

DATE: December 17, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-06262

**ECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Edward W. Loughran, Esq., Department Counsel

**FOR APPLICANT**

William H. Sams, Esq.

**SYNOPSIS**

Applicant is a U.S. citizen working for a defense contractor in Southern California. He has a financial interest in the residential property where he lives in Tijuana, Mexico. His wife, children, mother, younger sister, mother-in-law, and father-in-law are citizens and residents of Mexico. He used his aunt's California address to obtain a California vehicle registration, driver's license, and a U.S. Alien Registration card for his wife. He pays U.S. and California taxes, votes in California, and has served on a California jury. Security concerns based on foreign preference are mitigated, but concerns based on foreign influence and personal conduct are not mitigated. Clearance is denied.

**STATEMENT OF THE CASE**

On April 6, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. This action was taken under Executive Order 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). The SOR alleges security concerns under Guidelines C (Foreign Preference), B (Foreign Influence), and E (Personal Conduct) of the Directive. Under Guideline C, it alleges that Applicant is a citizen of the U.S. but has resided in Mexico since the age of five. Under Guideline B, it alleges that Applicant's spouse, son, daughter, mother, younger sister, mother-in-law, and father-in-law are citizens and residents of Mexico, that his older sister is a U.S. citizen residing in Mexico, and that Applicant owns a mobile home and residential property in Mexico. Under Guideline E, it alleges that Applicant improperly used his aunt's California address obtain a driver's license, register his automobile, and obtain a U.S. Alien Registration Card for his wife.

Applicant answered the SOR in writing on May 7, 2004. He denied the general security concerns under each guideline. He admitted the specific allegations under Guidelines C and E and offered explanations. He admitted the specific allegations under Guideline B, except the allegations that his older sister resides in Mexico and that he owns property in Mexico. He offered explanations and requested a hearing. The case was assigned to me on August 20, 2004. On

September 1, 2004, DOHA issued a notice of hearing setting the case for October 7, 2004. Applicant appeared as scheduled. DOHA received the transcript (Tr.) on October 26, 2004.

### **FINDINGS OF FACT**

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 35-year-old simulator technician for a defense contractor. His co-workers regard him as honest, loyal to the U.S., and dedicated to his family. He has held a security clearance since 1990. He works in Southern California and lives in Tijuana, Mexico. He commutes across the border daily. He has worked for several defense contractors at the same location for about 15 years. His clearance has never been suspended or revoked.

Applicant is citizen of the U.S., born in the U.S. of Mexican parents. His parents lived in the U.S. for about nine years. When Applicant was five years old, his parents returned to Mexico because they could not afford to buy a home in the U.S.

Applicant is married to a citizen and resident of Mexico. He has two children, a 12-year-old son and a 7-year-old daughter. His children are citizens and residents of Mexico.

Applicant paid for a plot of land that he and his father purchased in 1990. Applicant and his father agreed that title to the property would be in his father's name, since Applicant is not a Mexican citizen. After his father died, title passed to his mother, who in turn transferred it to Applicant's wife. Applicant purchased a double-wide mobile home, placed it on the property, and renovated it. He, his wife, and their children now live in it. His wife is not employed outside the home. His children attend a private school in Mexico. Applicant lives in Mexico because the housing is more affordable and his neighborhood is safe, peaceful, and not exposed to gang violence and drugs. Some of his co-workers who live in the U.S. commute long distances, up to 150 miles per daily round trip, to find affordable housing.

About two years ago, Applicant tried to qualify for a loan to purchase a home in the U.S. He could not qualify because of his debts. His employment income has risen since then, and he hopes to qualify for a home loan soon.

Applicant's mother, two children, wife, mother-in-law, father-in-law, and his younger sister are citizens and residents of Mexico. He intends to obtain U.S. citizenship for his son so that he will not be required to serve in the Mexican military. His younger sister has a green card and works in the U.S. His brother and older sister are citizens and residents of the U.S. None of his relatives and in-laws work for the Mexican government or military.

Applicant obtained a California driver's license, registered and insured his automobile in California, payed California and U.S. income taxes, and performed jury duty in California. In each transaction, he used his aunt's California address and represented it as his own. His aunt gave him permission to use her address.

Applicant pays only real property taxes in Mexico. He receives no medical benefits or retirement benefits from Mexico.

Applicant obtained a U.S. Alien Registration Card (green card) for his wife, representing she would reside at his aunt's address. He obtained the green card on the advice of an American immigration lawyer to make it easier for her to visit the U.S. for entertainment and shopping. Her green card expires in December 2004.

At the hearing Applicant admitted he knew he was making a false statement when he represented that his wife would live in the U.S. He intends to renew the green card using the false address. (Tr. 58-61) He asserted he did not know that using a false address was a crime. (Tr. 66-67)

### **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.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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, 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. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

## CONCLUSIONS

### **Guideline C (Foreign Preference)**

When an applicant acts in such a way as to indicate a preference for a foreign country over the U.S., he may be prone to provide information or make decisions that are harmful to the interests of the U.S. Directive ¶ E2.A3.1.1. None of the enumerated disqualifying conditions under Guideline C are established by the evidence. The evidence shows that Applicant resides in Mexico because of economic preference, not political preference. His political ties are to the U.S. He is a U.S. citizen, votes in the U.S., pays U.S. and California taxes, served on a jury in California, has a California driver's license and vehicle registration, and has attempted qualify for a loan to buy a house in California. I conclude that the allegation of foreign preference is rebutted.

### **Guideline B (Foreign Influence)**

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. A disqualifying condition (DC 1) may arise when "[a]n 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. Applicant's admissions establish DC 1 for the SOR ¶¶ 2.a. (wife), 2.b. (son), 2.c. (daughter), 2.d. (mother and younger sister), and 2.f. (mother-in-law and father-in-law). DC 1 is not established for the SOR ¶ 1.e. (older sister), because the uncontroverted evidence shows she is a citizen and resident of the U.S.

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members (spouse, father, mother, sons, daughters, brothers, sisters) . . . 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 ¶ E2A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1 ("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to chose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power"). Since the Government has produced substantial evidence to establish DC 1, the burden has shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). Applicant's family ties to Mexico and the possible effect they may have on Applicant's conduct are relevant considerations under Guideline B (Foreign Influence). ISCR Case No. 01-02452 at 8 (App. Bd. Nov. 21, 2002). His ties to his in-laws are also relevant because "there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at \* 8 (App. Bd. Feb. 20, 2002).

Guideline B is not limited to countries that are hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

Furthermore, even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know that even friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at \*\*15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S.

None of Applicant's family members or in-laws are agents of a foreign power. They are not employed by or connected with the Mexican government. Their modest social and economic statuses make them unlikely targets of exploitation. They are not engaged in businesses that engage in economic espionage. They all live in a border town whose economic and cultural interests are closely linked to the U.S. Although violent crime and drug trafficking are problems in many areas of Mexico, Applicant's community is peaceful and safe.

Mexico's economy is strongly linked to the U.S.<sup>(1)</sup> Although Mexico has experienced human rights abuses, it is a democracy with strong economic and cultural ties to the U.S. Its relations with the U.S. are cooperative and generally friendly. Its military forces focus on national defense, narcotics control, and civic action assignments such as road building, search and rescue, and disaster relief.<sup>(2)</sup> I conclude MC 1 is established, and the security concern based on Applicant's ties to his family and in-laws in Mexico is mitigated.

A disqualifying condition (DC 8) may arise if an applicant has "a substantial financial interest" in a foreign country. Directive ¶ E2A2.2.1.2.8. Applicant's admission that he has a financial interest in real estate and a mobile home in Mexico that are worth about \$25,000.00 establishes DC 8.

When an applicant has a "substantial financial interest" in a foreign country, that disqualifying condition can be mitigated by showing that the financial interests are "minimal" and not sufficient to affect the individual's security responsibilities. Directive ¶ E2.A2.1.3.5. Applicant's income is limited, and his ability to obtain a loan has been hampered in the past by the extent of his debts. He would be homeless and without resources to obtain another home if he lost his property. I conclude Applicant's financial interest in Mexico is not "minimal" in light of his overall financial condition. Accordingly, I conclude the security concerns based on Applicant's financial interests in Mexico are not mitigated.

#### **Guideline E (Personal Conduct)**

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. A "pattern of dishonesty or rule violations" can raise a security concern and be disqualifying (DC 5). Directive ¶ E2.A5.1.2.5. The evidence shows that Applicant registered his motor vehicle in California and obtained a California driver's license by falsely representing that he resided in California. His conduct was dishonest, demonstrated unwillingness to comply with rules and regulations, and may have violated the California Vehicle Code, §§ 4150 and 12800 (2004).

Applicant also obtained a green card for his wife by falsely representing that she resided in California. His fraudulent conduct may have made his wife ineligible for lawful admission to the U.S. *See* 8 U.S.C. § 1182 (alien who has fraudulently procured visa or admission to the U.S. may not be admitted).

Applicant's daily border crossings with a U.S. passport undoubtedly would be more difficult, if not impossible, if he registered his vehicle in Mexico and had a Mexican driver's license. Having chosen to live in Mexico, however, he must live with the consequences. Personal convenience and economic advantage do not justify or mitigate fraudulent conduct. Furthermore, Applicant's fraudulent conduct in obtaining a green card for his wife was motivated by personal convenience and enjoyment rather than economic necessity or a patriotic desire to be recognized and treated as a U.S. citizen.

I find the allegations in SOR ¶¶ 2.a., 2.b., and 2.c. are established. I conclude DC 5 is established, and Applicant's fraudulent conduct is not mitigated.

#### **FORMAL FINDINGS**

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

Paragraph 1. Guideline C (Foreign Preference): FOR APPLICANT

Subparagraph 1.a.: For Applicant

Paragraph 2. Guideline B (Foreign Influence): AGAINST APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

Subparagraph 2.f.: For Applicant

Subparagraph 2.g.: Against Applicant

Paragraph 3. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: Against Applicant

Subparagraph 3.c.: Against 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 a security clearance to Applicant. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. U.S. Department of State, *Background Note: Mexico* at 5 (September 2004).
2. *Id.* at 7-8; U.S. Department of State, *Mexico, Country Reports on Human Rights Practices* at 1 (February 25, 2004).