



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



In the matter of:)
)
) ISCR Case No. 07-07645
SSN:)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: David L. Hagan, Esquire

January 7, 2009

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on December 19, 2006. On April 4, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline B for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on April 17, 2008. He answered the SOR in writing through counsel on May 1, 2008, and requested a hearing before an Administrative Judge. DOHA received the request soon thereafter. This case was assigned to another Administrative Judge on June 6, 2008; but due to a temporary duty (TDY) commitment for that Judge, it was reassigned to the undersigned on August 25, 2008. DOHA had previously issued a notice of hearing on July 16, 2008, and I

convened the hearing as scheduled on September 10, 2008. The Government offered Exhibits (GXs) 1 through 5, which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AppXs) A and B, which were also received without objection. DOHA received the transcript of the hearing (TR) on September 19, 2008. The record closed on September 10, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel moved to amend the SOR by adding Paragraphs 2 and 3, alleging the following:

2. Guideline J: Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations. Available information raising this concern shows:

a. You are harboring your wife who is an illegal alien in violation of 8 U.S.C. 1324.

b. You are harboring your step-daughter who is an illegal alien in violation of 8 U.S.C. 1324.

3. Guideline E: Conduct involving questionable judgement, 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. Available information raising this concern shows that:

a. You are harboring your wife who is an illegal alien in violation of 8 U.S.C. 1324, as set forth above in 2(a).

b. You are harboring your step-daughter who is an illegal alien in violation of 8 U.S.C. 1324, as set forth above in 2(b) (TR at page 6 line 21 to page 7 line 19).

Applicant's counsel stipulated to the amendment (TR at page 7 line 22 to page 8 line 10).¹

¹The Government submitted two exhibits regarding Mexico, GXs 3 and 4. However, the Government did not ask that the undersigned take administrative notice of any facts vis a vis Mexico.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in Paragraph 1 of the SOR, with explanations. At his hearing, he denied the factual allegations in Paragraphs 2 and 3.

The Applicant is a 40 year old electronics technician who works for a defense contractor (TR at page 4 lines 12~18). He served in the U.S. Navy for six years, from which he was honorably discharged (TR at page 20 lines 9~23).

Guideline B - Foreign Influence

1.a. The Applicant met his spouse in the U.S., at the motel where he was staying on a business trip (TR at page 26 line 11 to page 28 line 15, and at page 60 line 13 to page 61 line 22). She worked at that motel (*Id*). He knew her heritage was Mexican, but he thought she was a legal resident of the U.S. (TR at page 29 line 22 to page 30 line 8). After their relationship became more serious, he discovered that she was in the U.S. illegally (TR at page 31 line 15 to page 30 line 16). Once they were married, however, he thought she could get legal residency status (TR at page 43 line 16 to page 46 line 17). He was wrong (*Id*). She is a citizen of Mexico, living in the U.S. illegally as Applicant's spouse (TR at page 57 line 9 at page 58 line 15). She is subject to deportation; and as such, may not be eligible to return to the U.S. for ten years (TR at page 43 line 16 to page 46 line 17).

1.b. The Applicant's minor step-daughter, his spouse's daughter by a previous marriage, is also in the U.S. illegally (TR at page 28 line 16 to page 29 line 4). Although she is also subject to deportation; due to her being a minor, she would not be barred from returning to the U.S. for ten years (TR at page 71 line 16 to page 73 line 14).

1.c. The Applicant's mother-in-law is a citizen of Mexico, residing in the U.S. (TR at page 61 line 23 to page 63 line 8). She is remarried to a native born American, but Applicant is unsure of her immigration status; i.e., whether she is in the U.S. legally (*Id*).

1.d. The Applicant's father-in-law and four brothers-in-law are citizens and residents of Mexico (TR at page 64 line 6 to page 66 line 6). The Applicant has spoken to his father-in-law once on the phone, but has never spoken to his brothers-in-law (*Id*). He has no idea what they do for a living (TR at page 64 line 6 to page 66 line 6).

Guideline J - Criminal Conduct & Guideline E - Personal Conduct

2.a., 2.b., 3.a. and 3.b. The Applicant is knowingly harboring two illegal immigrants, his spouse and his step-daughter, in violation of 8 U.S.C. 1324(a)(1)(A)(iii). Under 8 U.S.C. 1324(a)(1)(B)(ii), the Applicant is subject to a "fine" and/or imprisonment for "not more than 5 years."

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." 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 grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the 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.

Section 7 of Executive Order 10865 provides that 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B - Foreign Influence

Paragraph 6 of the new adjudicative guidelines sets out the security concern relating to Foreign Influence: “Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by a foreign interest.”

Here, Paragraph 7(a) is applicable: “*contacts with a foreign family member . . . who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.*” The Applicant’s spouse and step-daughter are Mexican nationals residing in the U.S. illegally. This is countered, however, by the first Mitigating Condition, as “*the nature of the relationships with foreign persons, the country in which these persons are located . . . are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual . . . and the interests of the U.S.*” The Applicant’s situation is an unusual one. So long as his spouse and step-daughter reside with the Applicant in the U.S., there is little likelihood of any attempt at coercion by Mexico or any other government. As to his other Mexican relatives, he has little, if any, contact with them.

Guideline J - Criminal Conduct

Paragraph 30 of the new adjudicative guidelines sets out the security concern relating to Criminal Conduct: “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.”

The adjudicative guidelines set out certain conditions that could raise security concerns. Paragraph 31(c) provides that an “*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,*” may raise security concerns. Here, I can find no countervailing Mitigating Condition, as the Applicant’s criminal conduct, harboring two illegal immigrants, is knowing, continuing conduct.

Guideline E - Personal Conduct

The adjudicative guidelines also set out the security concern relating to Personal Conduct: “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 information.”

Here, the last Disqualifying Condition applies, “*association with persons involved in criminal activity.*” His spouse and step-daughter are illegal immigrants. So long as

their illegal status in this country remains unchanged, I can find no countervailing Mitigating Condition.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(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) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. The Applicant has the unqualified support of his Executive Officer, of his Site Manager, and of his Team Leader (AppX A at pages 5~7).

I have considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his Criminal Conduct and related Personal Conduct.

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 B:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Richard A. Cefola
Administrative Judge