



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



In the matter of:

ISCR Case No. 15-00693

Applicant for Security Clearance

Appearances

For Government: Andrew Henderson, Esq., Department Counsel

For Applicant: *Pro se*

September 30, 2016

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant's relationship with his cohabitant, who is a citizen of Mexico and an undocumented resident of the United States, creates a risk of exploitation, manipulation, or duress under the Guidelines for Foreign Influence and Personal Conduct. Applicant failed to mitigate the Government's security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his electronic Questionnaires for Investigations Processing (e-QIP) on August 21, 2012. On August 20, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline B (Foreign Influence), and Guideline E (Personal Conduct). The action was taken under Executive Order (EO) 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 after September 1, 2006.

Applicant answered the SOR twice: in an undated submission, and on March 28, 2016. (Answer.) He requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on June 13, 2016. A notice of hearing was issued to Applicant on June 15, 2016, scheduling the hearing for July 11, 2016. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on July 25, 2016.

Findings of Fact

Applicant is 53 years old. (GE 1; Tr. 13.) He has been employed by a Government contractor for the past 33 years, and currently works as a flight test technician. He has held a security clearance that entire time and has received several promotions. (GE 1; Tr. 19-20.) Applicant cohabitates with his girlfriend. He has two children from a prior relationship; and his girlfriend has two adult children. (GE 1; Tr. 29)

The SOR alleged that Applicant's girlfriend is a citizen of Mexico and resides illegally in the United States. (SOR subparagraphs 1.a and 2.a). Applicant admitted these allegations, with clarifications. (Answer.)

Applicant met his 38-year old girlfriend in 2003, at a party. He testified that they have lived together for approximately 13 years. Both of her children are natural-born U.S. citizens. Applicant has been aware, for the duration of their relationship, that his girlfriend was an undocumented immigrant. She entered the United States at the age of 14. Applicant reported his relationship to his Facility Security Officer (FSO) in 2011 or 2012. Applicant's FSO suggested to Applicant that he should not marry his girlfriend, because it might affect his security clearance. Applicant heeded that advice. Although he wishes to marry his girlfriend, he has not. He also reported their relationship on his 2012 e-QIP. (GE 1; GE 2; Tr. 20-32.)

Applicant's girlfriend has not taken any steps toward obtaining legal residency status in the United States. Applicant testified the only way she could obtain legal status would be if they married, but he has refrained from doing so due to the advice of his FSO. He has not sought the advice of an immigration attorney. (Tr. 20-32.)

Applicant testified: "I'm as American as you can get. My son is a former Marine. My son-in-law is a former Marine. I love my country. I've done, you know, I've done a great job for 33 years for my company. I need my security clearance for that." (Tr. 32.)

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 to be 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing 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. 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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable clearance 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 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 EO 10865 provides that adverse 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 B, Foreign Influence

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 6:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a

way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. One is applicable in this case:

(d) sharing living quarters with a person or persons, regardless of their citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure or coercion.

Applicant has cohabitated with his girlfriend for 13 years. She is a citizen of Mexico and resides in the United States illegally. The heightened risk required to raise this disqualifying condition is a relatively low standard. Heightened risk denotes a risk greater than the normal risk inherent in having a foreign family member. In this instance, a heightened risk is present because his girlfriend is violating U.S. immigration laws. As a result, both Applicant and his girlfriend could be subject to manipulation, pressure, or coercion due to her undocumented status. The evidence is sufficient to raise AG ¶ 7(d).

AG ¶ 8 provides conditions that could mitigate security concerns raised under this guideline. I considered all of the mitigating conditions under AG ¶ 8, including:

(a) the nature of the relationships with foreign persons, the country in which these people are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

Applicant's girlfriend has lived in the United States since the age of 14. Her children were born and raised here. Applicant has loyally served his company for over 33 years. He is a natural-born U.S. citizen, as are his children. These factors weigh in Applicant's favor and are mitigating, in part. However, Applicant has close ties of

affection to his girlfriend and wishes to marry her. They live together and have ongoing contact with one another. Her status as an undocumented immigrant leaves Applicant highly susceptible to coercion. I cannot conclude: (1) that it is unlikely Applicant will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.; (2) that he can be expected to resolve any conflict of interest in favor of the U.S. interest; or (3) that there is little likelihood that his girlfriend could create a risk for foreign influence or exploitation. Although he has close ties to the United States, his long-term relationship with his girlfriend is significant. Applicant bears the burden to introduce sufficient evidence to mitigate the Government's concerns with respect to those issues, and he has not met this burden. None of the above mitigating conditions apply.

Guideline E, Personal Conduct

The security concern for the Personal Conduct guideline 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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

(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.

Applicant's decision to cohabitate with an undocumented immigrant leaves him vulnerable to exploitation, manipulation, and duress. Additionally, her status as an undocumented immigrant may affect Applicant's personal, professional, or community standing within the defense community. AG ¶ 16(e) applies.

AG ¶ 17 provides conditions that could mitigate security concerns raised under this guideline. The following are potentially applicable:

(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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

After considering the mitigating conditions outlined above in AG ¶ 17, the evidence does not establish mitigation under any of them. Applicant's relationship with an undocumented immigrant is ongoing and likely to continue, despite the security significance, so neither AG ¶ 17(c) or 17(d) apply. He failed to document steps taken to reduce or eliminate vulnerability to exploitation, manipulation, so AG ¶ 17(e) does not mitigate the Government's concern.

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 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. I have incorporated my comments under Guidelines B and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a patriotic American citizen, whose employment has been of value to our Government. He takes pride in his contributions. He forthrightly reported his relationship with an undocumented immigrant to his FSO, and followed the advice from the FSO that he should not marry his girlfriend. However, he has close ties to his girlfriend who is a citizen of Mexico residing illegally in the United States. That concern remains unmitigated. The record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Foreign Influence or Personal Conduct 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 B:	AGAINST APPLICANT
Subparagraphs 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a:	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 grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Jennifer I. Goldstein
Administrative Judge