

KEYWORD: Foreign Influence, Personal Conduct; Criminal Conduct

DIGEST: Applicant allowed an illegal immigrant couple to live in her residence so the woman could care for Applicant's daughter. Applicant entered into a sham marriage with the man so he could obtain U.S. citizenship. Applicant has failed to mitigate the foreign influence and related personal and criminal conduct security concerns that exist in this case. Clearance is denied.

CASENO: 03-24891.h1

DATE: 04/07/2005

DATE: April 7, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24891

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Timothy L. Spruell, Esq.

SYNOPSIS

Applicant allowed an illegal immigrant couple to live in her residence so the woman could care for Applicant's daughter. Applicant entered into a sham marriage with the man so he could obtain U.S. citizenship. Applicant has failed to mitigate the foreign influence and related personal and criminal conduct security concerns that exist in this case. Clearance is denied.

STATEMENT OF THE CASE

On May 25, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was 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 Guideline B (foreign influence) and Guideline E (personal conduct). Applicant submitted a response to the SOR that was received by DOHA on June 24, 2004, and requested a hearing. Applicant admitted some SOR allegations and denied others.

The case was assigned to another administrative judge on November 10, 2004, and reassigned to me on December 9, 2004, due to impending regional rotations. A notice of hearing was issued on January 13, 2005, scheduling the hearing for February 3, 2005. The hearing was conducted as scheduled. The government submitted ten documentary exhibits that were marked as Government Exhibits (GE) 1-10. GE 1-5 were admitted into the record and administrative notice was taken of the information contained in GE 6-10 without objection. Applicant testified, and submitted four

documentary exhibits that were marked as Applicant's Exhibits (AE) 1-4, and admitted into the record without objection. The transcript was received on February 14, 2005.

PROCEDURAL ISSUES

My review of GE 6-10 at the hearing indicated the allegations contained in the SOR, if true, might establish that Applicant's conduct was criminal. Upon being questioned by me, Department Counsel conceded it was the Government's position that Applicant's conduct was criminal; however, he declined to seek amendment of the SOR to allege criminal conduct under Guideline J. On my own motion, as authorized by Department of Defense Directive 5220.6, Enclosure 3 (Additional Procedural Guidance), paragraph E3.1.17, I thereupon amended the SOR to allege criminal conduct under Guideline J, as contained in Appellate Exhibit I. [\(2\)](#)

FINDINGS OF FACT

Applicant's partial admissions to the allegations contained in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, testimony, and exhibits, I make the following findings of fact:

Applicant is a 57-year-old woman who has been employed by a defense contractor since May 1981. She presently works as a computer systems analyst. She received an advanced degree in business information systems in August 1978. She has possessed a secret security clearance since approximately January 1992. She is considered by supervisors and co-workers to be a mature and stable individual with a reputation for being conscientious, dependable, reliable, and trustworthy.

Applicant was married in March 1971. Initially both she and her husband did not want children, but, as she approached middle age, she decided she very much wanted a child. Because her husband had undergone a vasectomy, she decided to adopt a foreign-born child. Accordingly, in 1991 she traveled to a former eastern-bloc country and adopted a two-week-old girl.

After Applicant returned to the United States with the child, she sought out child care for the infant through a Latin American organization. With the organizations assistance, she retained the services of a Peruvian woman to whom she

was referred without checking into the woman's immigration status. From 1991 to about 1994, the Peruvian woman lived elsewhere, cared for the child in Applicant's home, and was paid in cash without income taxes being withheld and other tax obligations paid. Meanwhile, Applicant and her husband decided to separate, and in October 1993 he vacated the marital residence.

The child care situation changed sometime in 1994, when the Peruvian woman, along with her Peruvian husband and children took up residence in what apparently is a separate apartment within Applicant's house. Applicant allowed the family to live in her home in lieu of paying the woman for the childcare services she continued to perform. Applicant claims to not know if the woman and her husband were lawfully married, but admits she considered them to have either been married or involved in a common law marriage. Applicant also admits she learned the family was in the United States illegally sometime about the time they began to reside in her home.

The Peruvian man, who had a college degree from a university in his native country, was becoming disillusioned with life in the United States, due primarily to his inability to find acceptable work because of his illegal status. Applicant contacted several immigration attorneys in an effort to obtain legal immigrant status for the family. She was unsuccessful in that pursuit, essentially being informed the family would have to return to their native land at which time she could attempt to obtain their lawful immigration.

Applicant's daughter was diagnosed with personality disorders as she grew older. Further complicating the situation, as Applicant saw it, was that the Peruvian woman and Applicant's daughter had naturally formed a very close, almost mother-daughter relationship by this time, and Applicant's daughter and the Peruvian woman's daughter a sister-like relationship. Somehow, the Peruvian couple and Applicant decided the solution to their problem would be for Applicant to marry the Peruvian man, while the Peruvian woman found a United States citizen to marry her.

In furtherance of the plan to gain apparent lawful immigrant status for the couple through sham marriages, Applicant divorced her husband in May 1995.⁽³⁾ Applicant married the man in September 1995. The Peruvian woman married a United States citizen around the same time. The Peruvian couple continued to live as man and wife in the separate apartment in Applicant's home, never living as husband and wife with the spouses they had acquired through the sham marriages. Although Applicant and her daughter traveled to Peru with the Peruvian couple in 1998 and 1999 to vacation and meet their relatives, she still claims she does not know to this day whether they are lawfully married to each other or simply living as a common law married couple. The record provides no other evidence to factually support a finding the couple was lawfully married, and the state in which this all transpired does not recognize common law marriages.

Applicant obtained a divorce from the Peruvian man in January 2002, after he had obtained a lawful immigrant status in the United States and apparently accomplished what was needed for him to eventually become a United States citizen if he so chooses. In her petition for divorce, filed on September 19, 2001, Applicant alleged she had separated from the man on November 3, 2000 and had remained separated from him since that date. The Peruvian woman has likewise obtained a divorce from the United States citizen she married. The Peruvian couple continue to live as husband and wife in Applicant's home, and remain Peruvian citizens.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. 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. Considering the evidence as a whole, Guideline B, pertaining to foreign influence, Guideline E, pertaining to personal conduct, and Guideline J, pertaining to criminal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁶⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ 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.⁽⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

No one has a right to a security clearance⁽¹¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹²⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹³⁾

CONCLUSIONS

Foreign Influence. A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

By her actions, Applicant has clearly demonstrated that her personal interests transcend the laws of this country. She knowingly engaged in a sham marriage with an illegal alien to prevent the loss of her daughter's surrogate mother and sister. While the Peruvian couple has apparently checked the necessary boxes to become United States citizens as a result of the sham marriages, they remain, at present, citizens of Peru. Applicant and her daughter have formed an obviously strong bond with the woman, and the couple continues to live in Applicant's home, albeit in a separate apartment type arrangement. Applicant has visited with the couple's family members in Peru, and there is little question but that she will do whatever is necessary, legal or not, to keep those people in this country.

Disqualifying Condition (DC) 1: *An 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;* DC 2: *Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse influence or duress exists;* and DC 6: *Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government* apply. Applicant indicated she reported her association with the Peruvians to her employer. Although it is unlikely she reported their illegal status or that her marriage was a sham designed to keep them in this country, there is insufficient evidence for me to conclude that DC 4: *Failing to report, where required, associations with foreign nationals* applies.

I have considered all Mitigating Conditions (MC), including: MC 1: *A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitants, or associate(s) in question 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.* As noted, the Peruvians remain citizens of that country, reside in Applicant's home, and have relatives in Peru. They remain vulnerable based upon their status and relatives, and Applicant remains vicariously vulnerable through them because of the obvious close ties of affection she and her daughter have with the family.

Not having found DC 4 to apply, MC 4: *The individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required* has no independent applicability. To the extent it should be in anyway considered, the failure to report the illegal status of the family, and the true nature of the marriage prevent applicability of this mitigating condition. The remaining mitigating conditions clearly have no applicability.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past

conduct justifies confidence the person can be trusted to properly safeguard classified information. 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.

Applicant allowed illegal immigrants to reside in her home, and entered into a sham marriage with one of them to allow them to remain in the United States. Although she possessed a security clearance, she clearly did not report her house guests illegal status or her illegal action in entering into a sham marriage to her security officer. However, considering all available evidence, there is insufficient proof to conclude she knew the man was lawfully married to another as alleged in SOR subparagraph 2.d., or that she falsified the divorce petition as alleged in SOR subparagraph 2.e.

DC 1: *Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*; DC 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 DC 5: *A pattern of dishonesty or rule violations, including violation of any written or recorded agreement between the individual and the agency* apply.

Applicant has now revealed the illegal status of the couple and the true nature of her marriage. Accordingly, she is entitled to application of MC 5: *The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*. However, considering all evidence of record, that mitigating condition is insufficient to overcome the security concerns caused by her personal conduct.

Under 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.

As alleged in SOR subparagraph 3.a., 8 U.S.C. § 1325 (b) provides: *Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than \$2,500.00, or both*. Applicant's sham marriage to the Peruvian man was clearly and solely for the purpose of evading the immigration laws of the United States. DC 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply. The statute alleged in SOR subparagraph 3.b., 8 U.S.C. § 1186 no longer exists, having been redesignated as 8 U.S.C. § 1188 in 1988. It also is not the same statute Department Counsel asked that I take administrative notice of, which is 8 U.S.C. § 1186a. In any event, none of those statutes are criminal statutes. Accordingly, SOR subparagraph 3.b. is decided for Applicant.

I have considered all mitigating conditions and conclude that none apply. Although the marriage was an isolated act, Applicant remained married to the man for seven years to permit him to complete the prerequisites to obtaining United States citizenship. Further, there is evidence of record that she failed to report wages she paid to the Peruvian woman and that she has housed this family for many years knowing their illegal status. Finally, based upon the statements she has provided, her testimony, and her appearance and demeanor while testifying, it is clear she will continue to do whatever she can to keep these people in the United States, whether her actions are legal or not. Under those circumstances, I specifically find that MC 1: *The criminal behavior was not recent*; MC 2: *The crime was an isolated incident*; MC 4: . . . *the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* do not apply. The remaining mitigating conditions have no applicability.

The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Having done so, I am unable to conclude that Applicant has presented sufficient evidence of refutation, extenuation, and mitigation to overcome the case against her, nor has she satisfied her ultimate burden of persuasion. Accordingly, Guideline B, Guideline E, and Guideline J are decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline B: Against Applicant

Subparagraph a: Against Applicant

SOR ¶ 2-Guideline E: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: For Applicant

Subparagraph e: For Applicant

SOR ¶ 2-Guideline B: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: 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 or continue a security clearance for Applicant. Clearance is denied.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Appellate Exhibit I was drafted by Department Counsel at my request due to the fact that he was familiar with what he believed the evidence would show to establish the criminal conduct the Government contended Applicant had committed.
3. Applicant has provided different accounts as to whether she divorced her husband in furtherance of the immigration scheme, or just because she decided to formally end their marriage. Considering all available evidence, most notably the timing of the divorce, I have concluded the divorce was obtained to allow her to marry the Peruvian man in furtherance of his effort to obtain apparent lawful immigration status.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

11. *Egan*, 484 U.S. at 528, 531.

12. *Id* at 531.

13. *Egan*, Executive Order 10865, and the Directive.