



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



In the matter of:

ISCR Case No. 09-02967

Applicant for Security Clearance

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel
For Applicant: *Pro se*

April 30, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the case file, pleadings, and exhibits, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under the personal conduct adjudicative guideline. Her eligibility for a security clearance is denied.

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on April 24, 2008. On November 20, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. DOHA took this action 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On December 11, 2009, Applicant answered the SOR in writing, provided additional explanations and attachments, and requested that her case be determined on

the record in lieu of a hearing. On February 5, 2010, the Government compiled its File of Relevant Material (FORM). The FORM contained documents identified as Items 1 through 8.¹ By letter dated February 17, 2010, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information or objections within 30 days of receipt. Applicant received the FORM on February 19, 2010. Her response was due on March 21, 2010. She filed additional information within the required time period, and I admitted it to the record without objection. On April 12, 2010, DOHA assigned the case to me for a decision.

Findings of Fact

The SOR contains two allegations of disqualifying conduct under AG E, Personal Conduct (SOR ¶¶ 1.a. and 1.b.). In her Answer to the SOR, Applicant admitted one allegation and denied one allegation. I admit Applicant's admission as a finding of fact. (Item 1; Item 4.)

Applicant, a U.S. citizen born in a U.S. territory or possession, is 33 years old and employed as a mechanical engineer by a federal contractor. In 1999, she was awarded a Bachelor of Science degree in Mechanical Engineering by a university in a U.S. territory or possession. Since 2004, she has been pursuing unspecified studies at a university in the United States. (Item 1; Item 5.)

From August 1999 until November 2001, she was employed by her present employer. From about January 2001 until November 2001, she was treated for depression with medication by a therapist in the U.S. community where she lived and worked. In November 2001, she discontinued the treatment. She then left her job and returned home to live with her parents, both medical doctors, in a U.S. territory or possession. She remained under the care of her parents until 2003, when she stopped taking medication because she was cured. (Item 5 at 37.)

Applicant returned to work for her present employer as a government contractor in 2003. She renounced dual citizenship with Spain in about 2003 and relinquished her Spanish European Union passport. She was granted a security clearance in 2003 or 2004. (Item 5 at 4-5, 40.)

After she completed her e-QIP in April 2008, Applicant was interviewed by an authorized investigator from the United States Office of Personnel Management (OPM) about her personal life and family relationships. The personal subject interview took place in August 2008. On June 26, 2009, in response to DOHA interrogatories, Applicant made certain changes to the text of the personal subject interview.² She then

¹The Government offered the following information for administrative notice: Section 1324 of Title 8, United States Code (Item 7) and *United States v. Acosta*, 531 F.2d 428 (9th Cir. 1976) (Item 8).

² Applicant's relevant and material changes to the personal subject interview are discussed below.

indicated that the interview text, as modified, was an accurate reflection of her personal subject interview. (Item 6 at 12.)

In January or February 2005, when singing in her church choir, Applicant met a man. She saw the man three times a week at church. In May 2005, Applicant began dating the man and became romantically involved with him. They considered themselves a couple in July 2005. (Item 6 at 6.)

In December 2005, the man, who worked in a restaurant, lost his job. Sometime thereafter, Applicant learned that he used a false social security number to obtain work. He was unable to acquire another job, and he relinquished his apartment because he could not pay his rent. In March 2006, he moved into Applicant's apartment to live with her. (Item 6 at 6.)

Applicant learned that her boyfriend had come to the United States illegally from a Latin American country in 2003. He told Applicant he left his native country because his marriage had ended and he wanted to avoid a painful situation. He said that even though he had no documentation to present when he entered the United States, he was not detained by authorities and was allowed to enter. (Item 6 at 6.)

Applicant advised her boyfriend that he could not use a false social security number to obtain employment in the United States. Without valid identification, he was unable to obtain restaurant work. He worked for one hour a day for an employer who did not require him to present identification. (Item 6 at 6.)

Even though he was an illegal alien, Applicant's boyfriend decided to establish his own yard maintenance business. Applicant supported her boyfriend in his business venture by helping him purchase equipment. He acquired a truck and had a business name painted on the truck, even though his business was not legally registered. He also acquired an internal revenue tax identification number. (Item 6 at 6.)

Applicant and her boyfriend discussed marriage, became engaged, and together planned a wedding that would take place in November 2007. Before the wedding took place, they learned from an attorney, hired by Applicant, that the fiancé had not been legally divorced in his native country and was still married. Because he believed that if he left the United States, he would not be permitted to reenter, he was unwilling to return to his native country to finalize his divorce.³ Even though the boyfriend was still legally married in his native country, the pastors of Applicant's church performed a marriage ceremony for them on November 17, 2007. Applicant did not intend to tell her employer about her marriage until she was "legally married" because she did not want her fiancé sent back to his native country. She was aware that her failure to inform her

³ Applicant's fiancé also had two young children with his wife in the Latin American country. (Item 6 at 7.)

employer of her relationship with an illegal alien could subject her to blackmail or coercion.⁴ (Item 6 at 8, 10.)

When she completed her e-QIP on April 24, 2008, Applicant listed her boyfriend's brother, sisters, and mother as her in-laws. She identified her boyfriend as an adult currently living with her. She left all questions about his proof of citizenship status blank and stated: "He has no documentation, waiting to be 'legally married' to start the process." (Item 6, 29-32.)

In her revised response to DOHA interrogatories, Applicant reported that her boyfriend was able to divorce his wife by remaining in the United States. His divorce was finalized in a U.S. court in March 2009, she said. Applicant and her boyfriend then married legally in May 2009. Applicant then contacted her employer's human resources office and changed her marital status from single to married. (Item 6 at 15.)

Applicant provided an eight-page response to the FORM. She defended her decision not to report her husband as a foreign contact before they were married. She failed to provide documentation to establish that she had informed her employer of her husband's illegal immigrant status. (Response to FORM, 1-8.)

One of Applicant's team leaders provided a letter of character reference on her behalf. He observed that she was careful in handling protected and classified information. He noted that he did not know about her marital situation. It is not clear from his letter that the team leader knew that Applicant was married to an illegal alien. (Item 4 at 4.)

In her response to the FORM, Applicant offered information that she believed applied in mitigation. She asserted that she did not know her boyfriend was an illegal alien until several months after they were living together in her apartment. She opined that harboring an illegal alien was a minor offense. She also argued that her relationship demonstrated infrequent behavior because it was singular and was unlikely to recur. She stated that when she married her boyfriend in May 2009 and thereafter reported her legal marriage to her employer, she mitigated concerns that her relationship with an illegal alien exposed her to exploitation, manipulation, or duress. (Response to FORM at 5, 6.)

I take administrative notice of section 1324 of Title 8 of the United States Code, a federal statute that makes it a felony crime to harbor an illegal alien. The statute reads, in pertinent part:

§1324. Bringing in and harboring certain aliens

⁴ The personal subject interview contains the following sentence: "The subject would rather lose her position with [her employer] than lose [her boyfriend]." In response to DOHA interrogatories, Applicant revised the sentence as follows: "[Applicant] would rather lose her position with [her employer] than lose [her boyfriend]; this also means that if threatened with exposure she would just quit her job and any blackmail would be ineffective." (Item 6 at 14.)

(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 shield 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).

(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.

(Item 7.)

I also take administrative notice that the term “harbor,” as used in section 1324 of Title 8 of the U.S. Code and as construed by the United States Court of Appeals, 9th Circuit, in *United States v. Acosta DeEvans*, 531 F.2d 428, means “afford shelter to.” (Item 7; Item 8.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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, the administrative judge applies these guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's

overarching adjudicative goal is a fair, impartial, and commonsense 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an 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 that an 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

AG ¶ 15 explains why personal conduct is a security concern:

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.

Applicant was awarded a security clearance in 2003 or 2004. In January or February of 2005, she met a man at her church and became romantically involved with him. She and the man considered themselves a couple in July 2005. The man lost his job in December 2005. Applicant learned that he used a fraudulent social security number to obtain employment and was an illegal alien. She advised him against using false identification to obtain work, but, knowing he was not in the United States legally, she allowed him to move into her home and cohabit with her. Additionally, she provided him with resources to establish a lawn-care business, even though he was an illegal alien. From at least 2006 to the present time, she has afforded shelter to an illegal alien, which is a federal crime under section 1324 of Title 8 of the United States Code. Her assertions that she did not know of his illegal status early in their relationship lack credibility.

Applicant and her boyfriend planned a wedding ceremony in November 2007. Soon before the ceremony was to take place, Applicant learned that her boyfriend was still married to a woman in his native country. Despite the incapacity imposed by his continuing valid marriage, Applicant and her boyfriend took part in an unofficial marriage ceremony in November 2007.

Applicant did not tell her employer of her spouse-like relationship with an illegal alien. She did not inform her employer of her marriage ceremony in November 2007. When she completed her e-QIP on April 24, 2008, Applicant listed her boyfriend's brother, sisters, and mother as her in-laws. She identified her boyfriend as an adult currently living with her. She left all questions about his proof of citizenship status blank and stated: "He has no documentation, waiting to be 'legally married' to start the process."

Applicant did not tell her employer of her relationship with an individual who had entered the United States illegally and who remained in the United States illegally. She withheld this information from her employer because she did not want the individual to be deported. She told her employer that she was legally married in May 2009.

Disqualifying conditions AG ¶¶ 16(a), 16(d), 16(e), and 16(g) apply to the facts of Applicant's case. AG 16(a) reads: "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(d) reads: "credible adverse information that is not explicitly covered under any other guideline and may 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. This includes but is not limited to consideration of . . . (3) a pattern of dishonesty or rule violations.”

Disqualifying condition AG ¶ 16(e) reads, in pertinent part: “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”

Disqualifying condition AG ¶ 16(g) reads: “association with persons involved in criminal activity.”

Several mitigating conditions might apply to the facts of this case. Applicant’s disqualifying personal conduct might be mitigated under AG ¶ 17(a) if “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” If “the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security process” and “[u]pon being made aware of the requirement to cooperate or provide information, then individual cooperated fully and completely,” then AG ¶ 17(b) might apply. If “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,” then AG ¶ 17(c) might apply. AG ¶ 17(e) might apply if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(g) might apply if “association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual’s reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.”

Applicant concealed her husband’s illegal status, and she knowingly provided shelter to an illegal alien. She informed her employer of her legal marriage when it suited her purposes. She did not make prompt, good-faith efforts to correct the concealment before being confronted with the facts. Her husband’s illegal residence in the United States is an on-going crime, as is her sheltering of him, while knowing that he is in the United States illegally. Nothing in the record establishes that Applicant has taken steps to eliminate the vulnerability, manipulation or duress that she could be subject to as a result of her husband’s illegal status or her harboring of him. After considering all applicable Guideline E mitigating conditions, I conclude that none applies.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant 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 commonsense 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 mature adult who has been recognized by her team leader as careful in handling sensitive and protected information. However, while holding a security clearance, she cohabited with and provided shelter to an illegal alien, and she failed to inform her employer of her domestic situation and her partner's illegal residence in the United States, thereby creating a situation that could seriously mislead the government about her honesty, reliability, and trustworthiness. Her lack of candor was not minor: it went to the heart of her qualifications for a security clearance. Applicant continues to associate with an individual who is involved in criminal activity, and she herself continues to harbor him, thereby raising serious security concerns about her willingness to abide by rules, regulations, and laws.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate security concerns arising from her 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: AGAINST APPLICANT

Subparagraphs 1.a. and 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 the national interest to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

Joan Caton Anthony
Administrative Judge