

DATE: September 3, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-23137

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

**FOR GOVERNMENT**

Marc Curry, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

SYNOPSIS

Applicant, a 50-year-old native of Chile, founded and now the C.E.O. of a consulting company doing business with the Department of Defense. He is also a 50 % owner of a company in Chile that has done business with the Chilean army and seeks other business from the Government of Chile as well as commercial export trade. He has family members living in Chile, one of whom has an interest in the Chilean company. Clearance is denied.

STATEMENT OF CASE

On December 27, 2002, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, *Safeguarding Information Within Industry*, 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 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. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On January 13, 2003, Applicant, in a sworn written statement, responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to another administrative judge who could not hold the hearing. A notice of hearing was issued on May 13, 2003 and it was re-assigned to me that date. A hearing was held on June 25, 2003. The Government introduced two exhibits and the Applicant testified. Both exhibits were admitted into evidence. The transcript was received on July 2, 2003. The record was held open for submission of additional information until July 25, 2003, but none was received.

FINDINGS OF FACT

Applicant admitted all of the specific allegations under Guidelines L and B but disagreed with the adverse interpretation placed on them. After a complete review of the evidence in the record and upon due consideration of the record, the

following additional findings of fact are made.

Applicant was born in Chile and immigrated to the U.S. in 1967 when he was 14 years old. He became a citizen in 1982, attended university and received a master's degree in international relations. He founded a company which has contracts with several U.S. government agencies. His largest contracts are now, and have been in the past, with the U.S. Navy doing logistics management and warehousing. He also has a contract to work on renovation of the Pentagon. Other agencies that he has contracts with include AID and NASA. He recently sold the company to a U.S. corporation but he continues to serve as president of the company with a salary of \$155,000.00 per annum. The company has 186 employees with several field offices in the U.S.

Applicant and his brother started another company in Chile to do business there. Each own a one-half interest in the company. That company is not a subsidiary of the U.S. company he founded but has the same name except the word "Chile" is appended to it. The company has done very little business in Chile but is soliciting work from the Government of Chile. Applicant's brother is an employee of the same U.S. company as the Applicant. Their sister is the office manager in Chile. She is a citizen of Chile and a single mother. One reason for the creation of the Chilean company was to provide financial assistance to the sister through employment with the company.

Another Chilean who is a recently retired naval officer was the general manager of the company but he was scheduled to leave the company July 31, 2003 and not be replaced.

The one significant business activity that the Chilean company has done in Chile involved a \$700,000.00 contract for assisting in decisions on equipment to buy for a military hospital. Almost half of the value of the contract was spent on hospital equipment consultants in the U.S. During the course of the contract Applicant met with a Chilean army colonel who was the project manager for the hospital construction.

Applicant is not now involved in any work in Chile but is exploring other possibilities including olive oil export to the U.S. He also believes that the work the U.S. company is doing in information retrieval and logistics for the U.S. Navy would be of value to the Chilean military as they modernize their logistics systems. The services Applicant proposes to furnish to Chile concerns information system tools and better management systems none of which are classified.

In addition to his sister who lives in Chile and works for his company there, he has two aunts and an uncle in Chile whom he visits twice a year. All of them are elderly and were never employed by the Government of Chile. At the conclusion of the hearing Department Counsel indicated that the concerns regarding Foreign Influence had been mitigated.

## 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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 participation; (6) the presence or absence of rehabilitation and other 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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the 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. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "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 Executive Order No. 12968 § 3.1(b)

The applicable Guidelines cited in the SOR concern the following Disqualifying Conditions (DC): 1. Outside Activities-Guideline L:

Involvement in certain types of outside employment or activities is of security concern if it poses a conflict with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information.

Conditions that could raise a security concern and may be disqualifying include any service, whether compensated, volunteer, or employment with:

A foreign country; any foreign national; a representative of any foreign interest;

Any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology.

Conditions that could mitigate security concerns include:

1 Evaluation of the outside employment or activity indicates that it does not pose a conflict with an individual's security responsibilities;

2 The individual terminates the employment or discontinues the activity upon being notified that it is in conflict with his or her security responsibilities.

2. Foreign Influence-Guideline B:

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 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.

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; or;

8. A substantial financial interest in a country, or in any foreign owned or operated business that could make the individual vulnerable to foreign influence.

Conditions that could mitigate security concerns include:

1. A determination that the immediate family member(s)(spouse, father, mother, sons, daughters, brothers, sisters), co-habitant, 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;

2. Contacts with foreign citizens are the result of official United States Government business;

3. Contact and correspondence with foreign citizens are casual and infrequent;

4. The individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required;

5. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities

### 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 all allegations set forth in the SOR.

Applicant's Answer and testimony sufficiently mitigated all issues regarding Foreign Influence Guideline B as the government conceded at the hearing.

With regard to Guideline L the Applicant is or has been the employer of two foreign nationals since the organization of the Chilean company. That company in Chile has engaged in one military project that has strictly commercial application since it dealt with medical equipment to install in a new military hospital. Applicant indicated a broad range of activities that he would like to work on in the way of economic development and assistance for the Government of Chile.

In view of the work the company of which he is president and founder does for the U.S. Navy, it is not certain that his knowledge of and access to classified material might not be used in such efforts. At this point the track record of activities of the Chilean company is quite limited with ideas and prospects ranging from olive oil to Naval logistics.

Although Applicant has no personal access to classified material and needs a clearance only because his employees have clearances to accomplish the missions the company performs in the

administration of the contracts they hold with the Government, the relationship with the Chilean company raises questions concerning the possibility that classified information might be compromised in the operation of the foreign company and increase the risk of unauthorized disclosure of classified information. (DC 2)

No assurances were given that would insure that a misuse of security information would not happen. Applicant indicated that some of the activities the U.S. company did for the U.S. Navy would be applicable and helpful for Chile. If such is the case, there would be better and more secure methods of transferring technology to Chile through official channels of the U.S. Government where, unlike here, independent oversight and control is available.

While Chile is a friendly country with the U.S. and there is a new free trade agreement with Chile, this does not totally mitigate the security concerns of the Government. If classified technology is to be transferred to a foreign country, there are methods for doing so in a protected environment; if unclassified methods are to be transferred, it might better be done in an organization where the leadership of the company did not have access to related classified information.

No information was provided concerning the work of Applicant's brother at the U.S. company, his access to information and his own role in the operation of the Chilean company all of which is relevant to the activities that the company might contract for and accomplish in Chile. Applicant failed to sufficiently mitigate the alleged security concerns of the government by showing that an evaluation of the outside activities did not pose a conflict with his security responsibilities. (MC 1) The Applicant has not terminated the foreign activity.( MC 2) By failing to mitigate these security concerns, Applicant has failed to demonstrate that it is clearly consistent with national security to grant him a clearance.

### FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline L: 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

Paragraph 2. Guideline B FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

### **DECISION**

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

Charles D. Ablard

Administrative Judge