

DATE: December 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23118

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Francis X. Lillis, Esq.

SYNOPSIS

Applicant has five siblings in the Democratic Republic of the Congo, and two sisters in Europe. Applicant immigrated to the United States in 1992 and became a citizen in 1996. The Guideline B Foreign Influence concerns are not mitigated due to Applicant's vulnerability to exploitation. Clearance is denied.

STATEMENT OF THE CASE

On August 27, 2003, the Defense Office of Hearings and Appeals (DOHA), under 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 Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under the personnel security Guideline B (Foreign Influence) 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. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed statement received on September 18, 2003, Applicant responded to the SOR allegations. He requested a hearing. This case was assigned to another judge on November 4, 2003, but reassigned to me on November 10, 2003 due to caseload assignments. A Notice of Hearing was issued on November 14, 2003, setting the hearing for November 25, 2003. On November 25, 2003, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented five exhibits which were admitted into evidence. Applicant appeared and testified, and offered 14 exhibits into evidence. Applicant also waived the fifteen day notice period. Applicant sent in three other exhibits not available at the time of the hearing, and Department counsel had no objection to their inclusion in the record. I included them in the record. I received the transcript (Tr.) of the hearing on December 4, 2003.

Applicant waived the 15 day notice period required by the Directive. He waived the notice period in the interest of getting a hearing scheduled sooner than would have been allowed with the required notice period. (Tr.9, 10)

FINDINGS OF FACT

Applicant admitted all of the allegations contained in the SOR. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 46 years old, married, and has two daughters. His wife and daughters were born in the United States. He was born and grew up in the Democratic Republic of the Congo (DRC), then known as Zaire, formerly the Belgian Congo. He attended high school and did some college work in the DRC. He then decided he wanted a better quality education, and sought admittance to a university in Germany to study electrical engineering. He attended school in Germany from 1979 to 1992, only making four trips back to the DRC in that time period due to lack of funds. (Applicant's Exhibits A, B, and C; Govt. Exhibit 1; Tr. 24, 39, 41, 63, 65, 88)

While attending the university and living in Germany, he met an American exchange student in 1987, and later married her in 1990. They lived in Germany while he finished his master's degree in electrical engineering in 1992. Applicant lived a total of 13 years in Germany. In 1992, Applicant and his wife visited the DRC for four weeks to allow his new wife to meet his family. In December 1992 they went to live in Idaho where his wife's family has a business and his wife could accept the job offer her family made her. Applicant found work in electrical engineering. Applicant's father was a businessman in the DRC. His male siblings are businessmen there now. (Applicant's Exhibits A and B; Tr. 17, 18, 19, 27, 40, 45, 63)

Applicant's parents are deceased. His mother died in 1995, and he made his last visit to the DRC at that time. In the past 24 years, Applicant visited his family in the DRC only four times (1981, 1988, 1992, and 1995). His family was and is a middle class family for the DRC. They had a house and cars. Applicant does not have any financial interests in the DRC. (Tr. 34, 47, 48, 63, 64)

Applicant has an United States passport. He surrendered his DRC passport when he became an American citizen in 1996. (Tr. 89)

In 1995, Applicant found work as an engineer for a semi-conductor company. That company sent him for training in Israel at their factory there. In December 1995, at the end of his training, he moved back to the United States to work for that company. Later, in 1997, he moved to his present location on the east coast after taking a job with another company. (Tr. 20 to 23)

Applicant has four brothers and three sisters. He sent money to his siblings at various times to help with health care costs. He sent \$200 to \$300 twice to help pay costs of a sister's illness. In 2003 he sent \$300 to a brother who has 13 children to help him take care of his family. He sent that amount twice this year. Applicant visited his sister in Belgium once and visited with his brothers when he was last in the DRC in 1995 for his mother's funeral. Applicant speaks with his siblings occasionally by telephone. One brother stayed with Applicant when he visited the United States in 1999 and 2000. None of his siblings are employed by the DRC government. One brother visited Applicant twice in the United States. This brother has a computer company in the DRC, but lives in Germany, and is the sibling to which Applicant is closest. Applicant's nieces and nephews like to visit the United States and come to visit periodically. (Tr. 29 to 32, 37, 64 to 81)

Applicant has two sisters living in the DRC. He has one sister living in Belgium and another sister living in France. He has three brothers living in the DRC, and one brother living in Germany who has a business in the DRC. One sister's husband worked for the DRC Ministry of Justice, but has now retired and receives a pension from the DRC. Another sister worked in the health department of the DRC, but no longer works there. (Applicant's Exhibit A; Tr. 28, 29, 49, 50, 61, 67, 84, 86)

Applicant submitted character reputation statements from his co-workers. Applicant is truthful, competent, and trustworthy in his work environment. (Applicant's Exhibits F, G, and H)

Applicant does not have a police record in the DRC. His siblings do not have police records also. (Applicant's Exhibits J through P; Tr. 58, 59)

The DRC is a country in turmoil, and political transition from its former government. The DRC underwent a civil war in the late 1990s and through 2001. (Gov'ts Exhibits 2 to 4)

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 judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing he use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

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. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the voluntariness of 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 (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. See *Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA

LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

GUIDELINE B: Foreign Influence

The Concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or 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. Directive, ¶ E2.A2.1.1.

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

- (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. Directive, ¶ E2.A2.1.2.1.
- (2) Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists. Directive, ¶ E2.A2.1.2.2.
- (3) Relatives, cohabitants, or associates who are connected with any foreign government. Directive, ¶ E2.A2.1.2.3.

Conditions that could mitigate security concerns include:

None

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

The SOR alleged Applicant's siblings live in the DRC, France and Belgium. Applicant's brother-in-law and sister previously worked for two DRC government agencies, but do not anymore. The brother-in-law receives a government pension from the DRC. Applicant sends money to certain siblings to help them pay medical costs in the DRC. All those allegations are admitted and true. Disqualifying Condition (DC) 1 applies and the Government has proven its case. DC 3 applies because of the brother-in-law's pension. Applicant's brother visited him twice and stayed at Applicant's house. Therefore, DC 2 applies.

The Mitigating Condition (MC) 1 [*A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question 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 person(s), involved and the United States. Directive, ¶ E2.A2.1.3.1.*] does not apply here. While Applicant's siblings are not agents of the DRC government, they are in a position to be exploited by the DRC or other foreign power in a way which could force Applicant to choose between his loyalty to them or the United States. They are employed in private businesses, i.e., farming and computers, which depend in some way upon DRC government policies. The DRC is in the midst of political turmoil and civil war. Applicant's siblings are caught in that political whirlpool merely by living there.

Moreover, Applicant's contacts with his siblings may be infrequent, but they are not casual contacts because of the family relationship. One brother visited Applicant and was also seeking business contacts for his computer company during the visit. They email each other, and he is the brother to whom he is the closest. Applicants nieces and nephews also visit him because they like to come to the United States. Therefore, MC 3 (*contact and correspondence with foreign citizens is casual and infrequent*) does not apply.

I considered all the record evidence. I applied the guidelines to that evidence, and used the "whole person" concept. As a result, I find against Applicant on this guideline.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline B: Against Applicant

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

DECISION

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

Clearance is denied.

Philip S. Howe

Administrative Judge