



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 15-06854

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

04/27/2017

Decision

MURPHY, Braden M., Administrative Judge:

Applicant has not mitigated the Guideline E trustworthiness concerns established by her husband's ongoing status as an undocumented, unregistered immigrant residing in the United States without legal permission. She has not shown that it is clearly consistent with the interests of national security that she be granted eligibility for access to sensitive information. Eligibility for access to sensitive information is denied.

Statement of the Case

On April 16, 2016, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline E, personal conduct. DOD CAF took this action under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), the adjudicative guidelines implemented by the DOD on September 1, 2006.

On December 10, 2016, the Director of National Intelligence (DNI) issued Security Executive Agent Directive (SEAD) 4, National Security Adjudicative Guidelines (AG). SEAD 4 became effective on June 8, 2017 for all adjudicative decisions on or after that

date, including this one.¹ It supersedes and replaces the AGs that Applicant received with the SOR. Any changes resulting from the implementation of the new AGs did not affect my decision in this case.

On April 29, 2016, Applicant answered the SOR and elected to have her case decided on the written record, in lieu of a hearing. On July 6, 2016, Department Counsel submitted the Government's file of relevant material (FORM), including Items 1 through 3. Applicant received the FORM on July 19, 2016. She was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant did not respond to the FORM and did not object to the Government's documents. The SOR and the answer (combined as Item 1) are the pleadings in the case. Items 2 and 3 are admitted into evidence. The case was assigned to me on April 27, 2017.

Findings of Fact

Applicant admitted the sole allegation in the SOR and provided a written statement along with several documents.² I have incorporated her admission and other comments into the findings of fact. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact.

Applicant is 36 years old. She was born in the United States in 1981. She is married and is the mother of three children. She earned an associate's degree in 2007. Since April 2010, she has worked for a government contractor in the health care industry. She submitted an application for a position of public trust in December 2014.³

Applicant's husband is 42 years old. He was born in a Latin American country in 1975. He came to the United States in 1994. They met in 1998 and married in 2003.⁴ Applicant disclosed the following information about her husband on her application:

He is undocumented. He has a foreign [name of country] passport and identification card. He entered the U.S. in 1994. Hasn't legalized his status due to fear of being deported. Can't afford a lawyer at the moment to get legalized.⁵

Applicant's husband remains an undocumented and unregistered immigrant alien, residing in the United States illegally. (SOR ¶ 1.a). Applicant states that they have sought legal advice from immigration lawyers on several occasions, but have not received useful information about legalizing his status. He maintains a valid passport and

¹ The new Adjudicative Guidelines are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

² The documents Applicant provided with her answer are considered part of the record.

³ Item 2.

⁴ Items 1, 2, 3.

⁵ Item 2 at 20.

identification card from his native country. He also has an Individual Taxpayer Identification Number from the U.S. Internal Revenue Service, issued in 2007. Copies of these documents are included with the answer. She states that in about 1996, after her husband first came to the United States, his uncle “requested asylum for him” but they later lost contact. She has no paperwork to support this assertion.⁶

Applicant indicated in her June 2015 background interview that her husband was at that time unemployed, and she was not able to provide any information about any previous job he might have held.⁷ She provided no updated information about her husband’s employment status in her answer. She described herself as the “main provider” for their household.⁸

Applicant’s husband is neither a U.S. resident alien (with a “green card”), nor is he a naturalized U.S. citizen. He resides with Applicant in their home in the United States. He has no legal documents that verify or permit his legal residency in the United States. Applicant indicates that she is working on getting her husband’s status legalized but confesses that she does not know what steps to take, and cannot afford a lawyer to assist with the process.⁹

Applicant attests that she is trustworthy, honest, humble, and loyal. She says she meets and complies with all rules and regulations, and would never bring harm to her company or her reputation. She indicates that she understands the importance of confidentiality and integrity.¹⁰

Policies

This case is adjudicated under the National Security Adjudicative Guidelines (AG) effective June 8, 2017. 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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 national security eligibility will be resolved in favor of the national security.”

⁶ Item 2.

⁷ Item 3 at 3.

⁸ Item 2.

⁹ Item 2.

¹⁰ Item 2. She provided a list of people, probably co-workers, who could attest to her character.

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 to obtain a favorable trustworthiness decision.

A person who seeks access to sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline E, Personal Conduct

The trustworthiness concern for personal conduct 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 or sensitive information. . . .

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 16. The following are potentially applicable in this case:

(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 individual may not properly safeguard classified or sensitive information;

(d) 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 individual may not properly safeguard classified or sensitive information. . .

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing; . . . and

(g) association with persons involved in criminal activity.

The text of SOR ¶ 1.a, which Applicant admits, is as follows:

Your spouse is an undocumented and unregistered immigrant alien, residing in the United States illegally.¹¹

In the FORM, Department Counsel cites Guideline E disqualifying conditions ¶¶ 16(d), 16(e) and 16(g),¹² but does not specifically argue why they might apply to the facts of this particular case. He merely argues that:

Applicant's answer does not meet the burden, offering little to mitigate the concerns raised about questionable judgment and/or untrustworthiness raised by associating with someone involved in criminal activity.¹³

The "criminal activity" suggested by the Government is the unregistered immigration status of Applicant's husband, with whom she "associates" by virtue of their marriage. Yet the Government cites no federal or other criminal statute to support application of AG ¶ 16(g). "Unlawful entry" into the United States is a criminal offense, under 18 U.S.C. 1325(a). However, the possible application of that criminal statute to her husband is far too speculative for me to consider it here. He came to the United States over 20 years ago, and how exactly he did so is not part of the record. An individual's "unlawful presence" in the United States may well violate U.S. immigration law and subject the person to potential deportation. However, standing alone, illegal presence in the United States is not necessarily a criminal offense. Regardless, there is no indication that Applicant's husband has ever been charged with a crime due to his immigration status, or that he has been (or is) "involved in criminal activity." I therefore cannot find that AG ¶ 16(g) applies.¹⁴

¹¹ Item 1 (SOR).

¹² The FORM cites the disqualifying conditions under Guideline E of the adjudicative guidelines made effective on September 1, 2006. The corresponding disqualifying conditions under the new AGs, effective as of June 8, 2017, are substantially similar, and AG ¶ 16(g) is unchanged.

¹³ FORM at 3 (citing ISCR Case No. 07-07645 at 4 (App. Bd. Mar. 25, 2009)).

¹⁴ I note that in ISCR Case No. 07-07645 at 5 (App. Bd. Mar. 25, 2009) the Appeal Board affirmed a decision against an applicant who was married to an illegal alien under AG ¶ 16(g), finding that being in the U.S. illegally was sufficient "criminal activity," even though no supporting statute was cited. I nonetheless find that the Government has not met its burden of establishing the applicability of AG ¶ 16(g) here, for the reasons stated.

In ISCR Case No. 15-00693, the Appeal Board noted that “sharing living quarters with someone who is in violation of U.S. immigration laws poses the requisite heightened risk” of exploitation. “That is, it is foreseeable that this relationship is one that could be exploited by those interested in acquiring U.S. [protected] information, should it come to their attention.”¹⁵ That case concerned both Guideline E (AG ¶ 16(e)) as well as Guideline B (foreign influence). Guideline B is not alleged here but the same logic applies under AG ¶ 16(e). Indeed, Applicant acknowledged this possibility when she disclosed on her application that her husband had not legalized his status “due to fear of being deported.”¹⁶ AG ¶ 16(e) therefore applies.

It is not clear from the record exactly how long Applicant has known of her husband’s status as an unregistered immigrant. However, she says they met in 1998, and they have been married since 2003. They have three children together and live together as a family in the same house, in the United States. The record therefore supports a conclusion that Applicant has known since at least 2003 when they married, and probably long before, that he is unregistered and resides in the United States without legal permission to do so. This evidence shows Applicant’s “questionable judgment, untrustworthiness, unreliability . . . [and] unwillingness to comply with rules and regulations . . .” The “catch-all” disqualifying conditions under AG ¶¶ 16(c) and 16(d) therefore apply.

The Directive presumes a nexus between admitted or proved conduct under any of the Guidelines and an applicant’s eligibility for a clearance (or, as here, for a position of public trust). See, e.g. ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016). The required nexus is shown because several Guideline E disqualifying conditions apply.

Conditions that could mitigate personal conduct trustworthiness concerns are set forth under AG ¶ 23. 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; and

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

Applicant’s husband’s immigration status remains ongoing and unresolved. Applicant says she has sought legal advice about legalizing her husband’s status in the past. There is no indication, however, that she has taken concrete steps to resolve the

¹⁵ ISCR Case No. 15-00693 at 2 (App. Bd. Dec. 22, 2016). In that case, the Appeal Board affirmed the denial of a clearance to an applicant who lived with his girlfriend, an illegal alien and Mexican citizen. The administrative judge’s analysis focused on the Applicant’s vulnerability to exploitation under both Guideline E AG ¶ 16(e) and Guideline B, due to similar concerns of heightened risk. In a concurring opinion, Administrative Judge Duffy held that he would have applied AG ¶ 16(g) instead. See *id.* at 2-3.

¹⁶ Item 2 at 20.

situation. Her husband has had a taxpayer identification number since 2007, yet has taken no other steps towards legalization. He also remains unemployed. Her husband's ongoing immigration status therefore continues to cast doubt on Applicant's reliability, trustworthiness and good judgment. AG ¶ 17(c) does not apply.

I credit Applicant with candidly disclosing her husband's immigration status to the Government on her application. This limits the risk of her being manipulated due to that relationship, as has been suggested by a concurring opinion of a member of the Appeal Board.¹⁷ Applicant has taken some steps to reduce or eliminate her vulnerability to exploitation, manipulation, or duress. However, the situation is ongoing, and an end is not in sight. AG ¶ 17(e) does not fully apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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 public trust position 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 Guideline E in my whole-person analysis. The record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a position of public trust. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns arising under Guideline E, 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:

¹⁷ Concurring opinion of A.J. Duffy in ISCR Case No. 15-00693 at 3 (App. Bd. Dec. 22, 2016).

Paragraph 1, Guideline E:

AGAINST APPLICANT

Subparagraph 1.a:

Against Applicant

Conclusion

In light of all of the circumstances it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to sensitive information. Eligibility for access to sensitive information is denied.

Braden M. Murphy
Administrative Judge