intend to do so. He further represented in his SF 86 he resided in

the U.S. when he submitted the document in 2001, and that he had been a resident of the U.S. for at least the preceding seven years. In fact, he lived primarily with his parents in Mexico during this time period. He claimed his parents had been residing in the U.S. as well, when they, in fact, had also been living in Mexico. Applicant further failed to list two sisters and three brothers on his SF 86 and provide the requested information about them. Finally, Applicant misrepresented in his SF 86 that he frequently crossed the U.S./Mexico border to go to Mexico to see his family, when actually his frequent short trips across the border were necessary for him to get to work in the U.S. Any of these determinations individually or cumulatively may be impediments to obtaining a security clearance. One objective of the security clearance process is to determine all relevant and material information concerning an applicant. Based upon truth and honesty, the process requires full and open disclosure by the applicant of all requested information. Any intentional misrepresentation or omission by an applicant raises serious concerns about the character and overall integrity of the individual. The government's evidence and Applicant's admissions constitute substantial evidence of disqualifying conditions under Guideline E.

I have considered all the Personal Conduct Mitigating Conditions (PC MC), and specifically PC MC E2.A5.1.3.3. (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.*), and conclude it does not apply. Applicant had an affirmative obligation to determine the true status of all information requested in the SF 86, and to fully provide and disclose complete and accurate answers to each item of the questionnaire. The conflicting misrepresentations and omissions on his SF 86 had to have been apparent to Applicant when he prepared his answers. As prepared, each of the responses on his SF 86 had clear, self serving, deliberate objectives, all designed to minimize negative inferences relevant to his security clearance application. Applicant did not provide statements to DSS Special Agents for nearly three years after filing his SF 86. He made no effort in the interim to correct the misleading responses and omissions. Applicant attributes the mistakes on the SF 86 to error on his part, by simply not understanding the full meaning of the questions or their legal significance. Considering all the circumstances, however, his candor and credibility are questionable given the seriousness of the issues set forth above. Accordingly, Applicant has failed to successfully mitigate the personal conduct security concerns raised in this case.

I have further considered all the facts in evidence and conclude the government has also established its case for disqualification under Guideline J - Criminal Conduct. Based on all the evidence, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.*) applies in this case. Title 18 U.S.C. § 1001, provides that knowingly and willfully submitting materially false, fictitious, or fraudulent information in any matter within the jurisdiction of the U.S. Government is a crime punishable by a fine and up to five years imprisonment.⁽³⁰⁾ Applicant's conduct in deliberately omitting and misrepresenting substantial material information required to be provided as a part of his SF 86 qualifies as serious uncharged criminal conduct within the meaning of Guideline J.

I have considered all the Criminal Conduct Mitigating Conditions (CC MC), and specifically CC MC E2.A10.1.3.2. (*The crime was an isolated incident.*), and find it does not apply. The misrepresentations and omissions on Applicant's SF 86 were graphic and compelling, and done with the intent to deliberately manipulate the security clearance process. Applicant's blatant errors were made willfully and knowingly, and involved several sections of the application. All were logically calculated to inappropriately influence the outcome. Applicant had nearly three years to correct the information he submitted, yet he made no attempt to do so before being confronted with the inaccuracies. The gravity of Applicant's conduct creates serious doubt about Applicant's judgment, reliability and trustworthiness. Applicant has failed to successfully mitigate the security concerns raised under Guideline J.

I have further reviewed all the record evidence in this case with respect to the "whole person" concept required by the Directive in evaluating Applicant's vulnerability in protecting our national security. I am persuaded by the totality of the evidence in this case that it is not clearly consistent with the national interest to grant Applicant a security clearance. For the reasons stated, Applicant has failed to mitigate the security concerns regarding the personal conduct and criminal conduct issues raised in this case. Accordingly, Guidelines E and J are decided against Applicant.

FORMAL FINDINGS

In accordance with Section E3.1.25 of Enclosure 3 of the Directive, the following are the formal findings as to each allegation in the SOR:

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

Subparagraph 1.a. Against the Applicant

Subparagraph 1 b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Paragraph 2. Criminal Conduct (Guideline J) 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 Applicant. Clearance is denied

David S. Bruce

Administrative Judge

1. Item 4 (Applicant's Office of Personnel Management Security Clearance Application dated January 5, 2001), at 1 and 3.
2. Item 6 (Applicant's statement dated September 16, 2004, to Defense Security Service Special Agent), at 3.
3. Item 5 (Applicant's statement dated October 30, 2003, to Defense Security Service Special Agent), at 1-2.
4. Item 4, *supra* note 1, at 2.
5. *Id.*, at 4-7.
6. *Id.*, at 1.
7. *Id.*, at 3.
8. *Id.*, at 4. (No information was provided as to when Applicant's father became a U.S. citizen.)
9. Item 5, *supra* note 3, at 1. See also Item 4, *supra* note 1, at 8.
10. *Id.*
11. Item 7 (The card references Applicant's "Nationality" as "USA." It also references a passport number).
12. Item 6, *supra*, note 2, at 6.
13. *Id.*, at 5.
14. *Id.*, at 5-6
15. *Id.*

16. Item 4, *supra* note 1, at 1.
17. Item 5, *supra* note 3, at 2.
18. Item 6, *supra* note 2, at 3.
19. Item 4, *supra* note 1, at 3.
20. Item 5, *supra* note 3, at 2.
21. Item 6, *supra* note 2, at 2.
22. Item 4, *supra* note 1, at 5.
23. Item 6, *supra* note 2, at 3 and 6.
24. Directive, Enclosure 2, Para. E2.2.2.
25. Executive Order 10865 § 7.
26. ISCR Case No. 96-0277 (July 11, 1007) at p. 2.
27. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
28. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Para. E3.1.15.
29. Item 3 (Applicant's response to SOR dated March 14, 2005), at 1.
30. Item 10 (Copy of Title 18 U.S.C. §1001, Chapter 47, Fraud and False Statements).