

DATE: February 14, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10778

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Nichole L. Noel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a native-born U.S. citizen, but his mother, six cousins, and a family friend are citizens and residents of Brazil. He falsified his application for employment by a defense contractor by representing he was a college graduate who had been accepted in a master's degree program, when in fact he had completed only three years of college. He failed to correct the falsification when his promotion to vice-president was announced. He has never informed his employer of the falsification. Security concerns based on foreign influence are mitigated, but concerns based on personal conduct are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On May 17, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. 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). Department Counsel moved to amend the SOR on December 8, 2004, by dividing one compound allegation into two and deleting one allegation. With no objection from Applicant, the motion to amend was granted on December 10, 2004. The amended SOR alleges security concerns under Guidelines E (Personal Conduct) and B (Foreign Influence).

In an undated document, Applicant answered the original SOR in writing. He admitted some allegations and denied some, and he requested a hearing. The case was assigned to another administrative judge on October 1, 2004. On November 10, 2004, DOHA issued a notice of hearing setting the case for December 10, 2004. On the day of the hearing, the case was reassigned to me, without objection from Applicant, because of an unexpected unavailability of the assigned judge. The case was heard as scheduled. DOHA received the transcript (Tr.) on December 20, 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 43-year-old vice-president for business development of a defense contractor. He has worked for his current employer since May 1984. He received a security clearance in December 1986.

In his employment application, executed on May 10, 1984, Applicant answered "yes" to the question whether he received a college degree and he described the degree as a bachelor of science in electrical engineering. During his employment interview, Applicant told the interviewer he had been accepted in a master's degree program. The interviewer made a handwritten notation on Applicant's resume reflecting his acceptance into the graduate program. Applicant's resume states he was a candidate for a bachelor of science degree to be awarded in May 1984. In fact, Applicant had dropped out of college after three years because of financial and academic problems, and he never received a college degree.

When Applicant was promoted to his current position as a vice-president in 2001, the president of the company sent out a memorandum announcing the promotion. The memorandum stated Applicant had a bachelor of science degree and a master of science degree, both in electrical engineering. Although Applicant has neither a bachelor's nor a master's degree, he did nothing to correct the error. As of the date of the hearing, Applicant had not informed his employer that he falsely represented he had a college degree on his initial employment application, nor had he corrected his employer's belief that he had a master's degree.

Applicant's 83-year-old mother was born in Brazil and is a Brazilian citizen. She became a permanent resident of the U.S. in 1955, and she worked for many years as a domestic cook. Applicant was born while his mother lived in the U.S., and he is a native-born U.S. citizen. He does not claim Brazilian citizenship. Applicant's mother retired in 1987 and returned to Brazil. She is financially independent, receives no financial assistance from Applicant, and is not employed by or connected with the Brazilian government. Applicant talks to her weekly.

Applicant has six cousins who are Brazilian residents and citizens. One cousin is a sergeant in the Brazilian Air Force. None of his other cousins are employed by or connected with the Brazilian government. They range from 44 to 50 years old and all live in the same general neighborhood. Applicant and his cousins talk frequently, usually about his mother's health. Applicant lent one cousin \$1,000.00 and forgave the loan after she paid back about \$300.00. He and his mother each gave \$500.00 to another cousin. He also sent \$300.00 to a disabled childhood friend of his mother.

Applicant has a family friend, his godmother's son, who is a Brazilian resident and citizen. The friend is a carpenter, and is not employed by or connected with the Brazilian government. Before his godmother's death, Applicant had contact with the family friend every three or four years. Since his godmother's death, Applicant talks to him at least twice a month, because Applicant was the administrator of his godmother's estate.

Applicant is responsible for business development for his employer. He frequently travels to Brazil on business and to visit his family. He knows a number of Brazilian government officials and discusses business matters with them.

Brazil is a democracy. The U.S. and Brazil have traditionally enjoyed friendly, active relations encompassing a broad political and economic agenda.

POLICIES

Guideline E (Personal Conduct)

"[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 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

Under Guideline E, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

Two disqualifying conditions (DC) are applicable in this case.

DC 4 is established because Applicant concealed information that increases his vulnerability to coercion, exploitation, or duress. Directive ¶ E2.A5.1.2.4. In his employment application, Applicant falsely represented he was a college graduate who had been accepted in a graduate program. He perpetuated the falsehood by doing nothing when his promotion announcement reflected bachelor's and master's degrees in electrical engineering. He has never disclosed his falsehood to his employer. He is vulnerable to coercion, exploitation, or duress by anyone who threatens his continued employment by exposing his falsification to his employer.

DC 5 is established because Applicant has exhibited a pattern of dishonesty. Directive ¶ E2.A5.1.2.5. Applicant began his employment with a lie in May 1984, perpetuated the lie when his promotion to vice-president was announced in 2001, and has lived the lie every day of his employment.

No mitigating conditions are established. Applicant has done nothing to correct the falsification or reduce his vulnerability to coercion, exploitation, or duress. Although his original falsification occurred more than 20 years ago, it is not mitigated by the passage of time, because Applicant's deception regarding his educational credentials has been a

continuing course of conduct up to the present. *See* ISCR Case No. 01-3695, 2002 DOHA LEXIS 453 at *7 (App. Bd. Oct. 16, 2002) (failure to pay debts is continuing course of conduct).

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. A disqualifying condition (DC 3) also may arise if an individual has relatives "who are connected with any foreign government." Directive ¶ E2.A2.1.2.3. DC 1 is established with respect to Applicant's mother, cousins, and family friend (SOR ¶¶ 2.a., 2.b., and 2.c.). DC 1 and DC 3 are established with respect to Applicant's cousin who is serving in the Brazilian Air Force. Applicant's financial support to some of his cousins (SOR ¶ 2.d.) demonstrates his ties of affection and obligation to his cousins, but it raises no independent security concern.

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 choose 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 ties to Brazil 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).

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). Although Brazil historically has been regarded as friendly to the U.S., the 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.

Neither Applicant's mother nor his extended family members are foreign agents. They are not involved in businesses practicing economic espionage. Their social, economic, and political positions make them unlikely targets of coercion or exploitation. Applicant's cousin who is in the Brazilian Air Force is too low-ranking to be involved in military policy or international affairs. Brazil is a country friendly to the U.S. Applicant's family friend is a carpenter, not connected to

the government. I conclude MC 1 is established for Applicant's mother, and the same considerations underlying MC 1 apply to his cousins and family friend.

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. Before his godmother's death, Applicant's contact with the family friend was very infrequent and casual. It has become more frequent and formal only because Applicant is the administrator of his godmother's estate, and not because of any change in the personal relationship between Applicant and the family friend. I conclude MC 3 is established with respect to the family friend.

After considering Applicant's relationships with his mother, extended family, and a family friend together as well as individually, I conclude the security concern based on the possibility of foreign influence is mitigated. Accordingly, I resolve the allegations under Guideline B for Applicant.

FORMAL FINDINGS

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

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

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

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

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For 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 for Applicant. Clearance is denied.

LeRoy F. Foreman

Administrative Judge