DATE: January 3, 2005

In Re:

SSN: -----------

Applicant for Security Clearance

ISCR Case No. 03-11614

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DECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Scott M. Badami, Esq.,

Elizabeth L. Martin, Esq.

SYNOPSIS

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Applicant is a computer software engineer for a defense contractor. He has held security clearances for almost 30 years. He volunteered to security investigators that he downloaded pictures of nude women from the internet in 1996, kept them on his hard drive for approximately four months, and entered anonymous chat rooms on the internet twice to discuss the pictures. Applicant also volunteered to the investigators that in 2001, he paid a masseuse on two occasions for sexual activity. Applicant has disclosed these activities to his wife and supervisors. Applicant mitigated security concerns for sexual behavior. Clearance is granted.

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STATEMENT OF THE CASE

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On April 10, 2004, the Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb 20, 1990), 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). Applicant acknowledged receipt of the SOR on May 11, 2004. The SOR alleges security concerns under Guideline D (Sexual Behavior) of the Directive.

Applicant answered the SOR in writing on June 25, 2004. He admitted some of the allegations, denied others, and provided a detailed explanation of his conduct. He requested a hearing before an administrative judge. The request for a hearing was received by DOHA on July 1, 2004. Department Counsel was prepared to proceed with the case on October 15, 2004, and the case was assigned to me on October 20, 2004. A notice of hearing was issued on October 27, 2004. The hearing was held on November 22, 2004. Two government exhibits, six Applicant exhibits, the testimony of three witnesses for Applicant, and the testimony of the Applicant were received during the hearing. The transcript was received on December 3, 2204.

FINDINGS OF FACT

Applicant is a 49-year-old computer software engineer working on radar system simulations for a defense contractor. Applicant received his first security clearance almost 30 year ago when he was a Marine. He subsequently held security clearances while working as a software engineer for defense contractors. He submitted a security clearance application to renew his clearance for his present employer. As part of the clearance process, Applicant was interviewed by a special agent of the Office of Personnel Management (OPM). In a previous interview with a security service polygrapher, Applicant had informed the interviewer he had downloaded pictures from the internet and had engaged the services of a prostitute. Applicant voluntarily disclosed to the OPM special agent that he informed the polygrapher of his conduct.

Applicant admitted he downloaded in 1996 from the internet onto his hard drive pictures of nude women. The pictures were of nude women and not pictures of women engaged in sexual activities. Applicant did not know the age of the women but he believes some may have been younger than 18 years old. He referred to them as "women of undetermined age." He referred to the pictures as "child pornography" because he did not know the age of the women and some could have been younger than 18 years old. He also admitted he entered an internet chat room about two times to discuss the pictures with unknown individuals. He does not know the identity of the people in the chat room and they do not know his identity. Applicant kept the pictures on his hard drive for about four months before deleting them and destroying the hard drive. At the time, applicant was separated from his first wife and had not met his present wife.

Applicant admitted that he paid a masseuse to have sex with him on two occasions in 2001. He does not know the name or citizenship of the masseuse except she was an Asian woman. At the time, Appellant was married but having marital difficulty.

Appellant informed his wife that he of downloaded the pictures and purchased sex from the masseuse. He informed his two supervisors of the same actions. His wife was angry with him but has forgiven him and they now have a good marriage. They adopted a girl in the last year. His supervisors testified he is an excellent worker and provides valuable service to the defense contractor and the Department of Defense. His evaluation reports with his employer are excellent.

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 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 fair, impartial, and a 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

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* 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 of 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 determination should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶E2.2.2.

CONCLUSIONS

Under Guideline B (Sexual Behavior), a security concern exists if sexual behavior involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercions, exploitation, or duress, or reflects lack of judgment or discretion. Directive ¶ E2.A4.1.1. Sexual behavior Disqualifying Conditions in this case are: Directive ¶ E2.A4.1.2.2. (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*); Directive ¶ E2.A4.1.2.2. (*sexual behavior that causes an individual to be vulnerable to coercions, exploitation, or duress*); and Directive ¶ E2.A4.1.2.4. (*sexual behavior of a public nature and/or that which reflects lack of discretion or judgment*). There is no evidence the downloaded pictures were of children, were pornographic, or amounted to and a criminal offense. The soliciting of sexual activities for money is a misdemeanor criminal offense. Downloading pictures of nude women from the internet, discussing them in a chat room, and paying for sexual activity could cause an individual to be vulnerable to coercion, exploitation, or duress. The chat rooms appear to be anonymous and the sexual activity with the masseuse private. However, such actions show a lack of judgment or discretion. Others could learn of Appellant's activities and make him vulnerable to coercion, exploitation, or duress. I conclude the disqualifying conditions have been established.

The mitigating conditions that may apply to Applicant are: Directive ¶ E2.A4.1.3.2. (*the behavior was not recent and there is no evidence of subsequent conduct of a similar nature*); Directive ¶ E2.A4.1.3.3. (*there is no other evidence of questionable judgment, irresponsibility, or emotional instability*); and Directive ¶ E2.A4.1.3.4. (*the behavior no longer serves as a basis for coercion, exploitation, or duress*). The downloading of the pictures and chat room discussions occurred eight years ago and there has been no subsequent similar conduct. The use of the masseuse for sexual purposes occurred over three years ago and there has been no recurrence. There is not evidence of other questionable judgment, irresponsibility or instability. In fact, the evidence shows Applicant is stable, now use good judgment, and is responsible. Since Applicant volunteered the information and has told his wife and supervisors, there is no basis for the activities to be used for coercion, exploitation, or duress. I conclude Applicant has mitigated the disqualifying conditions.

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is eligible for access to classified information.

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, Guideline B FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

<u>DECISION</u>

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Thomas M. Crean

Administrative Judge