KEYWORD: Criminal Conduct

DIGEST: Fifty-five year old Applicant was a participant in a 1973 drug deal that resulted in his arrest and conviction of unlawfully, feloniously, knowingly, and intentionally possessing, with intent to sell, phencyclidine. He was sentenced, in part, to imprisonment for four years at the state penitentiary, but was actually incarcerated first in the county jail for two months, and then in the state penitentiary for six months. He was released from incarceration upon entering a work-release program while residing in a state-controlled half-way house for nine months. The imprisonment for eight months is insufficient to disqualify him under 10 U.S.C. § 986, as revised. Clearance is granted.

CASENO: 04-00354.h1

DATE: 06/08/2006

DATE: June 8, 2006

In re:

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

Applicant for Security Clearance

ISCR Case No. 04-00354

DECISION OF CHIEF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esquire, Department Counsel

FOR APPLICANT

Arvin H. Reinhold, Esquire

SYNOPSIS

Fifty-five year old Applicant was a participant in a 1973 drug deal that resulted in his arrest and conviction of unlawfully, feloniously, knowingly, and intentionally possessing, with intent to sell, phencyclidine. He was sentenced, in part, to imprisonment for four years at the state penitentiary, but was actually incarcerated first in the county jail for two months, and then in the state penitentiary for six months. He was released from incarceration upon entering a work-release program while residing in a state-controlled half-way house for nine months. The imprisonment for eight months is insufficient to disqualify him under 10 U.S.C. § 986, as revised. Clearance is granted.

STATEMENT OF THE CASE

On September 30, 2003, Applicant applied for a security clearance and completed a Security Clearance Application (SF 86).[(1)] On October 4, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons under Guideline J (criminal conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn, written statement, dated October 24, 2005, Applicant responded to the SOR allegations and requested a hearing. Department Counsel indicated the government was ready to proceed on January 26, 2006, and the case was assigned to me on March 23, 2006. A notice of hearing was issued on April 6, 2006, and the hearing was held, as scheduled, on April 26, 2006. During the hearing, two Government exhibits and the testimony of four Applicant witnesses (including Applicant), were received. The transcript (Tr.) was received on May 5, 2006.

FINDINGS OF FACT

Applicant admitted the factual allegation and the conclusory allegation pertaining to criminal conduct under Guideline J (subparagraphs 1.a. and 1.b.). Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 55-year-old employee of a defense contractor and he is seeking to obtain a security clearance, the level of which has not been divulged. He had previously been granted a secret security clearance in November 1983,[(2)] but, in September 1985, that clearance was administratively terminated as unneeded.[(3)] He has been employed as an electrician by several different government contractors on contracts at the same military facility since June 1983.[(4)] He has worked for his current employer since September 2003.[(5)] His current immediate supervisor and a former supervisor both support his application and have characterized him in very positive terms. Applicant is a "role-model employee," and is considered very dependable, well respected, and honest.[(6)] He served in an inactive enlisted status with the U.S. Army from October 1970 until July 1973, and with the Army National Guard from August 1973 until August 1974,[(7)] and received an honorable discharge.[(8)] He was married in February 1983,[(9)] and has two step-sons.[(10)]

On September 28, 1973, Applicant agreed to accompany his uncle during a drug deal because his uncle was afraid to go alone due to threats.[(11)] Unfortunately for Applicant and his uncle, the "buyers" turned out to be state drug agents.[(12)] He was arrested and charged with unlawfully, feloniously, knowingly, and intentionally possessing, with intent to sell, phencyclidine.[(13)] On the advice of his attorney, he pled guilty and was sentenced, in part, to imprisonment for four years at the state penitentiary.[(14)] He was actually incarcerated from about August 1974 until about April 1975, first in the county jail for two months, and then the remainder of the term in a minimum security penitentiary.[(15)]

Applicant was released from imprisonment in April 1975, and entered into a work-release program while residing in a half-way house under state control until January 1976.[(16)] The half-way house was run on the honor system and those in the program were not locked in at night, but also not permitted to go to bars or other prohibited locations.[(17)] During the day, Applicant worked in another city at a regular job in private industry outside the state system.[(18)] In January 1976, upon being released from the work-release program, he was paroled.[(19)] He was released from parole in about 1978.[(20)] Notwithstanding his arrest and conviction, Applicant continues to maintain his innocence and contends he was not a participant in the drug dealing of his uncle.[(21)]

Since his release from the work-release program, Applicant has not been involved in any further criminal activity.[(22)] With added maturity, he has turned his life and lifestyle around, and has been active in union and community affairs.[(23)]

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (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 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the conclusions below**.**

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*. The memorandum provided policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. § 986) that precluded the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described above involves one of those specific circumstances.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or arine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

(1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;

(2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));

(3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or

(4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The statute also "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases." Implementing guidance attached to the memorandum indicated that provision 1, described above, "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of *more than* one year, regardless of the amount of time actually served."

On October 9, 2004, Section 1062 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 was approved and adopted, amending portions of Subsection (c)(1) of 10 U.S.C. § 986, thereby altering it to read as follows:

(1) has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, *and was incarcerated as a result of that sentence for not less than one year.* (Emphasis of change supplied)

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security" or "clearly consistent with the national interest."[(24)] For the purposes herein, despite the different language in each, I have concluded all of the standards are the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which raises a security concern under the Directive that it wis not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline J. By his own admission, Applicant was involved in criminal behavior in 1973 that resulted in his arrest and a conviction. As a consequence of the September 1973 arrest and subsequent conviction for the one charge, he was sentenced to four years imprisonment. As noted above, he was actually incarcerated in a county jail and then the state penitentiary from about August 1974 until about April 1975. From April 1975 until January 1976, he was in a work-release program while residing in a half-way house under state control. Applicant's criminal conduct clearly falls within Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), CC DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*), and CC DC E2.A10.1.2.3. (*conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year*).

I acknowledge CC DC E2.A10.1.2.3. has not yet been formally amended to conform with the 2004 change in the law, and no implementing guidance has yet been provided. Nevertheless, in complying with the mandate that these security clearance review decisions be fundamentally fair commonsense decisions, I have concluded that the new law was intended to be applied retroactively.

It has been over 31 years since that conviction and sentence. The criminal conduct for which he was convicted is not considered recent since it ceased with his September 1973 arrest. Applicant has refrained from further criminal conduct and has apparently turned his life around. Those facts support the application of Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*the criminal behavior was not recent*) and CC MC E2.A10.1.3.2. (*the crime was an isolated incident*).

An analysis of Applicant's conduct under the "whole person concept," reveals knowledgeable, voluntary participation as a colleague of his uncle in illegal drug dealing that occurred over 31 years ago, when Applicant was 23 years old, with substantial evidence of rehabilitation, and little likelihood of recurrence. A person should not be held forever accountable for misconduct from the past when there is a substantial indication of subsequent reform, remorse, or rehabilitation. Under other circumstances, it would appear that Applicant's criminal conduct is mitigated.

Applicant was clearly incarcerated for eight months while in the county jail and the state penitentiary. However, because the term "incarcerated" has not been defined in 10 U.S.C. § 986, there remains one unresolved issue: whether or not his nine months in a work-release program and mandated residency in a state-controlled half-way house from April 1975 until January 1976, constitutes incarceration under 10 U.S.C. § 986.[(25)]

The government argues the work-release/half-way house segments of Applicant's sentence constituted incarceration or imprisonment under 10 U.S.C. § 986. Applicant differs, and contends time spent in a work-release/half-way house does not constitute incarceration or imprisonment. A review of case law seems to flow primarily from interpretations arising from the application of the U.S. Sentencing Guidelines (USSG) in criminal cases. Unfortunately, the ambiguity in 10 U.S.C. § 986 also exists in USSG, for § 4A1.1(2)(b) thereof only defines "sentence of imprisonment" as "a sentence of incarceration." Likewise, the plain-English definition defines "incarceration" as "Imprisonment; confinement in a jail or penitentiary."[(26)] Imprisonment, however, is not limited to a place usually associated with that purpose. It is a "coercion exercised upon a person to prevent the free exercise of his powers of locomotion." Complicating the issue is the differing interpretation of the same status of some situations such as work-release/half-way house, characterized as "chameleon" in nature, depending on the purpose of the review.[(27)] Status is examined one way in determining how much credit an individual should receive for "time served," and in another way in determining how much enhancement to a sentence should be added for prior criminal conduct.

The 7th Circuit, in *U.S. v. Timbrook*,[(28)] explored the issue of whether a sentence of work-release in a county jail is a sentence of imprisonment under USSG. In that case the sentencing judge imposed the work-release as a substitute for 24-hour confinement, but treated the sentence as imprisonment and stated there is "a big difference between ordering someone into a work release setting as opposed to a treatment setting or halfway house."[(29)] The court rejected the defendant's contention that a "sentence of work release is not a "sentence of imprisonment" because it is analogous to a community treatment center or a halfway house, both of which are not deemed "imprisonment" under [USSG]."[(30)] It cited two decisions from other circuits which held:

Confinement in a community treatment center is not "incarceration" within the meaning of the Guidelines provisions. A community confinement center or a halfway house is not a "secure jail facility" almost by definition. "Houses" and "Treatment Centers" are not supposed to be jails.[(31)]

Nevertheless, the court held the sentence of work-release in a county jail is a sentence of imprisonment under USSG.[(32)]

It also cited favorably two decisions from other circuits. The first case, by the D.C. Circuit, in *U.S. v. Ruffin*,[(33)] involved a defendant who had previously been sentenced "to the custody of the Attorney General. . . for imprisonment for a period of (1) year. Work release ordered. Hours: 6:00 AM thru 6:00 PM Monday thru Friday."[(34)] The Court rejected the defendant's argument that work-release was not imprisonment, and held the "sentence "involve[d] a term of imprisonment," his work release was "part of the term of imprisonment," he actually served a period of imprisonment."[(35)]

The second case, by the 5th Circuit, in *U.S. v. Brooks*,[(36)] involved a defendant who had previously been sentenced to a

boot camp. The court rejected the defendant's argument that time spent in a state boot camp should not be counted as a "term of imprisonment" for purposes of calculating his criminal history category under USSG. Instead, it found that physical confinement is a key distinction between sentences of imprisonment and other types of sentences,[(37)] and discussed the USSG "commentary" in terms of the types of sentences not requiring twenty-four hours a day physical confinement, such as "probation, fines, and residency in a halfway house."[(38)] Since the defendant in that case was not free to leave the boot camp, the court held his confinement there constituted imprisonment. The Court cited favorably three decisions from other circuits, including *U.S. v. Ruffin*, cited above, the 10th Circuit, in *U.S. v. Vanderlaan*,[(39)] and the 9th Circuit, in *U.S. Schomburg*.[(40)]

The Court in *Vanderlaan* discussed supplementary illustrations on criminal history under USSG, and noted:

The example states that a sentence of probation imposed upon an offender on the condition that he reside in a halfway house would be treated as a non-imprisonment sentence. But where an offender is sentenced to imprisonment with a recommendation for halfway house placement, the sentence would be treated as a sentence of imprisonment.[(41)]

An earlier 7th Circuit decision, in *Ramsey v. Brennan*,[(42)] discussed a situation where the defendant argued he should have received credit toward his prison sentence for the period he served in a half-way house before his criminal trial. While the case seemingly turned on the issue of the term "in custody," and the court referred to the term as a "chameleon,"[(43)] the court agreed with the government and an earlier 5th Circuit decision, in *U.S. v. Smith*,[(44)] that "custody" in that situation did not include time spent in a halfway house awaiting trial.

In a halfway house ("residential community center" in bureaucratese) the inmate or resident is confined only at night, placing him in a twilight zone between prison and freedom. Whether such confinement should count as time served toward his prison sentence-whether the deprivation of liberty by confinement in a halfway house is sufficiently like prison to be treated the same in deciding how long the convicted criminal should serve-is not a question susceptible of rational determination, at least by tools of inquiry available to judges. It is a matter of judgment, or policy, or discretion. . . .[(45)]

The 9th Circuit, in *Brown v. Rison*,[(46)] disagreed, rejecting both the unique and the ordinary and obvious meaning of the term. Instead, it chose to examine the conditions of the defendant's confinement to the treatment center and concluded those conditions fell "convincingly" within both the plain meaning and the obvious intent of the term "custody."[(47)] In that case, the defendant was required to spend each evening and night, from 7:00 PM to 5:00 AM, at the center, without outside contact. He was subject to all of the center's regulations, and was required to maintain his employment, restrict his travel, and be subject to drug testing. The Court concluded that the he was "subject to 24-hour supervision by the center, which was acting as an agent of the criminal justice system, and he was physically incarcerated there for a substantial part of each day for nearly a year."[(48)] It found that the restraints on his liberty were sufficient to constitute custody for the purposes of sentencing.

The 6th Circuit, in *U.S. v. Rasco*,[(49)] provided a different perspective. The Court rejected the earlier interpretation of the USSC commentary, discussed above. In its view, the USSC commentary does not categorically exclude detention in a half-way house from the definition of a "sentence of incarceration" for purposes of computing USSC sentences, nor does it exclude halfway house placement from the "sentence of imprisonment." "Such an interpretion would elevate the importance of a defendant's place of detention over the reason for which the detention was imposed."[(50)]

Applicant argues that the term of his placement in a half-way house should be considered as a part of his probation or his ultimate parole as it was not part of his original sentence. He also urges that the characterization of the placement should be given very little weight.[(51)] While it is true that the quality of the evidence herein is superficial, there being no police or court records in evidence, the evidence supplied by Applicant to the government, through his SF 86, sworn statement, response to SOR, and his testimony, was generally consistent.[(52)] Applicant was sentenced to four years imprisonment, and after spending two months in the county jail, and six months in the state penitentiary, he was moved to a half-way house where he was entered into a work-release program. Upon the end of the work-release program, he was paroled. There was no mention of probation.

Applicant also argues the applicability of the canon of strict construction of criminal statutes, or rule of lenity, which commands that genuine ambiguities affecting a criminal statute's scope be resolved in the defendant's favor.[(53)] However, as noted, the rule promotes "fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement. . . ."[(54)] It only "properly comes into play when, at the end of a thorough inquiry, the meaning of a criminal statute remains obscure."[(55)] In this instance, the ambiguity of a criminal statute is no longer the focus of our analysis because the matter has moved on from a criminal venue to an administrative one. I conclude the rule of lenity in this case is no longer a consideration. Instead, since this is now a matter dealing with the interests of national security, the rule is reversed. "[S]ecurity-clearance determinations should err, if they must, on the side of denials."[(56)]

As noted above, all of the evidence herein flows directly from Applicant's pen or mouth as there are no police or court records in evidence. Likewise, the government offered nothing to describe with any additional specificity the exact nature of the half-way house or work-release program. Accordingly, based on all of the above, I conclude Applicant's placement in this particular work-release program and mandated residency in a state-controlled half-way house from April 1975 until January 1976, does not constitute "incarceration" under 10 U.S.C. § 986. This nine month period is a status or condition substantially short of "imprisonment" or "incarceration" as those terms are generally defined.

The period of actual incarceration time served (eight months) excludes this matter from the revised portions of Subsection (c)(1) of 10 U.S.C. § 986 (*has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year*). Consequently, 10 U.S.C. § 986, as revised, does not apply in this instance. Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case. Accordingly, allegations 1.a. and 1.b. of the SOR are concluded in favor of Applicant.

For the reasons stated, 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 J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

DECISION

In light of all 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.

Robert Robinson Gales

Chief Administrative Judge

1. Government Exhibit 1 (Security Clearance Application, dated September 30, 2003).

2. *Id*. at 7.

3. Response to SOR, dated October 24, 2005, at 6.

4. *Id.*

5. Government Exhibit 1, *supra* note 1, at 2.

6. Tr. at 32-33, 40.

7. Government Exhibit 1, *supra* note 1, at 4.

8. Tr. at 26.

9. Government Exhibit 1, *supra* note 1, at 3.

10. Tr. at 13.

11. Government Exhibit 2 (Statement of Subject, dated February 1, 1984) at 1.

12. *Id*.

13. Response to SOR, *supra* note 3, at 3.

14. Tr. at 20-21.

15. *Id.* at 22, 28; Government Exhibit 2, supra note 11, at 1..

16. Tr. at 23-24, 28.

17. *Id*. at 28.

18. *Id*. at 24, 29.

19. *Id.* at 23.

20. *Id.* at 29.

21. Government Exhibit 1, *supra* note 1, at 8. "I was not guilty of this crime. I was in the company of my uncle and his buddy. . . . They were guilty, but I was not."

22. *Id.* at 16.

23. *Id.* at 17.

24. The Directive, as amended by Change 4, dated April 20, 1999, uses "clearly consistent with the national interest" (Sec. 2.3.; Sec. 2.5.3.; Sec. 3..2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.); Sec. E3.1.26.; and Sec. E3.1.27.), "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.).

25. At my request, the parties submitted post hearing briefs.

26. *Black's LawDictionary* (4th Ed. 1951).

27. *See Brown v. Rison*, 895 F.2d 533, 536 (9th Cir. 1990).

28. 290 F.3rd 957 (7th Cir. 2002)

29. *Id.* at 959.

30. *Id.* at 960.

31. *Id.,* citing *U.S. v. Latimer*, 991 F.2d 1509 (9th Cir. 1993); *U.S. v. Pielago*, 135 F.3d 703 (11th Cir. 1998).

32. *Id.*

33. 40 F. 3d 1296 (D.C. Cir. 1994).

34. *Id.* at 1299.

35. *Id.*

36. 166 F. 3d 723 (5th Cir. 1999).

37. *Id.* at 726.

38. *Id.* at 727.

39. 921 F .2d 257 (10th Cir. 1990).

40. 929 F. 2d 505 (9th Cir. 1991) (finding that defendant's sentence of one-year weekend work project was a "sentence of imprisonment" for purposes of [USSG], despite lack of custodial confinement, based on sheriff's descretion to alter sentence to include imprisonment).

41. 921 F. 2d 257, 261.

42. 878 F. 2d 995 (7th Cir. 1989).

43. *Id.* at 996.

44. 869 F. 2d 835 (5th Cir. 1989).

45. 878 F. 2d 995, 996.

46. 895 F. 2d 533 (9th Cir. 1990).

47. *Id.*

48. *Id.*

49. 963 F. 2d 132 (6th Cir. 1992).

50. *Id.* at 137.

51. The post-hearing brief is not the time or place to challenge the characterization of Applicant's placement as a half-way house. If Applicant challenges that characterization, he had the obligation to do so in a timely manner, during the evidentiary portion of the hearing. As noted above, the burden of producing evidence initially falls on the government to establish a case which raises a security concern under the Directive that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or

mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance. In this instance, the challenge to the characterization is rejected as untimely.

52. Applicant has attempted to supplement the record by submitting an affidavit, dated May 5, 2006, furnishing additional information describing the halfway house program. The affidavit is rejected as not being timely.

53. *U.S. v. Bowen*, 127 F. 3d 9, 13 (1st Cir. 1997), citing *U.S. v. Lanier*, 520 U.S. 259 (1997); *Staples v. U.S.*, 511 U.S. 600 (1994).

54. *Id.* 127 F. 3d.

55. *Id.*

56. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988)