KEYWORD: Personal Conduct

DIGEST: From the fall of 2003 to around June 2005, Applicant knowingly employed an illegal alien as a live-in housekeeper-babysitter. The employment of an illegal alien violates federal law. His extensive favorable information is not sufficient to mitigate the personal conduct security concerns raised by his behavior. Clearance is denied.

CASENO: 06-20084.h1

DATE: 08/16/2007

DATE: August 16, 2007

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In re:
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ISCR Case No. 06-20084

Applicant for Security Clearance)
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DECISION OF ADMINISTRATIVE JUDGE
JUAN J. RIVERA

APPEARANCES

FOR GOVERNMENT
Emilio Jaksetic, Esquire, Department Counsel

FOR APPLICANT
William F. Savarino, Esquire

SYNOPSIS

From the fall of 2003 to around June 2005, Applicant knowingly employed an illegal alien as a live-in housekeeper-babysitter. The employment of an illegal alien violates federal law. His extensive favorable information is not sufficient to mitigate the personal conduct security concerns raised by his behavior. Clearance is denied.

STATEMENT OF THE CASE

On October 31, 2005, Applicant submitted a security clearance application (GE 1, Electronic Questionnaires for Investigations Processing). On September 28, 2006, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a statement of reasons (SOR) alleging facts and security concerns under Guideline E (Personal Conduct). The SOR informed Applicant that DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information and submitted the case to an administrative judge for a security determination.[1] On October 11, 2006, Applicant answered the SOR and requested a hearing.

The case was assigned to me on May 2, 2007. On May 23, 2007, DOHA issued a Notice of Hearing scheduling the hearing for June 19, 2007. On May 24, 2007, Applicant's counsel requested a postponement. I re-scheduled the hearing for June 25, 2007. The hearing was convened as scheduled. The government presented one exhibit, marked GE 1 and the testimony of two witnesses to support the SOR.[2] Applicant testified on his own behalf, and presented five witnesses and 36 exhibits, marked AE 1-36.[3] DOHA received the transcript (Tr.) on July 6, 2007.

FINDINGS OF FACT

[1] *See* Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended and revised. On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended, in which the SOR was issued on or after September 1, 2006.

[2] Department counsel called Applicant as an adverse witness in his case-in-chief.

[3] In his closing argument, the government noted Applicant's amended income tax returns for tax years 2001-2004 (AE 21-24) were dated June 7, 2007, and that the 2005 income tax return (AE 25) was undated. Applicant's counsel mistakenly submitted documents showing the dates the copies were made, and not the date they were filed. He asked to substitute the documents provided with the correct copies of the documents. The government objected. I granted Applicant's request in order to develop a full and accurate record. Applicant's counsel's June 29, 2007, cover letter to the post-hearing submissions was marked as AE 31; the 2001 amended income tax return was marked AE 32; the 2002 amended income tax return was marked AE 33; the 2003 amended income tax return was marked AE 34; the 2004 amended income tax return was marked AE 35; and the 2005 income tax return was marked AE 36. Department Counsel's July 3, 2007, memorandum re-stating his objections was marked as Appellate Exhibit 1.

Applicant denied SOR ¶¶ 1.a and 1.b. After a thorough review of all evidence of record, I make the following findings of fact:

Applicant is a 43-year-old businessman. He attended high school at a state military academy, graduating in 1983 (Tr. 211). He was admitted to a military service academy and attended the service academy for three and one-half years. In his third year, he used cocaine and tested positive during a drug screening urinalysis. He was forced to withdraw from the military academy (Tr. 214-16). From June 1987 to January 1989, Applicant attended college; graduated with a bachelor's degree in international affairs. Applicant married his wife in August 1989, and they have three boys of this marriage, ages 13, 11, and 8 (Tr. 210-11).

From August 1989 to December 1998, Applicant worked for two different government contractors. In January 1999, afraid his job was being terminated, Applicant founded his own company to provide information technology services and solutions to the government and industry. During his first year in business, Applicant's company earned approximately $360,000. Thereafter, the company experienced exponential growth. In 2006, his company employed 245 employees, had earnings of approximately $40 million, and had over 15 contracts with different government agencies (Tr. 220-22). His company has been recognized as one of the 50 fastest-growing companies in the technology sector in the greater Washington DC area (Tr. 230-231).

Applicant and his company have had access to classified information at the secret level since approximately 2000. The available evidence shows Applicant never failed to comply with the rules and procedures for handling classified information. Applicant also owns four other companies, a holdings company, an information technology services company, a real estate investment company, and a computer equipment surplus/resale company (Tr. 224).

Applicant's company's exponential growth was the result of his long hours of hard work and sacrificing his time with his family. He and his wife divided their labor and responsibilities; Applicant took care of managing the company, and his wife took care of managing the home and taking care of their children (Tr. 231).

Around 2001, Applicant and his wife began to use the services of an 18-19 year-old Brazilian babysitter (V) who was recommended to them by one of their regular babysitters. Applicant and his wife believed V was legally in the United States. She was residing with her uncle and aunt, both of whom are American citizens living in the United States, and her aunt is a practicing attorney in the United States.

After using V as a babysitter for a period of time, Applicant and his wife hired V, from approximately June 2002 to June 2005, as their live-in housekeeper-babysitter. Applicant did not check V's background or legal status because he and his wife had met with V's aunt and uncle, they liked her after having used her as a babysitter for some time, and he felt pressured by his wife to hire V. His wife wanted a housekeeper-babysitter to help her take care of their home and their three

boys. He was also pressured by his feelings of guilt because of the amount of time he was spending at work and away from his family (Tr. 277-78).

In the fall of 2003, Applicant's wife informed him that V was illegally in the United States (Tr. 40, 280). His wife offered V an airplane ticket to go visit her family in Brazil. V refused it because if she left the United States she would not be allowed to return (Tr. 40). Applicant testified he considered firing V, but continued her employment until around June 2005. He explained she had become part of his family, and he believed it was not the right thing to do. As a Christian, he believed he could not throw her out into the street without a family network to support her, or without a job (Tr. 43-44).

Applicant and his wife offered to sponsor V into the United States, and to assist her with her immigration problems. Applicant testified V refused any assistance, and asked them not to interfere. V led them to believe she was already filing for residency with the assistance of her aunt and uncle (Tr. 44, 281). In 2004, V informed Applicant she was getting married to a U.S. citizen. Applicant believed her marriage to a U.S. citizen would resolve her illegal status. V married in December 2004. Applicant paid for her wedding expenses because she did not have the financial resources, and he felt it was the right thing to do. V left Applicant's employment in May-June 2005 (Tr. 46).

Around June/July 2005, Applicant realized he had a tax-wages problem because he had not paid social security taxes on V's wages or withheld federal income taxes. He asked his accountant to resolve V's wages-tax issue. He was informed he could not pay the taxes owed because he had no social security number, green card, or work permit number for V. Between May 2005 and January 2006, he and his wife attempted numerous times to contact V through her husband (who works in a bank), V's aunt and uncle, and friends, to no avail. After she left his employment, V did not return Applicant's calls (except for one time she talked to Applicant's wife) or provide him with any information he could use to pay any due taxes (Tr. 46-47).

In October 2005, Applicant submitted a security clearance application seeking an upgrade of his access to classified information. In his security clearance application, he disclosed he attended the service military academy. He also disclosed that in May 2003, he illegally used his wife's prescription drugs (Percocet) without having his own prescription. He explained he had three prior back surgeries for a ruptured disk. In 2003, he knew he had injured another disk while participating in a triathlon competition during the weekend. He elected to self-medicate instead of going to the emergency room to obtain a prescription for the medication (GE 1). The next work day, Applicant visited his physician and obtained his own prescription.

In December 2005, Applicant requested a legal opinion from his professional tax preparer and asked him how to resolve V's tax problems. At the advice of his attorney, Applicant established a household company to pay back the overdue taxes

owed from 2001 to 2005 as a result of V's employment. Applicant filed his amended income tax returns paying the back due wage taxes for 2001-2004, and his 2005 income tax return in October 2006.[4]

In January 2006, Applicant was interviewed by a background investigator. During the interview, he voluntarily disclosed that his wife had hired an illegal alien to work as a live-in housekeeper-babysitter, and that he had not paid social security or withheld federal income taxes for V (Tr. 35-37). According to the investigator's recollection, Applicant acted as if he did not know he was required to withhold federal taxes for his living-in housekeeper (Tr. 63-64), and Applicant knew before he hired V that she was an illegal alien (Tr. 84).

Concerning his failure to pay federal taxes pertaining to V's salary and social security taxes, Applicant explained it was an oversight on his part because he did not prepare his own income tax returns. Since establishing his company, Applicant has used the services of a professional tax preparer to complete his income tax returns, and has delegated to his office assistant the completion of his tax preparation work sheet. He claimed the issue of paying taxes for a household employee was never raised by his tax preparer and he never realized he had to pay such taxes. It was not until a business meeting in the fall of 2005 that he realized he had a tax problem for not having paid taxes pertaining to V's employment (Tr. 49-50).

Applicant's witnesses and references, most of whom have known him for many years, consider him an upstanding citizen, and a role model. Applicant has established a solid reputation for being trustworthy, honest, fair and caring, and for having high moral standards. He is not considered the type of person who would violate the law or fail to follow rules and regulations. Among his employees and business associates, Applicant has established a reputation for doing what is right and fair. Those who know him best consider him a devout Christian, a family man, and an outstanding father.

Professionally, Applicant is a highly successful businessman. He is recognized as a good leader, and a caring and concerned employer. He is also a philanthropist, having made approximate $350,000 in charitable contributions to schools, the community, and the needy from 2002 to 2007 (AE 18).

I took administrative notice of § 1324a of Title 8 of the United States Code. The statute, generally, makes it unlawful to employ or continue to employ an illegal alien (a person not authorized to be in the United States). This is civil statute that provides for a potential civil fine of "not less than $250 and not more than $2,000" for each first time violation after an administrative hearing is completed. Applicant's violation was not pursued by the United States.

POLICIES

[4] AE 21-25 and AE 32-35.

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. Foremost are the disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. However, the guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive,[5] and the whole person concept.[6] Having considered the record evidence as a whole, I conclude Guideline E (Personal Conduct) is the applicable relevant adjudicative guideline.

BURDEN OF PROOF

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.[7] The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish a prima facie case by substantial evidence.[8] The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries the ultimate burden of persuasion.[9]

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest"

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[5] Directive, Section 6.3. states, "Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2 . . .".

[6] AG ¶ 2(a). states, "The adjudication process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ."

[7] *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

[8] Directive, ¶ E3.1.32.1; ISCR Case No. 02-12199 at 3 (App. Bd. Apr. 3, 2006) (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record); ISCR Case No. 98-0761 at 2 (App. Bd. Dec. 27, 1999) (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence).

[9] *Egan, supra* n. 7, at 528, 531.

standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.[10]

The scope of an administrative judge's decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. Executive Order 10865, § 7.

CONCLUSIONS

Under Guideline E (Personal Conduct), conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. AG ¶ 15.

From the spring of 2001 to June 2002, Applicant employed an illegal alien as a babysitter. From June 2002 to June 2005, Applicant employed the illegal alien as a live-in housekeeper-child care provider. He learned his live-in housekeeper was an illegal alien in the fall of 2003. He knew or should have known that employing an illegal alien was unlawful. Notwithstanding, he continued her employment until June 2005, when she voluntarily left her job. Applicant failed to withhold federal income taxes and pay social security taxes on his illegal alien employee during the whole period of time she worked for him. In October 2006, he filed amended income tax returns for tax years 2001-2004, and his 2005 income tax returns paying his taxes.

Applicant's overall behavior cast doubt on his judgment, his ability to comply with rules and regulations, and make him potentially vulnerable to exploitation, manipulation, or duress.

Personal Conduct disqualifying conditions AG ¶ 16(d): *credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; (3) a pattern of dishonesty or rule violations; (4) evidence of significant misuse of Government or other employer's time or resources*; and AG ¶ 16(e): *personal conduct, or concealment of information*

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[10] *See Id*; AG ¶ 2(b).

about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing . . ., apply.

The government produced substantial evidence raising potentially disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. As previously indicated, the burden of disproving a mitigating condition never shifts to the government.

After considering all the Personal Conduct Mitigating Conditions under AG ¶ 17, two are potentially applicable to Applicant's case:

> *(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;* and
>
> *(d) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.*

Mitigating condition AG ¶ 17(c) is partially applicable. Applicant's offense is a civil violation. As such, in a grading scale, it is not as serious as a criminal offense. Applicant established that his hiring of the illegal alien, and failure to pay social security taxes and withhold federal taxes, happened under such unique circumstances in his life that it is not likely to recur. Applicant was starting his own information technology company during a very difficult period of time, near to the stock market and the "dot coms" crash. He was working very long hours to establish his company and that kept him away from home and his family. He wife was in charge of managing the household and taking care of their young children. Applicant felt pressured to go along with his wife's hiring decision without too much scrutiny. Applicant's situation has changed. His company seems to be solidly established, his children are older, and he does not appear to be under the same time constraints and business pressure he once felt. Nevertheless, his conduct does cast doubt on Applicant's reliability, trustworthiness, and good judgment. Therefore, he does not receive full credit under AG ¶ 17(c).

Concerning mitigating condition AG ¶ 17(d), I find it fully applies. Applicant voluntarily disclosed in his security clearance application, and to the government investigator, his questionable behavior. The evidence also shows he disclosed to his family, friends, and business associates that he was pending a security clearance hearing and the reasons behind the government's security concerns. Based on Applicant's disclosures, and considering his demeanour and truthful testimony, I believe he has taken positive steps to reduce or eliminate any potential vulnerability to exploitation or duress.

Notwithstanding the applicability of the two Guideline E mitigating conditions as previously described, Applicant's favorable information is not sufficient to mitigate the overall Guideline E concerns.

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under AG ¶ 2(a). "Under the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant's life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant's security eligibility by considering the totality of an applicant's conduct and circumstances."[11] The directive lists nine adjudicative process factors (factors) which are used for "whole person" analysis. Additionally, other "[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." AG ¶ 2(a). Ultimately, the clearance decision is "an overall common sense determination." AG ¶ 2(c).

Applicant hired a babysitter in 2001 believing she was legally in the United States. By the time he discovered in the fall of 2003, that she had problems with her visa and was illegally in the United States, the babysitter had become part of his family. Applicant and his family established a strong relationship with her. By all accounts, Applicant is a big–hearted person and a religious man. He believed he was doing the right thing by protecting her, keeping her in his employment, and assisting her to become a legal resident.

Applicant knew, however, he also had the legal obligation not to continue his babysitter's employment. From the fall of 2003 to May 2005, he elected to disregard his legal obligations because of his personal and his family concerns for the babysitter. Applicant's behavior, although admirable, raises concerns about his judgment and his ability to follow rules and regulations. His behavior creates doubt about Applicant's ability to disclose a security violation committed by someone close to him, if that person's employment or financial well being would be jeopardized by the disclosure.

I have carefully considered all of Applicant's favorable evidence. He was forthright and honest during his testimony. In January 2006, he voluntarily disclosed to an investigator that he had hired an illegal alien to work as a live-in housekeeper and that he had unpaid tax issues to resolve. He disclosed in his security clearance application he had illegally used his wife's medications, and that he attended a service military academy for three and one-half years. Applicant is considered by those who know him best to be trustworthy, with high ethical and moral values. The available evidence supports the conclusion that he lives a stellar life and is considered a pillar of the community. He is also highly successful as a businessman, and generously contributes financially and personally to the community.

[11] ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003).

Notwithstanding his extensive favorable evidence, considering the totality of the facts and circumstances, including his background, education, maturity, business experience, and outstanding character, Applicant failed to mitigate the security concerns raised by his behavior.

"Because of the extreme sensitivity of security matters, there is a strong presumption against granting a security clearance. Whenever any doubt is raised . . . it is deemed best to err on the side of the government's compelling interest in security by denying or revoking [a] clearance."[12] After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the foreign preference, personal conduct, and criminal conduct security concerns.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b	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 or continue eligibility for a security clearance for Applicant. Clearance is denied.

Juan J. Rivera
Administrative Judge

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[12] *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990).