DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-04308
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

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

November 12, 2008

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On May 12, 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and Department of Defense (DoD) Regulation 5200.2-R, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on June 4, 2008 and requested a hearing. The case was assigned to me on September 4, 2008, and was scheduled for hearing on October 7, 2008. A hearing was convened on October 7, 2008, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny, Applicant's application for a security clearance. At the hearing, the Government's case consisted of three exhibits; Applicant relied on one witness (himself) and one exhibit. The transcript (R.T.) was received on October 15, 2008. Based upon

a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Summary of Pleadings

Under Guideline E, Applicant is alleged to have falsified his security clearance questionnaire of April 2007 by omitting his March 2001 arrest for alien smuggling when answering question 23. Under Guideline J, the alleged omission is incorporated by reference, and the underlying March 2001 arrest for alien smuggling in violation of 8 U.S.C. § 1324 is also alleged.

For his answer to the SOR, Applicant admitted falsifying his security application and being arrested in March 2001 for alien smuggling. In explanation, he claimed to not recall being placed under arrest by the detaining officers. He claimed the officers placed him in a room for a long period of time, fingerprinted him, and then released him after he signed some papers that he did not read before signing. Applicant claimed. Alternatively, to miscalculating the dates of coverage in the questionnaire; even though he was detained in March 2000, instead of 2001. He claimed he did not recall being read his "Miranda Rights," and was only 20 years at the time when he made a mistake in judgment. Applicant did not address the details of the arrest in his answer.

Findings of Fact

Applicant is a 27-year-old-engineering technician for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant is unmarried and has one child by his girlfriend, who lives with him (R.T., at 36). Born and raised in the U.S., Applicant has for many years crossed the neighboring border to visit family members. Since 2000, he estimates to have crossed the border three to four times a month on average to dine, and occasionally visit his aunt (R.T., at 37-38).

While visiting a border country with his cousin in March 2001, Applicant was arrested by border agents and charged with alien smuggling in violation of 8 U.S.C. § 1324 (a felony). He had been asked by an unknown individual to drive his car across the point of entry to the U.S. (R.T., at 32-33, 44-45, 5, 64). This unknown individual offered him $300.00 to drive his car across the border (R.T., at 44-45). Applicant acquiesced to he individual' request as a favor (R.T., at 65) and (accompanied by his cousin) drove the car to the U.S. point of entry (just short of the border) for the car owner without questioning him about his cargo or intentions or taking the $300.00 (R.T., at 33, 45-46). Federal custom officials declined to prosecute him for his role in the operation. At the time of his arrest, Applicant was a lot attendant for a national home supplier (*see* ex. 1).

When Applicant and his cousin reached the U.S. border, a border agent asked to open the trunk of the vehicle Applicant was driving. Applicant acquiesced in the agent's request. When the agent opened the trunk, he found aliens inside (R.T., at 33, 46-47). The agent grabbed the aliens from the trunk and escorted Applicant out of the vehicle and upstairs in the building.

Once inside the building, Applicant was seated and questioned. He was then fingerprinted and asked to sign a piece of paper which the agent retained (R.T., at 34, 48-53). He was detained in the room until he was released on the U.S. side of the border (R.T., at 51-52). Because he was never read his Miranda Rights, he claims he was never physically arrested (R.T., at 33). Having never been arrested before, he did not attach any significance to being fingerprinted (R.T., at 54-55). Applicant never read the paper he was given to sign before he signed it, and does not remember what he signed (R.T., at 53-54). He assures he did not attach any significance either to his being interviewed in the room for an extended period without being told he was free to leave (R.T., at 54-55). FBI records confirm that Applicant was arrested in March 2001 and charged with alien smuggling before being released (*see* ex. 2).

Just what evidence the border agents developed regarding the extent of Applicant's knowledge of the alien cargo he was transporting when stopped and searched is not clear from the administrative record. The only evidence of his arrest and charge of knowing or reckless disregard that he was transporting undocumented aliens is the FBI criminal information sheet and Applicant's testimony. Applicant's denial of any pre-knowledge draws some reinforcement from his noted release after questioning, and later declination to prosecute him for the charge. Without more probative evidence of his knowing or reckless disregard of the contents of the vehicle he was asked to operate across the border, no inferences of criminal conduct can be drawn with respect to this specific charge.

Asked to complete a security clearance questionnaire (e-qip) in April 2007, Applicant answered "no" to question 23f, which asks him whether he had ever been arrested within the last 7 years, or convicted of any offense (leaving out traffic-related offenses of less than $150.00). In answering "no" to the question, Applicant omitted his March 2001 arrest. He answered "no," too, to question 23a (that addresses non-time sensitive felony offenses). When he came to question 18 of the e-qip (questioning him about his travel activities), he answered non-applicable (*see* ex. 1; R.T., at 42).

Before answering the questionnaire, Applicant had two days to check with relatives and law enforcement authorities about any questions he had trouble answering (R.T., at 71-72). Still, he never checked for federal arrests, only state arrests, claiming no understanding at the time of differences between state and federal authorities (R.T., at 60-61).

Applicant attributed his omissions to three reasons: (1) He was never notified of any arrest resulting from 2001 detention and did not know he had any criminal record at the state or federal level, (2) he mistakenly assumed his 2001 border arrest occurred in

2000, and was beyond the seven year period covered by the question (R.T., at 57-58, 62-63), and (3) he later checked with his state's arrest records and found no record of an arrest. Even though, he assigned three reasons for omitting his arrest, he assured he would have listed his 2001 arrest if he was certain it was not more than seven years earlier (R.T., at 58-59). However, he never articulated any reason why he would have listed it anyway if he had correctly calculated the date of the arrest. His articulated no reasons either for not checking with federal authorities (claiming only that he did not discern a difference at the time).

After he completed his e-qip, Applicant was twice interviewed by an OPM agent. In his first interview, Applicant was asked by the investigator about his 2001 border arrest (R.T., at 69-70). When the investigator asked him whether he was familiar with the arrest, he responded affirmatively. In his second interview, he was queried about his dual citizenship with the border country (R.T., at 70). Applicant affirmed he was a U.S. citizen by birth and was not a dual citizen (R.T., at 34, 70).

Applicant acknowledged that his mother has dual citizenship with this border country (*see* ex. 1; R.T., at 73), and he has a father who was born in this country and has citizenship and possible residence there (ex. 1). Besides his immediate family members, Applicant has an aunt and cousin who reside in this border country (R.T., at 37-38). Because Applicant did not list any of these relatives in his e-qip, their exact whereabouts in the country is unclear.

In issue then, is whether inferences of knowing and wilful omission can be attributed to Applicant based on his acknowledged search by border agents, his lengthy detention and interrogation, his fingerprinting, his affixing his signature on a piece of paper without reading it, and his confirmed arrest and alien smuggling charge in the FBI's criminal information sheet. While in theory it is certainly plausible that a person could be detained and fingerprinted based on a suspicious chain of events, and then released without an arrest, the likelihood of such an occurrence under the circumstances described by Applicant seems remote. Detention and fingerprinting by itself are key elements of an arrest. So, too, his being asked to sign papers before he was released in more consistent with some kind of citation or acknowledged arrest than would be for any neutral acknowledgment of his detention, or even an authorized release of privacy material.

Further, Applicant himself hedged some on his reasons for omitting his 2001 arrest when he ascribed a second reason in his answer for his omitting his arrest. He indicated, alternatively, that he miscalculated the dates and "thought I was past the seven year mark when I submitted my security paper work on April 13th, 2007" (*see* Applicant's response to SOR). Such an attributed reason, even if framed alternatively, was provided under oath and clearly acknowledges falsifying his security paper work, and admitting his awareness of the arrest when he completed his e-qip. Because this particular arrest is covered by a felony statute, its listing was required in question 23a, regardless of the amount of time elapsed (*see* ex. 1).

When answering any allegations or questions under oath, an applicant is expected to be fully truthful in his responses covering the question. Applicant was never able to successfully reconcile these highly divergent reasons for his arrest omission in his answer and hearing testimony.

Considering all of the circumstances surrounding Applicant's e-qip omission of his 2001 alien smuggling arrest (a serious felony under the governing statutory provisions, if convicted), inferences warrant that his omission was made either knowingly, or in reckless disregard of the truth. Applicant is of record in checking state courts for evidence of arrests before completing his e-qip, but not federal sources at the time. Having family residing in this border country and regularly visiting these family members provided Applicant with at least some motivating reasons for wanting to keep his family contacts and visits out of the investigatory process. If his omission of his 2001 arrest had not been detected, he might well have succeeded in maintaining an effective separation between his family members and the clearance application investigatory process.

Applicant is well regarded by his employer. His direct supervisor describes his work performance as admirable and worthy of the promotion he received (s*ee* ex. A). His supervisor credits Applicant with long work-days, travel to shore installation sites and solid team work. He characterizes Applicant as a punctual employee who has earned the trust of every supervisor he has worked for (ex. A).

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Personal Conduct

> *The Concern*: Conduct involving questionable judgment, untrustworthiness, unreliability, 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. AG ¶ 18.

Criminal Conduct

The Concern: 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. Adjudication Guidelines (AG) ¶ 18

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

As the result of his transporting undocumented aliens across the U.S. border in March 2001, Applicant was stopped, searched, detained, and eventually arrested and charged with alien smuggling in violation of 18 U.S.C. §1324. While he was never prosecuted for the offense, the FBI's criminal information sheet confirms that Applicant was clearly arrested and charged with the smuggling offense. Security concerns are

raised over Applicant's omitting his arrest in the e-qip he completed in April 2007, and over the underlying conduct itself.

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's omission of his March 2001 alien smuggling arrest (a felony). DC ¶ 16(a), "the deliberate omission, concealment, falsification or misrepresentation of relevant and material 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," applies to Applicant's omissions.

So much trust is imposed on persons cleared to see classified information that deviation tolerances for candor lapses are gauged very narrowly. Applicant's explanations were insufficient to avert inferences of knowing and wilful concealment of his 2001 arrest.

Mitigation of Applicant's arrest/charge omission is difficult to credit Applicant with, since he failed to promptly correct his omissions and misstatements until he was asked about his arrest in his first OPM interview. In the past, the Appeal Board has denied applicants availability of the predecessor mitigating condition of MC ¶ 17(a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*) where the applicant has waited many months to timely correct a known omission. *Compare* ISCR Case No. 97-0289 (Appeal Bd. January 1998) with DISCR Case No. 93-1390 (Appeal Bd. January 1995).

By willfully and knowingly failing to disclose his 2001 alien smuggling arrest and felony charge, Applicant concealed materially important background information needed for the government to properly process and evaluate his security clearance application. His probative reasons for his omitting his arrest/charge (lack of notice of an arrest and, alternatively, mistaken recall of th date of the arrest) are not sustainable grounds for averting inferences of falsification. Weighing all of the circumstances surrounding his e-qip omission, and lack of any prompt, good faith correction, Applicant's claims lack the necessary probative showing to avert drawn conclusions that he knowingly and deliberately withheld material background information about his alien smuggling arrest/charge.

Criminal conduct related to e-qip omission and underlying actions

Knowing and wilful falsification is also covered by the criminal conduct guidelines. Mitigation of the criminal features of his omissions falls along a little bit different fault line than is the case with personal conduct considerations. To be sure, an applicant's youth at the time of the offense in issue and positive work record can play a major role in mitigating criminal conduct coverage of his omissions. So while DC ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," has application to Applicant's e-qip

omission, MC ¶ 32(d), "there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement," has potential mitigation benefit as well.

Employment of the criminal conduct guideline and the use of separate whole-person weighing of Applicant's actions and personal assessments of his work contributions weigh in his favor. Applicant has no prior or subsequent criminal record, and his work contributions demonstrate considerable passage of time and maturity. Applicant's avoidance of any recurrent conduct in the last seven years and solid work record enable him to mitigate the potential criminal implications of his arrest omission.

To the extent, criminal conduct issues associated with Applicant's 2001 alien smuggling arrest/charge retain any security concern, they are unsubstantiated. Applicant was never prosecuted on any alien smuggling charges, and his advance knowledge of the cargo of the vehicle he agreed to drive across the border for an unknown individual, while suspicious, and is no accompanied by any firm evidence of knowing or reckless smuggling of aliens across the border: proof conditions of 8 U.S.C. § 1324.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the 2(a) factors in Enclosure 2), unfavorable conclusions warrant with respect to subparagraph1.a of Guideline E. Favorable conclusions warrant, however, with respect to subparagraphs 2.a and 2.b of Guideline E.

In reaching my decision, I have considered the evidence as a whole, including each of the 2(a) factors enumerated in the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE E: (PERSONAL CONDUCT):	AGAINST APPLICANT
Sub-para. 1.a:	AGAINST APPLICANT
GUIDELINE J: (CRIMINAL CONDUCT):	FOR APPLICANT
Sub-para. 2.a	FOR APPLICANT
Sub-para. 2.b:	FOR APPLICANT

Conclusions

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

Roger C. Wesley
Administrative Judge