



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 20-01850
)
Applicant for Security Clearance)

Appearances

For Government: Andrew Henderson, Esq., Department Counsel
For Applicant: *Pro se*
03/17/2021

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate personal conduct security Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On November 3, 2020, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the personal conduct guideline the DoD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, DoD Directive 5220.6 (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR on November 9, 2020, and elected to have her case decided on the basis of the written record, in lieu of a hearing. Applicant received

the File of Relevant Material (FORM) on January 6, 2021, and interposed no objections to the materials in the FORM. Applicant supplemented the record with a notice of approval of her petition for the issuance of an immigrant visa to a relative (her husband) by the Department of Homeland Security (DoHS), and forwarding of its approval to the Department of State's (DoS) National Visa Center (NVC) for further processing and action. The DoHS's petition approval included the caveat that the notice of petition is subject to the DoHS's reserved right to verify that Applicant has complied with all laws, rules, and regulations. Applicant's supplemental notice of action by the DoHS is admitted without objection as Item 3.

Summary of Pleadings

Under Guideline E, Applicant allegedly resides with her spouse in the United States, who is an undocumented alien. Allegedly, she been residing with her spouse in the United States since August 2018.

In her response to the SOR, Applicant admitted all of the allegations with explanations. She claimed that her husband is in the process of establishing his legal residence in the United States. Her answers, as such, reflect qualified admissions.

Findings of Fact

Applicant is a 49-year-old naturalized Mexican-American who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in November 1989 and divorced in December 2017. She has three children from this marriage. (Item 2) She became a naturalized U.S. citizen in March 2000. (Item1) Applicant remarried in August 2018 to an individual who is an undocumented Mexican national who has resided with Applicant since August 2018. (Item 1) Applicant completed some post-high school trade courses between April 2019 and the present, but has not earned a diploma or a certificate. (Item 2) She reported no military service.

Since September 2010, Applicant has been employed by her current employer as an aircraft structural mechanic-level1. (Item 2) She reported unemployment between March 2018 and September 2019 and worked for non-defense employers in various jobs between May 2003 and March 2018. (Item 2) This is her first security clearance application.

Current residence status of Applicant's spouse

Applicant's present husband is a Mexican national who remains in the United States illegally. (Item 2) Although it is unclear when her husband entered the United States illegally, inferences can be drawn based on his 1-797 C Form application for

recognized legal residency in the United States that he never applied for an unlawful presence waiver until June 2020, well after Applicant completed her electronic questionnaires investigations processing (e-QIP) in November 2019. (Item 2)

Applicant's approved DoHS petition for the issuance of a visa to her husband has been forwarded to the DoS's National Visa Center (NVC) for further process and action on Applicant's requested immigrant visa for her husband. (Item 3) At this time, Applicant's husband's immigrant status and entitlement and eligibility for an immigrant visa and legal admission to the United States are still pending with an unpredictable outcomes.

Applicant provided no other evidence of her husband's pursuit of legal visa and permanent residency status in the United States. Without more updated information from Applicant, her husband's undocumented border entry and ensuing residency in the United States is and continues to be illegal in violation of U.S. immigration laws.

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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 have access to such information." *Id.* at 527. Eligibility for access to classified information may only be granted "upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Personal Conduct

The Concern: Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, and trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes . . . AG ¶ 15.

Burdens of Proof

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See *also* Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden

of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. 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 [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Security concerns are raised over Applicant’s residing with a Mexican national (her husband) whose undocumented entry into the United States and continued residency in the country is in violation of the federal immigration laws in force. Applicant’s continued residing with an undocumented Mexican national in violation of U.S. immigration laws warrants the application of disqualifying condition (DC), ¶ 16(g), “association with persons involved in criminal activity” of the personal conduct guideline.

Applicant’s continuous co-habitation with her husband since their marriage in August 2018 constitutes a *per se* violation of Guideline ¶16(g). This conclusion is reached after examination of both the plain text of DC ¶16(g) and case precedents. See, *e.g.*, ISCR Case No. 06-20084 (Aug. 16, 2007)(knowingly employing an illegal immigrant); ISCR Case No. 07-07645 (Jan. 7, 2009)(married to an illegal immigrant); ISCR Case No. 07-05407 (March 31, 2008)(engaged to an illegal immigrant); ISCR Case No. 08-03647(Feb. 19, 2009)(married to an illegal immigrant); and ISCR Case No. 18-00753(Oct. 31, 2018)(married to an illegal immigrant).

While these cited decisions lack precedential authority, they draw support from the Appeal Board (ISCR Case No. 07-07645 at 5 (App. Bd. March 25, 2009) and provide persuasive authority for finding Applicant’s residing with an undocumented Mexican national to be incompatible with the trust requirements for holding a security clearance. Applicant’s documented DoHS petition approval (with verification caveats) does not in and of itself grant any legal immigration status to Applicant’s husband and does not guarantee that the “alien beneficiary will subsequently be found to be eligible for a visa.” (Item 3)

Final visa and legal residency status of Applicant’s husband rests with DoS’s NVC’s processing center that remains pending. Based on the limited information provided by Applicant, she may not take advantage of any of the mitigating guidelines at this time.

Whole-person Assessment

Whole-person assessment of Applicant's clearance eligibility requires consideration of whether her history of association with an undocumented Mexican national without any demonstrated compliance with federal immigration laws is otherwise compatible with DoD requirements for holding a security clearance. While Applicant is entitled to credit for her civilian contributions to the defense industry, her efforts to date are not enough to overcome her marriage and co-habitation with an undocumented Mexican national who has been and continues to be in violation of federal immigration laws.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude personal conduct security concerns are not mitigated. Eligibility for access to classified information is denied.

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:

Guideline E (PERSONAL CONDUCT):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

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 Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Roger C. Wesley
Administrative Judge