



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



In the matter of:)
)
) ISCR Case No. 08-03647
)
)
Applicant for Security Clearance)

Appearances

For Government: John B. Glendon, Esquire, Department Counsel

For Applicant: *Pro se*

February 19, 2009

Decision

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guideline for personal conduct. Accordingly, his request for a security clearance is denied.

Statement of the Case

Applicant requested a security clearance by submitting an Electronic Questionnaire for Investigations Processing (e-QIP) on February 23, 2007. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and

Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

On August 29, 2008, DOHA issued to Applicant a Statement of Reasons (SOR) that specified as the basis for its decision security concerns addressed in the Directive under Guideline E (Personal Conduct) of the Revised Adjudicative Guidelines (AG).² The SOR contained three allegations under Guideline E. In his Answer, signed and notarized on September 16, 2008, Applicant admitted to allegation 1a and denied allegations 1b and 1c. He also requested a hearing before an administrative judge. The government amended the SOR on October 20, 2008 by adding one allegation under Guideline E. In his response of November 10, 2008, Applicant denied the additional allegation.

Department Counsel was prepared to proceed on November 13, 2008, and the case was assigned to me on November 17, 2008. DOHA issued a Notice of Hearing on November 25, 2008 and I convened the hearing as scheduled on December 17, 2008.

During the hearing, the government offered three exhibits, marked as Government Exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified and offered six exhibits, which were marked as Applicant Exhibits (AE) A through F and admitted without objection. DOHA received the transcript on December 24, 2008.

Administrative Notice

I take administrative notice of Title 8 of the U.S. Code, §1324, which concerns the felony of harboring illegal aliens. The pertinent federal statutory language follows:

§1324. Bringing in and harboring certain aliens

(A) Any person who –

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

shall be punished as provided in subparagraph (B).

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. The Revised Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, imprisoned not more than 5 years, or both.

Findings of Fact

Applicant's admissions in response to the SOR are admitted as fact. After a thorough review of the pleadings, Applicant's response to the Statement of Reasons, and the record evidence, I make the following additional findings of fact.

Applicant, 63 years old, completed one year of college, specializing in accounting (AE C). He joined the federal government in 1966, and worked as a civilian for the Department of Defense for more than four decades. When he retired in 2004, he was employed as an information management specialist. During his federal service, Applicant received more than 50 letters, awards and certificates for his superior job performance and contributions (AE B; AE E). Applicant is currently employed as a senior manager for a defense contractor.

Applicant married in 1966. He has five adult children from the marriage, and seven grandchildren. He and his first wife grew apart because of his long work hours and frequent travel. They started living apart in 1989, and obtained a legal separation in 1993 (Tr 54; AE F). Their divorce became final in 2004. That year, he met his current wife, whom he married in December 2005 (GE 2). Applicant has two step-children, 13 and 15 years old, who are the children of his current wife.³ They also have an 8-month old son together.

Applicant's wife was born in a foreign country. She entered the United States illegally in the late 1990s with her first husband (GE 3; Tr 70). After their divorce, she worked at a hair salon doing general cleaning. When Applicant met her in 2004, and married her in 2005, he did not know of her illegal status (Tr 49). He first learned of her status in April 2006, when he was preparing their joint 2005 federal tax return and discovered she did not have a Social Security number. She provided him with a number he referred to as a "tax ID number," which appeared on her previous tax returns, W-2 forms, and bank statements. His wife told him that the IRS had notified her of a problem with the tax ID number on a previous return she had filed (Tr 71). Despite having this information, Applicant filed their 2005, and subsequent tax returns, using the tax ID number.⁴ He believed that her tax ID number was

³ Applicant has not legally adopted his wife's children (Tr 97).

⁴ On his security clearance application, in response to the question that asks for his spouse's Social Security number, Applicant provided a number with the same format as a Social Security number. It does not have the format of a tax ID number (also called an Employer Identification Number or EIN). The evidence is silent as

valid to use on the return, although it could not be used to claim tax benefits (Tr 72).

Between mid-2006 and 2007, Applicant's mother-in-law came to the United States for a heart operation. His father-in-law, who had been in the United States for several months, living with another family member, moved in with Applicant as well. Both family members were in the United States on visas (GE 3). Applicant's in-laws lived with him for approximately six months. They had little interaction, as neither spoke the other's language (Tr 92-97).

In June 2006, Applicant accepted a new job. Shortly after he started, he approached the security manager and inquired whether or not he needed a security clearance. He was instructed to complete a security clearance application, on which he disclosed his wife's foreign citizenship, but not her illegal status. He also failed to list his foreign in-laws (GE 1). Applicant believed that disclosing his wife's foreign citizenship was sufficient, and it did not occur to him that he also should disclose her illegal status (Tr 90-92). "This -- this is how I was telling the Government. Okay? It wasn't on my mind after we got married or after I told -- found out that -- to run to my security office, which I wasn't even sure who it was or what to say or --" (Tr 91). He also failed to inform his security officer of his wife's illegal status because "I wasn't -- you know, I wasn't -- didn't know I had to for one thing, because I wasn't familiar with the industrial security regulation personnel thing." (Tr 88). During his security clearance interview in November 2007, he did disclose his wife's illegal status to the investigator (GE 3).

At the hearing, when asked if he was aware that contact with foreign nationals must be reported to his security officer, he replied that he was aware, because of his experiences with traveling while holding a clearance. However, he did not think such concerns were relevant to his case: "I just didn't know it would apply that once I found out my wife was illegal or a foreign national that I had to say that. Okay? I mean, she's my wife." He also did not believe his marriage to a foreign national was a security concern: "It wasn't a concern to me because I knew that I wasn't a risk. I could not be influenced or coerced or any of that stuff into doing anything wrong towards -- to jeopardize my clearance." (Tr 89).

In 2006, Applicant contacted the Immigration and Naturalization Service (INS) and obtained citizenship paperwork for his wife. He also researched web sites to obtain information about applying for citizenship (Tr 76). Subsequently, however, he "...heard that the government was using citizenship applications to find illegal immigrants and deport them." (GE 3). Based on this understanding, and his belief that an illegal immigrant must be outside the United States in order to file a citizenship application (Tr 73-74), he decided not to submit the paperwork, and wait to see if immigration laws would be reformed (GE 3).

to whether the number on the security clearance application is the "tax ID number" Applicant used on the federal tax returns.

Applicant has not consulted an immigration attorney, although his current salary would appear to allow him to do so (Tr 77). He seemed uncertain about the information his wife has obtained about her options. He believes she has talked with relatives and friends and may have received free legal advice through a service at her church (Tr 75). He does not know if she has any rights based on her status as the spouse of an American citizen (Tr 80). He thinks that in order to obtain legal status, his wife and her children must return to her native country and remain there for five years before she can seek U.S. citizenship. Because Applicant wants his stepchildren “to have a future” in the United States, he decided, within the past six months, that she should return to her native country (Tr 39-40; 78-79). As of the date of the hearing, no further steps had been taken.

Policies

Each security clearance decision must be a fair, impartial, and common sense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).⁵ Decisions must also reflect consideration of the “whole person” factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline E (Personal Conduct).

A security clearance decision is intended to determine whether it is clearly consistent with the national interest⁶ for an Applicant to be granted access to classified information. The government must produce admissible information on which it based the preliminary decision to deny or revoke a security clearance. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the Applicant to refute, extenuate or mitigate the government’s case. Because no one has a “right” to a security clearance, an Applicant bears a heavy burden of persuasion.⁷ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability

⁵ Directive. 6.3.

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁷ See *Egan*, 484 U.S. at 528, 531.

and trustworthiness to protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an Applicant’s suitability for access in favor of the government.⁸

Analysis

Personal Conduct

AG ¶ 15 expresses the security concern about personal conduct:

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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Disqualifying conditions AG ¶ 16(a) and AG ¶ 16(c) are relevant to the facts:

AG ¶ 16(a) - deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

AG ¶ 16(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 regulations, or other characteristics indicating that the person may not properly safeguard protected information.

The government alleges that, when he completed his security clearance application, Applicant deliberately failed to disclose his in-laws, who are citizens and residents of a foreign country. Falsification of a security clearance application implicates AG ¶ 16(a); however, application of this disqualifying condition requires deliberate concealment. Although Applicant failed to report his foreign in-laws on his security clearance application, he did report numerous other family members, including his former

⁸ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

wife, his five children, and his three siblings. More to the point, he disclosed several foreign relatives. If he intended to mislead the government about foreign contacts, it is unlikely that he would have disclosed the foreign nationality of his current wife and two stepchildren and provided their country of citizenship. Reporting his close foreign family members provided the government with notice that a security issue existed. I find Applicant's statement credible that omission of his in-laws was inadvertent.

However, Applicant's conduct raises other security concerns. In 2006, he became aware that his spouse and her children had been in the United States illegally for more than 5 years, and that they remained in an illegal status. Nevertheless, he failed to take steps to correct the situation. Most significantly, he engaged in felony conduct by violating the federal immigration statute that prohibits harboring illegal aliens.⁹

Applicant also demonstrated untrustworthy behavior by failing to disclose on his security clearance application that his spouse was an illegal alien. At the time he completed his security clearance application in February 2007, he had known of his wife's status for 10 months. He should have indicated this significant fact in his application. He also should have informed his security officer. His statement that he "...wasn't even sure who it was" (Tr 91) is not credible, since he previously had sought out his security manager to find out whether or not he needed to submit a new security clearance application (Tr 88). Applicant's harboring of an illegal immigrant, and his concealment of her status from the government, have continued since 2006. Based on his violation of federal law, and his failure to comply with security requirements, AG ¶ 16(c) applies.

The personal conduct guideline also includes factors that can mitigate disqualifying conditions. The following mitigating conditions are relevant to the facts:

AG ¶ 17(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 cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 17(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.

Applicant's conduct can hardly be considered minor. After he became aware that

⁹ 8 U.S.C. §1324 (A) (iii).

his spouse and her children were in the United States illegally, he failed to take steps to correct the situation, and violated federal law by harboring them. Applicant's conduct is not in the past, but is ongoing and casts serious doubt on his trustworthiness and good judgment. AG ¶17(c) does not apply.

Nor can AG 17(d) be applied. Although Applicant obtained information through INS and related web sites about applying for citizenship, he ultimately decided not to pursue that option. Since then, he has taken no steps to consult or retain an immigration attorney to advise him on a plan of action, even though it appears that such a step would be financially within his means. He is unclear as to what information his wife has obtained. As of the date of the hearing, Applicant had not resolved the situation: he was living with an illegal alien, had not sought professional advice, and had no plan other than an uninformed opinion that his wife and children might need to return to their native country. His inaction raises doubts about whether or not he is committed to resolving this ongoing security concern. I find against Applicant on Guideline E.

Whole Person Analysis

Under the whole person concept, an administrative judge must evaluate the Applicant's security eligibility by considering the totality of the Applicant's conduct and all the circumstances. An 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

In April 2006, when Applicant learned that he was married to and living with an illegal alien, he was a mature and experienced adult with a long history of holding a security clearance. Based on his familiarity with the security clearance process, he knew or should have known that those who hold security clearances are required to inform their security departments of significant life changes that could affect their security worthiness.

He often traveled while he held a security clearance, and admitted that this experience made him aware of the concerns related to contacts with foreign nationals. Yet, when he completed the security clearance application, Applicant failed to inform the government of a highly pertinent fact – that his wife was an illegal alien. Given his background and experience, his claim that he was unaware of the need to inform his security manager of his spouse’s illegal status is not credible. His claim that he did not even know his security officer’s identity is undermined by the fact that he previously sought out his security officer to determine if he needed to complete a security clearance application. Finally, Applicant did not report his wife’s status because “it wasn’t a concern to me because I knew I wasn’t a risk.” It is most troubling that Applicant decided, on his own, that the situation did not constitute a security risk. The government requires those who hold security clearances to disclose pertinent facts so that authorized security personnel can decide where security risks lie. Applicant’s ongoing violation of federal law, his failure to disclose his wife’s illegal status for more than one-and-a-half years, and his willingness to disregard security requirements, raise serious doubts about his trustworthiness and reliability.

Overall, the record evidence fails to satisfy the doubts raised about Applicant’s suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guidelines.

Formal Findings

Paragraph 1, Guideline E	AGAINST APPLICANT
Subparagraph 1.a - 1.c.	Against Applicant
Subparagraph 1.d.	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant’s request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge