



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-09586
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel Crowley, Esquire, Department Counsel
For Applicant: Laura O'Reilly, Esquire

August 4, 2008

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on May 10, 2006. On March 20, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E 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 11, 2008. He answered the SOR in writing and requested a hearing before an Administrative Judge. I received the case assignment on May 20, 2008. DOHA issued a notice of hearing on May 30, 2008, and I convened the hearing on June 20, 2008. The Government offered Exhibits (GE) 1-2, which were received without objection. Applicant testified in his own behalf and presented the testimony of one witness. He submitted exhibits (AE) A-R. I left the record

open until July 15, 2008 at the request of Counsel for Applicant. Applicant submitted information concerning the interview that was scheduled and held on July 8, 2008. The record closed on August 1, 2008. DOHA received the transcript of the hearing (Tr) on June 30, 2008. Based upon a review of the case file, testimony, and pleadings, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, dated April 11, 2008, Applicant admitted the factual allegation in ¶ 1.a of the SOR. Applicant provided additional information to support his request for eligibility for a security clearance.

Applicant is a 40-year-old employee of a defense contractor. He graduated from high school in 1986 and attended college courses for a brief period (AE O). He has been employed with his current employer since 2005 (GE 1).

Applicant worked for a local company for nineteen years. He received the highest award possible from that company (Business Improvement Award) (AE N). He was the incident commander at the facility. He left when new management arrived to pursue a new opportunity. He did not have a security clearance for his prior job, nor did he need one.

Applicant is twice divorced. He married his current wife on May 18, 2006. He met his wife through her brother with whom he worked in 2002. He did not date her until 2005. Applicant learned that she was an illegal alien. However, he also knew that she had an application for adjustment status filed through the sponsorship of her brother in 2001 (AE C).

Applicant's wife filed her document I-130 with the Immigration and Naturalization Service (INS) in 2001. Applicant contacted an attorney after he married his wife. He learned that there was a flood of paperwork being processed at that time due to government policy (Tr. 35). Applicant was advised to file another form for his wife using his name as sponsor. He completed that task in April 2006. His understanding was that it would be expedited. When Applicant completed his SF 86 and spoke to an investigator, he communicated that information. However, when he called his immigration attorney, he learned that in fact, the form had not yet been filed. His attorney acknowledged that he neglected to expedite the case (AE R) A petition for adjustment of status was eventually filed for his wife on October 21, 2007 (Tr. 38). The delay in the filing was not the fault of Applicant.

Applicant and his wife had an appointment with the Immigration office on July 7, 2008. (AE R). The interview that had been scheduled for March 27, 2008 was postponed by the attorney due to a scheduling conflict. Applicant expects that his wife will become a permanent resident of the U.S. after the interview process. They are waiting for the final processing. Applicant's wife's immigration attorney attended the

hearing and spoke on her behalf. Applicant's wife's fingerprint check revealed no criminal record.

Applicant's wife arrived in the U.S. in 2000 after crossing the border in Arizona. She stayed with her sister and her brother. She has another brother in the U.S. Her brother is a U.S. citizen and her sister is a permanent resident who is pursuing citizenship.

Applicant's wife is not working but she is authorized to work. She has an employment authorization card (AE A). She is taking English classes and takes various college courses. She is studying so that she could get a job in the future (AE P). She possesses a valid driver's license (AE A). Applicant and his wife are active in church activities. He sometimes goes with his wife to class.

Applicant has an exemplary work record in his former company and his current one (AE N). He has a responsible position. He has not had any incidents or problems in his work or personal life. He received letters of recommendation and a service award in 2005. Applicant has no criminal record (AE D).

Although Applicant's wife entered the U.S. illegally from Mexico, she can still apply for permanent residence in the U.S. Section 245I of the Immigration and Nationality Act (INA) allows adjustment of status for the alien if a provable petition was filed for the alien before April 30, 2001, and that alien was present in the U.S. on December 20, 2000. She is not in any type of criminal status and is not subject to being arrested and/or deported for simply being here in the U.S. She has no criminal record (AE E).

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, 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 E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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 cooperate with the security clearance process.

AG 16 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(C) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable

judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulation, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and many 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.

Applicant met, dated and married a woman from Mexico whose status in the U.S. is not legal. This involvement with someone who has violated laws of the U.S. is sufficient to raise the disqualifying conditions under 16(c) and (d).

The AG ¶ 16 continues:

(e) personal conduct, or concealment of information 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.

This disqualifying condition is also a factor for consideration in this case.

Paragraph 17 lists conditions that could mitigate security concerns. Specifically, AG ¶ 17 states:

(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 case doubt on the individual's reliability, trustworthiness, or good judgement.

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur" does apply.

AG 17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress is a factor for consideration.

Applicant acknowledged that he knew his wife was an illegal alien when he met her in 2002. However, her brother had already petitioned for her change of status in April 2001. There was a delay in the process through no fault of Applicant. Afer their marriage, Applicant filed another petition for his wife. They had a hearing on July 7, 2008. Applicant's wife is not in any criminal status pending the determination. Applicant

has no criminal record. He was open and forthright about his wife's situation. Moreover, she is pending status for permanent residence. I conclude these were a unique set of circumstances and that Applicant has mitigated any security concerns under the personal conduct guidelines.

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) the 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a hard working responsible man. He was employed with one company for almost 20 years. He now is working for a defense contractor. He is a loyal employee. He is enthusiastic about his job. He has earned the respect and appreciation of his supervisors and co-workers. He is stable and concerned about his future. He has received excellent performance ratings and evaluations. Government counsel even conceded that Applicant's professional life is without tarnish.

Applicant met his wife through her brother with whom he worked. They established a friendship in 2002. They started dating in 2005. Applicant married in 2006, and acknowledged that he knew at that time that she was an illegal alien. However, he also knew that her brother had sponsored her for change of status. He could not foresee that problems with processing would develop. Before he married her, he could not do anything to sponsor her himself. He did not violate any rules or regulations. He demonstrated his determination to address his wife's illegal alien status and acquire legal resident status of her. I have considered that evidence in this decision.

Overall, the record evidence and whole person analysis leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his 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 E: FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

NOREEN A. LYNCH
Administrative Judge