

DATE: September 11, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-16743

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant mitigated concerns raised by the citizenship and residence of her mother-in-law and her husband's step-siblings in Cuba. She failed to mitigate security concerns raised by her criminal conduct and personal conduct in deliberately falsifying her security clearance application by failing to list her shoplifting conviction. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1960), as amended, DOHA issued a Statement of Reasons (SOR) on 2 February 2006 detailing the basis for its decision—security concerns raised under Guideline B (Foreign Influence), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 21 February 2006 and elected to have a hearing before an administrative judge. The case was originally assigned to another administrative judge but was reassigned to me on 20 July 2006. On 2 August 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (R.) on 10 August 2006.

I kept the record open for Applicant to submit a security clearance application she submitted in 2001 to obtain her Secret clearance. Applicant was unable to locate the application, but Department Counsel found it in his case file and submitted it for her. Ex. E.

FINDINGS OF FACT

Applicant is a 32-year-old native-born U.S. citizen who is employed as an office manager for a defense contractor. She holds a master's degree in computer systems security. She has held a Secret clearance since May 2003. Ex. 1 at 8. She started work with her current employer in April 2004. *Id.* at 2. In July 2004, she completed a Security Clearance Application to upgrade her clearance to Top Secret.

In May 1997, Applicant married her husband. He was born in Cuba and immigrated to the U.S. in November 1994. His father brought him to the U.S. when he was 19 years old, with his sister and brother. R. 22. Applicant's husband served in the U.S. Army for three years and was separated with an honorable discharge in August 1998. He is now 30 years old, a naturalized U.S. citizen, and works out of his home as a registered nurse caring for disabled individuals. R. 21-23, 28; Ex. A. His father, his sister, and his brother are U.S. citizens. R. 21-23. His sister served six years in the U.S. Army and is now is a homemaker taking care of her children. His brother drives a cement truck. Applicant believes her father-in-law is in the Philippines, but is not sure.

Applicant's husband's mother, half-brother, and half-sister live in Cuba. His half-brother is 21 or 22 years old and graduated from college. His half-sister is now 16 and attends high school. R. 22. Applicant's husband has not seen them since he left Cuba in 1994, although he spoke to them on the telephone two or three times. He sent money to his mother three or four times, but never as much as the quarterly amount of \$300 permitted by the U.S. Government. R. 24. He exchanged e-mails with his mother every month. R. 30. He has not been in contact with his family in Cuba recently--his family there is upset that he has not sent them more money. Nevertheless, he does want to visit Cuba to see his mother at least once before she dies. R. 25. Neither her age nor her physical condition are such that he expects she will die in the near future. He obtained a license to visit his mother in Cuba, but did not receive his passport before the license expired. He cannot get another license for three years. He now intends to wait until relations between Cuba and the U.S. improve before he will go back to visit. *Id.* His mother works at a bank. R. 27. Applicant has never had contact with her husband's mother or half-siblings.

On 29 July 2004, Applicant completed a security clearance application (SCA) by certifying that her statements therein were "true, complete, and correct" to the best of her knowledge and belief and by acknowledging that a "knowing and willful false statement" could be punished by fine and/or imprisonment. Ex. 1 at 9. Question 9 asked Applicant to list her relatives and associates. She listed her mother, father, and two brothers. Applicant did not list any of her husband's relatives. She claims she was not aware that she had to list other than her own family members and that she did not see any question in the security clearance computer program she completed that concerned in-laws. R. 34.

Question 26 asked if, in the previous seven years, Applicant had been "arrested for, charged with, or convicted of any offense (s)" not listed elsewhere on the SCA, regardless of whether the record has been "sealed" or otherwise stricken. Ex. 1 at 7. She answered "no." Applicant claims she was not arrested but merely cited for shoplifting. She admits she pled guilty, was convicted, and sentenced to a fine of \$200 with \$100 suspended. She asserts she was very embarrassed by the incident and did not put it on the form because she was told it would be removed from her record after a year. R. 18-19, 35-36. On 8 June 2006, a district court judge ordered her arrest and criminal record sealed. Ex. D.

"Cuba is a totalitarian police state, which relies on repressive methods to maintain control." Ex. 2 at 1. "The Castro regime has long targeted the United States for intensive espionage activities." Ex. 4 at 1.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only 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). Each security 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." Directive ¶ 6.3. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or.

10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. **CONCLUSIONS**

Guideline B--Foreign Influence

In the SOR, DOHA alleged Applicant's mother-in-law, brother-in-law, and sister-in-law are citizens and residents of Cuba (¶ 1.a); and her husband sends \$50 to \$100 to family in Cuba once or twice yearly (¶ 1.b) and intends to visit Cuba in the near future (¶ 1.c). In her Answer, Applicant admitted each of the allegations, with explanation.

A security risk may exist when an applicant's immediate family, or other persons to whom he may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Directive ¶ E2.A2.1.1. The totality of an applicant's family ties to a foreign country, as well as each individual family tie, must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003).

A potentially disqualifying condition may arise when an applicant has immediate family members, or others to whom she has close ties of affection or obligation, who are citizens of, residents of, or present in a foreign country. DC E2.A2.1.2.1. There is a rebuttable presumption that an applicant has ties of affection or obligation to her husband's immediate family members. *See* ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Feb. 20, 2002). It may also be disqualifying to share living quarters with a person if the potential for adverse foreign influence or duress exists. DC E2.A2.1.2.2.

After carefully reviewing all of the evidence, I conclude DC E2.A2.1.2.1 does not apply. Applicant rebutted the presumption that she has close ties of affection or obligation with her husband's mother and half-siblings. DC E2.A2.1.2.2 applies. She shares living quarters with her husband and the potential for adverse foreign influence or duress exists through him. Although Applicant's husband still loves his mother and step-siblings and is concerned for their welfare, it is clear that Applicant herself is indifferent at best. She has never even talked to her mother-in-law. Although Applicant's husband provided some financial assistance to his family in Cuba in the past, it was of such a nominal value as not to raise DC E2.A2.1.2.8. As he has put his desire to visit Cuba on hold for the immediate future, he will not place himself in a position that could lead to exploitation of pressure by a foreign government against Applicant. *See* DC E2.A2.1.2.6.

Guideline E--Personal Conduct

In the SOR, DOHA alleged Applicant falsified material facts in her SCA by failing to disclose her mother-in-law, brother-in-law, or sister-in-law who reside in Cuba⁽¹⁾ (¶ 2.a) and her police record of being arrested for and convicted of shoplifting (¶ 2.b). In her Answer, Applicant denies each of the allegations, with explanation.

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1. The deliberate falsification or omission of relevant and material facts from any SCA is a security concern and may be disqualifying. DC E2.A5.1.2.2. Information is material if it would affect a final agency decision or would impede a thorough and complete investigation of an applicant's background. *See* ISCR Case No. 01-06870, 2002 DOHA LEXIS 469 at **13-14 (App. Bd. Sep. 13, 2002). An applicant's relatives and criminal history are matters that could affect a final agency decision on whether to grant the applicant a clearance, and her failure to disclose it would impede a thorough investigation of the applicant's background.

Applicant asserts that when she completed the computer-generated SCA, there was no question that would require listing her mother-in-law or her husband's step-siblings and that she would have listed her in-laws if asked. "[P]roof of Applicant's omission, standing alone, does not establish or prove Applicant's intent or state of mind when [she] completed the security clearance application." ISCR Case No. 02-23133, 2004 DOHA LEXIS 697 at *11 (App. Bd. Jun. 9, 2004). The administrative judge must consider whether "given the record evidence as a whole, there is direct or circumstantial evidence concerning Applicant's intent or state of mind when [she] completed the security clearance application." *Id.* at 12. There is no direct or circumstantial evidence in the record to establish that the entry list options in

the computer program included those for mother-in-law or foreign associates of her and her husband. I conclude there is no evidence, other than the omission of the information from the SCA, on which to conclude Applicant deliberately falsified her SCA by failing to list her mother-in-law and her husband's step siblings.

Applicant admitted that she pled guilty to, and was convicted of, shoplifting. She gave excuses for why she did not list it on her SCA. She asserts that she was very embarrassed by her conduct, but omitted it from the SCA because she understood that it would be expunged from her record in a year. Question 26 is clear. An applicant is required to list criminal offenses even if they are sealed or stricken from the record. After listening to her testimony and observing her demeanor, I am convinced she deliberately falsified her answer to question 26. The evidence raises DC E2.A5.1.2.2.

An applicant may mitigate such deliberate falsification by taking positive steps to significantly reduce or eliminate her vulnerability to coercion, exploitation, or duress. MC E2.A5.1.3.5. By admitting her shoplifting conviction, Applicant has raised this mitigating condition.

Guideline J--Criminal Conduct

In the SOR, DOHA alleged Applicant was arrested for and convicted of shoplifting (§ 3.a) and violated 18 U.S.C. § 1001 by knowingly and willfully falsifying her SCA (§ 3.b). Applicant denied the allegations.

It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. Information is material if it would affect a final agency decision or would impede a thorough and complete investigation of an applicant's background. *See ISCR Case No. 01-06870*, 2002 DOHA LEXIS 469 at **13-14 (App. Bd. Sep. 13, 2002). An applicant's failure to fully advise investigators of her criminal conduct would impede a thorough security investigation and affect a final agency decision. A violation of 18 U.S.C. § 1001 is a serious offense-it carries a maximum sentence that includes confinement for up to five years.

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. It is potentially disqualifying when there are allegations or admissions of criminal conduct against an applicant (DC E2.A10.1.2.1) or engages in a single serious crime or multiple lesser offenses (DC E2.A10.1.2.2). Both disqualifying condition apply. Applicant admitted an allegation of criminal conduct--the shoplifting. And she committed a serious offense by deliberately falsifying her SCA.

An applicant may mitigate criminal conduct security concerns by establishing that the criminal behavior was not recent (MC E2.A10.1.3.1); the crime was an isolated incident (MC E2.A10.1.3.2); the applicant was pressured or coerced into committing the acts and those pressures are no longer present (MC E2.A10.1.3.3); the applicant did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur (MC E2.A10.1.3.4); the applicant was acquitted (MC E2.A10.1.3.5); or there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6). There is strong evidence that all but MC E2.A10.1.3.3 and E2.A10.1.3.5 would have applied had shoplifting been her only criminal offense. But such is not the case. Applicant's deliberate falsification of her SCA is also a criminal offense. I conclude none of the listed mitigating conditions apply. Although Applicant submitted her SCA more than two years ago, it is the very foundation on which a security clearance is granted. Therefore, her criminal behavior is recent, and MC E2.A10.1.3.1 does not apply.

Admission of guilt is often the first step to rehabilitation. Applicant cannot bring herself to admit she deliberately falsified her SCA.

The Whole Person

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive E2.2.1. "Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." *Id.* In evaluating Applicant's case, I have considered the adjudicative process factors listed in the Directive ¶ E2.2.1.

Applicant appears to be a bright, mature, educated woman. She is a college graduate who recently completed a master's degree in computer systems security. Yet she refused to admit that she deliberately falsified her SCA. Instead, she tried to excuse her behavior by testifying that she thought she did not have to list it because it would be mitigated in a year. I found her testimony on this point to be disingenuous at best. Eligibility for access to classified information is limited to those "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968 § 3.1(b) (Aug. 4, 1995). Applicant failed to convince me she has the requisite honesty, trustworthiness, or reliability.

I find against Applicant on SOR ¶¶ 2.b, 3.a, 3.b.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline B: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

Subparagraph 3.b: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. Apparently DOHA did not consider Applicant's failure to list her father-in-law in the Philippines, or her brother-in-law and sister-in-law who are U.S. citizens as potentially disqualifying conduct.