



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	
SSN:)	ISCR Case No. 08-02471
)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer I. Goldstein, Esquire, Department Counsel
For Applicant: *Pro Se*

February 17, 2009

Decision

MOGUL, Martin H., Administrative Judge:

On July 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns for Applicant under Guidelines E and J. 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 responded to the SOR (RSOR) in writing on September 11, 2008, and requested a hearing before an Administrative Judge. I received the case assignment on November 5, 2008. DOHA issued a Notice of Hearing on December 3, 2008, and I convened the hearing, as scheduled, on December 15, 2008. The Government offered Exhibits 1 through 4, which were received without objection. Applicant testified on her own behalf and submitted no documents at the hearing. At the request of Applicant, the record remained open until December 22, 2008, to allow Applicant to offer post hearing documents. She offered into evidence three character letters, and a Performance

Evaluation, which have been marked as Exhibits A through D respectively, and entered into evidence without objection. DOHA received the transcript of the hearing (Tr) on December 23, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 24 years old, and a high school graduate with one year of college. She is unmarried, and she has no children.

Applicant works for a defense contractor as a survey specialist, and she seeks a DoD security clearance in connection with her employment in the defense sector.

Paragraph 1 (Guideline E - Personal Conduct)

1.a. On November 16, 2005, Applicant was taken into custody in California, after crossing the border from Mexico into the United States with an illegal alien hiding in the trunk of the car, in which she was riding as a passenger. The initial charges against her were (1) Bringing illegal aliens into the United States, and (2) Alien smuggling. She was detained in jail overnight, and on the following day she signed an agreement with the United States that if she participated in this illegal activity again, she would be arrested and prosecuted. She was released, and no charges were brought against her.

Applicant testified that at the time of this event she was 21 years of age. On the day of the incident Applicant received a telephone call from her cousin, asking Applicant if she would like to accompany her cousin on a ride to Tijuana to pick up a relative of her cousin's boyfriend from the Tijuana airport, and bring him back to the United States. Applicant stated that she had done this with her cousin on two previous occasions. She agreed to accompany her on this date.

She testified that they picked up the individual from the Tijuana airport, and as they were preparing to reenter the United States, her cousin stopped the vehicle, opened the trunk of her vehicle, and the individual whom they had picked up got into the trunk. Applicant then asked, "What are you doing?" It was then that she was first informed that he did not have the proper paperwork to enter the United States legally. Applicant testified that she had no prior suspicion of what they would be doing, since the previous two times they had transferred someone from the Tijuana airport into the U.S., the person had the proper paperwork and simply sat in the vehicle and entered legally.

Applicant testified that when she realized what they were doing on this trip, she knew that it was wrong, and she protested this action to her cousin. However, since she was in unfamiliar territory in Tijuana, Mexico, and it was the middle of the night, she was

afraid for her safety, and she simply did not know what to do. As they attempted to cross into the United States the Border Patrol stopped the vehicle and found the individual hiding in the trunk. Both she and her cousin were searched and handcuffed, and ultimately they were fingerprinted and their pictures were taken.

They were both detained overnight in jail, and in the morning Applicant signed a document, stating that if she was involved in this conduct in the future she would be arrested and charged with committing a felony. Thereafter, both she and her cousin were released and they had no further requirements.

Applicant testified credibly as to her remorse over being involved in this incident, and that she would never engage in such conduct in the future. She also reiterated that with the exception of this event, she has never been arrested or involved in any other illegal conduct. Finally, she testified that if she ever found herself in a similar circumstance she would exit the vehicle and call to have someone else come and take her home.

Paragraph 2 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because she has engaged in criminal conduct.

2.a. Applicant's conduct, reviewed above in Paragraph 1, constitutes criminal conduct. At the hearing, Department Counsel requested that I take administrative notice of 8 United States Code section 1324. I find that Applicant's action did constitute a violation of that code section, as she attempted to bring an alien into the United States in a manner other than through a designated port of entry or place other than as designated by the Commissioner.

Mitigation

Applicant offered into evidence three character letters from individuals who have known her in her professional capacity (Exhibits A through C). They all were extremely laudatory and described Applicant as "honest and reliable," and "one of our brightest, hardest working, and trusted employee's (*sic*)!"

Finally, Applicant also submitted her Performance Evaluation, dated August 24, 2007. In all categories she was rated Good, with an Outstanding rating as to treating her supervisors with respect, and cooperation with others. She was rated overall as a "good employee and a valued member of the team", with her "skills growing on a daily basis."

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 E - Personal Conduct

With respect to Guideline E, the evidence establishes that Applicant's conduct exhibited questionable judgement, and a potential unwillingness to comply with rules and regulations. However, I do not find that Applicant's conduct falls under any of the

Disqualifying Conditions (DC). While she did engage in criminal conduct as will be discussed below, the circumstances involved in her conduct were rather unique. First she did not have any advanced notice of the conduct and only learned that her cousin was planning to transport an illegal alien into the U.S., when they were in Tijuana, Mexico, late at night. While she should have refused to remain in the vehicle when she realized what her cousin intended to do, it is understandable that a young girl in these circumstances would be frightened and not sure what she would be the proper action she should take.

I resolve Paragraph 1, Personal Conduct, for Applicant.

Guideline J, Criminal Conduct

The Government also established that Applicant engaged in criminal conduct, by being involved in the illegal transportation of an alien into the United States, which is a violation of 8 United States Code section 1324.

In reviewing the Disqualifying Conditions, I find that DC 31. (a), a single serious crime or multiple lesser offenses, applies in this case. DC 31. (c), allegations or admissions of criminal conduct, regardless of whether the person was formally charged, is also applicable to this case.

However, I find that MC (a) is applicable, as this conduct happened under unusual circumstances as reviewed above, it is highly unlikely to recur again, and it does not cast doubt on the Applicant's current reliability, trustworthiness and good judgement. MC (d) also applies as I find successful rehabilitation, since no criminal conduct has occurred in more than three years, Applicant expressed sincere remorse, and the positive character letters and Performance Evaluation, is strong evidence of a good employment record.

Paragraph 2, Criminal Conduct, is found for Applicant

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.

I have considered the potentially disqualifying and mitigating conditions under Guidelines E and J, in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above, as to why the mitigating Adjudicative Guidelines apply, the youth of the Applicant at the time of the incident, the facts surrounding the incident, her genuine contrition, and her positive recommendations and Performance Evaluation, I find that the record evidence leaves me with no significant questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude that at this time, Applicant has mitigated the security concerns.

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
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge