

DATE: September 30, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-09440

**DECISION OF ADMINISTRATIVE JUDGE**

**CAROL G. RICCIARDELLO**

**APPEARANCES**

**FOR GOVERNMENT**

Jeff A. Nagel, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is 49 years old and works for a federal contractor. Applicant has held a top security clearance for 15 years and had access to secret compartmented information. Applicant sexually molested his infant daughter in 1982, and exhibited questionable sexual behavior with his minor son and niece until at least 1998. In the 1980s, Applicant had incidences of shoplifting and theft. In 1993, Applicant transported and harbored an illegal alien for six months, who later became the mother of his adopted son. Applicant intentionally circumvented border control authorities to help her gain access. Applicant has failed to mitigate the security concerns regarding his sexual behavior, criminal conduct, and personal conduct. Clearance is denied.

**STATEMENT OF CASE**

On April 12, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guidelines D, sexual behavior, Guideline J, criminal conduct, and Guideline E, personal conduct.

In a sworn answer dated May 16, 2005, Applicant responded to the SOR and admitted all of allegations, while providing explanations. Applicant elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the government's case on June 22, 2005. A complete copy of the file of relevant material (FORM) was received by Applicant on July 1, 2005. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the FORM, and did not provide any additional information. The case was assigned to me on August 25, 2005.

**FINDINGS OF FACT**

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the

pleadings, exhibits, statements, and the record, I make the following findings of fact:

Applicant is 49 years old and has worked for a federal contractor since 2001. In the past he has worked for other federal contractors and was in the Navy for six years. Applicant held a top secret security clearance and had access to sensitive compartmented information (SCI). Applicant was married in 1975, and divorced in 1986. He had one daughter from this marriage. Applicant remarried in 1989, and he and his wife adopted a son in 1993.

Applicant admitted he sexually molested his infant daughter in 1982. No specific information was provided as to what he actually did to his daughter.

Applicant became sexually aroused while wrestling with his 17-year-old niece in 1997. He masturbated afterwards and has occasionally fantasized about his niece while masturbating since that incident.

Applicant became sexually aroused while bathing and taking a shower with his minor son until 1998. Applicant's son was born in 1993 and this sexual behavior continued until 1998.

Applicant became sexually aroused while his minor son sat on his lap until at least 1997. Applicant masturbated afterwards. Applicant claims that the state child protective service determined

he did not molest his son. No documentation regarding an investigation into these incidents and the findings were provided to support this claim.

Applicant used his computer to view pornographic Internet websites, at times containing minor females not under the age of 13, until at least 1997.

Applicant claims he has made significant efforts to stop his destructive sexual behavior. Applicant has not substantiated what those efforts are, when he made the efforts, whom he dealt with, whether they are licensed, their areas of expertise, and what is the prognosis concerning his behavior. Applicant claims he has sought counseling. No substantiation was provided as to who he sought the counseling with, for how long, and the prognosis. Applicant claims in his 2005 statement that his behavior almost cost him his second marriage and he has worked three years to regain the trust of his wife. (2) No information was provided as to whether his wife was aware of his sexual misconduct before she married him. No information was provided as to the specific information known by Applicant's wife. Applicant claims he is now back in counseling to address issues of sexual abuse from his past and "actions and behaviors he has exhibited as an adult." (3) No information was provided regarding whether Applicant sought or received any type of treatment after he sexually molested his infant daughter. No information was provided as to whether his daughter and her mother are aware of this molestation or if anyone else in his family is aware of it. In addition, although Applicant claims he told his employer "there might be an issue with my clearance," (4) he does not elaborate on whether he specifically told his employer the nature of the issues were.

Applicant stole cash overages from his employer from May 1980 to at least March 1982. Applicant shoplifted merchandise from various retail stores in at least 1986 or 1987.

Applicant knowingly assisted a Mexican citizen's illegal entry into the United States in 1993 by meeting her at the United States-Mexico border, transporting her to his home, and harboring her in his home from July 1993 to December 1993. She gave birth to a boy in December 1993, who was fathered by another man. Applicant and his wife subsequently adopted the boy. Applicant was frustrated by the difficulties he was experiencing in getting approval for a temporary visa for the boy's birth mother, so he illegally assisted her in crossing the border undetected and accompanied her to his home. Applicant stated "While I am not attempting to condone my behavior, I think it's important to understand that there is a different feeling concerning this type of activity when living close to an international border." (5) Applicant violated a federal felony statute by his actions. (6)

Applicant claims he has held a security clearance for 15 years and on his security clearance application (SCA) he admits that it was revoked or denied in 1998. Applicant does not elaborate on the reason.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline D, sexual behavior, Guideline J, criminal conduct, and Guideline E, personal conduct considerations, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(7)</sup> The government has the burden of proving controverted facts.<sup>(8)</sup> The burden of proof is something less than a preponderance of evidence.<sup>(9)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.<sup>(10)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(11)</sup>

No one has a right to a security clearance<sup>(12)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(13)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(14)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>(15)</sup> 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.

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

Guideline D - Sexual Behavior becomes a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress or reflects lack of judgment or discretion.

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. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guidelines are set forth and discussed in the conclusions below.

## CONCLUSIONS

I carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline D, Guideline J, and Guideline E.

Based on all the evidence, Sexual Behavior Disqualifying Condition (SB DC) E2.A4.1.2.1 (*Sexual behavior of a criminal nature, whether or not the individual has been prosecuted*), SB DC E2.A4.1.2.3 (*Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress*), and SB DC E2.A4.1.2.4 (*Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*), all apply in this case.

Appellant admits he molested his infant daughter and would masturbate after being aroused by his minor son and a niece. Applicant also used the Internet to view child pornography. It is unclear as to how long Applicant committed these acts, but it is clear that there were multiple victims and his actions were not a one time aberration, but went on for a period of time. Applicant's molestation of his own infant daughter is a criminal offense. All of the admitted allegations regarding sexual behavior make Applicant vulnerable to exploitation, coercion or duress. Although Applicant's actions were not done in public they do reflect poor judgment.

I have also considered all the mitigating conditions and especially considered Sexual Behavior Mitigating Condition (SB MC) E2.A4.1.3.2 (*The behavior was not recent and there is no evidence of subsequent conduct of a similar nature*), SB MC E2.A4.1.3.3 (*There is no other evidence of questionable judgment, irresponsibility, or emotional instability*), and SB MC E2.A4.1.2.4 (*The behavior no longer serves as a basis for coercion, exploitation, or duress*). The last listed incident regarding Applicant's sexual behavior was 1998. It has been seven years so it is not recent. SB MC E2.A4.1.3.2 applies. Applicant's actions were not a one time incident, but took place over a long period of time with multiple victims and within Applicant's immediate and extended family. His lack of judgment and actions with regards to his daughter, were illegal, morally repugnant, and irresponsible. This behavior is a basis for concern with regards to coercion, exploitation, or duress, and outweighs the lack of recency of the offensive conduct. In addition, without knowing what Applicant's wife, daughter, ex-wife, and son are aware of and whom else is aware of these incidents, they all could be used against Applicant to the detriment of national security.

Applicant shoplifted and stole from his employer in the 1980's. In 1993, he illegally transported and harbored an illegal alien. He harbored her in his home for almost 6 months. 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*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*) both apply.

I have considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*The criminal behavior was not recent*), CC MC E2.A10.1.3.2 (*The crime was an isolated incident*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*), and conclude none apply. Although Applicant's shoplifting and stealing offenses occurred from 1980 to 1982, and 1986 or 1987, and happened at least 18 years ago, it is the recurring pattern of offenses that is of concern. Applicant's life is a reflection of a steady violation of rules, regulations and laws. Although his stealing from his employer from May 1980 to March 1982 is somewhat minor, the fact is he did not stop there. Rather he moved on to shoplifting in 1986 or 1987, at the age of 31, hardly an expression of youthful indiscretion. From there he escalated his actions by transporting and harboring an illegal alien. Applicant's excuse for his actions was that he was frustrated by corrupt Mexican officials. Applicant fails to grasp that he thwarted and broke United States laws that are in place for the protection of United States citizens and not subject

to violation when it was to his benefit. Applicant's cavalier attitude that there is "a different feeling concerning this type of activity when living close to an international border"<sup>(16)</sup> causes serious concern

in how Applicant justifies violating the law, and that somehow when you live close to the border it is okay to break the very laws in place to regulate this activity.

Based on all the evidence, Personal Conduct Disqualifying Condition (PE DC), E2.A5.1.2.4 (*Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*), and PE DC E2.A5.1.2.5 (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*) apply in this case.

Applicant history shows a long and recurring pattern of dishonesty and rules violations. Although Applicant's incidents of stealing happened awhile ago and could be considered minor if viewed in isolation. However, Applicant escalated his criminal activity to include a serious felony offense of transporting and harboring an illegal alien. The lack of appreciation for the seriousness of this offense and the explanation that one must understand that somehow the laws are applied differently when living close to an international border is of great concern in how Applicant views the laws of our nation.

I have considered all the mitigating conditions and especially considered Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). I have also considered the general adjudicative guidelines, including the nature, seriousness and motivation of Applicant's conduct, in that at the age of 37 he willfully, knowingly, and voluntarily committed a felony offense.

I conclude none of the mitigating conditions apply. This is the type of conduct that could make Applicant vulnerable to exploitation.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence in this case. I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. 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. Applicant's pattern of sexual behavior makes him extremely vulnerable to exploitation. Applicant's pattern of criminal conduct causes concern regarding Applicant's ability to follow the rules and are reflective of his personal conduct. Applicant has failed to mitigate the security concerns caused by his sexual behavior, criminal conduct, and personal behavior. Accordingly, Guideline D, pertaining to sexual behavior, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct are decided against Applicant.

### **FORMAL FINDINGS**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

#### Paragraph 1 Sexual Behavior (Guideline D) 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) FOR THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. Against the Applicant

Paragraph 3 Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 3.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.

Carol. G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. GE 2 at 3.
3. *Id.*
4. *Id.*
5. GE 2 at 2.
6. Title 8 U.S.C. § 1324 is a federal felony statute that makes it a violation of the law under (1) (A) (i) to knowingly bring into the United States a person at a place other than a designated port of entry; (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States; (iii) knowingly or recklessly conceals, harbors, or shields from detection, or attempts to do so to such a alien; (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing it is a violation of law.
7. ISCR Case No. 96-0277 (July 11, 1997) at 2.
8. ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
9. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
10. ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
11. ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
12. *Egan*, 484 U.S. at 531.
13. *Id.*
14. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
15. Executive Order 10865 § 7.
16. GE 2 at 2.