



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



In the matter of:)
)
) ISCR Case No. 16-00891
)
Applicant for Security Clearance)

Appearances

For Government: Michelle P. Tilford, Esq., Department Counsel
For Applicant: *Pro se*

11/15/2018

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On June 21, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, personal conduct. Applicant responded to the SOR on July 14, 2017, and requested a hearing before an administrative judge.

The case was assigned to another administrative judge on March 30, 2018. Scheduling of the case was delayed at Applicant's request. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 13, 2018, scheduling the hearing for August 18, 2018. The case was reassigned to me on July 26, 2018. An amended notice was issued on August 6, 2018, changing the courtroom location, while keeping the date and time. The hearing was convened as scheduled.

Evidentiary Rulings

Applicant's request to introduce classified information during the hearing was denied. In response, Applicant submitted a motion in limine to preclude the Government from introducing certain evidence. That motion was denied.

Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. GE 3 and 4 were admitted over Applicant's objection. Applicant testified and submitted Applicant's Exhibits (AE) 1 through 9 and 11 through 20, which were admitted without objection.

Findings of Fact

Biographical information

Applicant is a 60-year-old employee of a defense contractor. He has worked in some capacity for his current employer since 2009. He graduated from a military service academy in 1980. He served on active duty in the U.S. military from 1980 until he retired as a senior officer with an honorable discharge in 2007. He has a master's degree. He is married with an adult stepchild.¹

Events leading to Applicant's wife's felony conviction

The facts in this section are derived primarily from a statement of facts signed by Applicant's wife as part of a plea agreement with the United States Attorney and a letter agreement between Applicant and the United States Attorney in which the United States agreed not to prosecute him. Except for minor facts not germane to this decision, unless specifically identified otherwise, I adopt the facts in his wife's statement of facts and Applicant's letter agreement over any contrary evidence presented at the security clearance hearing.

In the late 1990s to 2002, Applicant was assigned as the defense attaché at the U.S. Embassy in a foreign country. As such, he was authorized to make visa referrals recommending that a foreign citizen be issued a United States visa. The referral went to the consular officer or consular associate who adjudicated the visa application. His wife also worked at the U.S. Embassy as a consular associate. She processed visa applications. A consular associate's decision to approve any given visa application was subject to review by a supervisory official, but such review was not required.

Based upon Applicant's position and his wife's generous and outgoing nature, they became acquainted with a number of people in the local economy and government, some of whom were incredibly wealthy. Their friends included a U.S. citizen (Mr. A) with many connections in the foreign country and a foreign billionaire (Mr. B).

¹ Tr. at 23, 141; GE 1.

Mr. A was general manager of a company (Company X) based in the foreign country. The company was a subsidiary of a holding company (Company Y) for some of the largest business concerns in the foreign country. Company Y was owned by Mr. B. Employees of Companies X and Y periodically traveled to the United States for their companies' business purposes. Those employees were required to obtain non-immigrant visas for their business travel to the United States. Mr. A had a financial interest in the favorable adjudication of visa applications submitted by Company X and Company Y employees.

In June 2002, which was a few months before Applicant and his wife were scheduled to transfer back to the United States, they entered into a loan agreement with Mr. A, in which they would receive an interest-free loan of \$750,000 that would be repaid at \$30,000 a year for 25 years. On the same day, Applicant's wife flew to the United States and two days later signed a contract to buy a house for \$675,000. She then returned to the foreign country and resumed her work as a consular associate.

Applicant and his wife closed on the property for \$675,000 in August 2002. The purchase was made in cash using the funds that were wired to them by Mr. A. Applicant described it as an investment for Mr. A. Applicant and his wife would make improvements and eventually sell the property. Once sold, Mr. A would be repaid and receive 60% of the appreciation of the property.

Applicant's wife regularly adjudicated visa applications submitted by employees of Companies X and Y and close associates and relatives of Mr. A. This continued throughout her tenure as a consular associate, including the periods before and after the loan agreement with Mr. A. She knew that some of the applicants on such visa applications were employees of Companies X and Y and close associates and relatives of Mr. A.

Applicant's wife did not disclose her financial relationship with Mr. A to any United States official responsible for her appointment as a consular official and no United States official authorized her to maintain a financial relationship with Mr. A while also adjudicating visa applications submitted by employees of Companies X and Y and Mr. A's business and personal associates. The loan and her partnership with Mr. A regarding the property in the United States created a conflict of interest with respect to her adjudication of visa applications submitted by employees of Companies X and Y and Mr. A's business and personal associates. She knew that she had this conflict of interest.

In October 2002, Applicant and his wife returned to the United States and lived in the property. In the same month, they applied for a \$100,000 home equity loan from a federal credit union. The loan application called for information about all financial obligations, but Applicant and his wife did not list anywhere on the loan application their \$750,000 debt to Mr. X. The loan was approved and \$100,000 was disbursed to Applicant and his wife. They made regular and timely payments on the home equity loan and ultimately fully repaid the loan.

In October 2004, Applicant and his wife applied for a \$175,000 home equity loan. The loan application called for information about all financial obligations, but Applicant and his wife did not list anywhere on the loan application their loan and remaining debt to Mr. X. The loan was approved and \$175,000 was disbursed to Applicant and his wife. They made regular and timely payments on the home equity loan and ultimately fully repaid the loan.

Legal proceedings

Applicant and his wife were eventually investigated for the above actions. In May 2008, his wife entered into a plea agreement with the United States Attorney in which she signed a statement of facts. Applicant signed a letter agreement with the United States Attorney in which the United States agreed not to prosecute him. He admitted the facts pertaining to him that were in his wife's statement of facts. She agreed to plead guilty to the following felony charge:

Between on or about June 24, 2002, and on or about September 30, 2002, at the United States Embassy in [foreign country], the defendant, [Applicant's wife], being an officer and employee of the executive branch of the United States Government knowingly and willfully participated personally and substantially as a Government officer and employee, through decisions on applications, specifically, applications for United States non-immigrant visas, in which the defendant and the defendant's spouse had a financial interest. (In violation of Title 18, United States Code, Sections 208(a) and 216(a)(2))

The maximum penalties for the offense were five years of imprisonment, a fine of \$250,000, a special assessment, and three years of supervised release. The parties agreed that probation was reasonable, but the court was not bound by their agreements and sentencing recommendations. She agreed to pay \$505,000 to the United States, which was the proceeds plus interest from the sale of the house, net of all liens and outstanding mortgage obligations, except the loan to Mr. A. The United States also agreed that it would not criminally prosecute Applicant for the specific conduct described in the statement of facts, any alleged offenses relating to his tax return for tax year 2002, or the conduct described in the letter agreement between the United States and Applicant.

Applicant's wife pleaded guilty to the charge in May 2008. She was sentenced to supervised probation for 12 months. She successfully completed the terms of her probation.

Applicant's position

Applicant accepts little responsibility for the events leading to his wife's conviction. He contended that they were victims of a "witch-hunt," and she was unfairly prosecuted. He asserted that as a consular associate, she did not have the authority to approve visas. He believes the government was targeting Mr. B in order to seize his

assets. He stated that she accepted the plea agreement because the investigation was dragging out, they had exorbitant legal fees, and they had family problems associated with his wife's child and grandchild. He asserted that neither Mr. A nor his associates ever asked him or his wife to do anything illegal, unethical, or immoral. He stated that in hindsight, what they did was a bad idea and they would never do it again, but they did not think so at the time. He also stated that his wife's statement of facts and his letter agreement were inaccurate. He testified that he "believe[s] witnesses were coerced."²

Applicant believes the investigation resulted because the government at least initially thought his wife was "selling visas for money."³ He wrote in a 2006 letter to the Secretary of State:

I believe the lead investigator [Investigator] is unfairly manipulating the investigation in order to obtain an unwarranted indictment. [Investigator] needs an indictment in order to discredit me and cover up his own criminal wrongdoing. In the course of his investigation, [Investigator] has tried to intimidate witnesses into signing false statements, he tried to pressure one of my former NCOs into improperly revealing classified and [remainder redacted for security and privacy reasons].⁴

Applicant stated that he and his wife did not tell anyone in the U.S. Government about the loan from Mr. A, but they did not attempt to hide it. He stated that on a previous occasion, military bureaucracy unfairly forced his wife to leave a post in another country. He stated that if they asked anyone about accepting the loan, they might receive the same type of unreasonable response. Mr. A asked them not to tell anyone about the loan. Applicant surmised that Mr. A did not want his extended family members to find out about the loan. Applicant did not know why Mr. A agreed to the deal, but Applicant and his wife guessed that Mr. A wanted to get a foothold in the real estate market or he wanted to curry favor with Mr. B, who was friendly with Applicant's wife.⁵

Applicant admitted that they did not reveal their loan from Mr. A when submitting their home equity loan applications. In response to the SOR, he wrote that "[i]n hindsight, that was probably a mistake, but at the time [they] did not think the loan from [Mr. B] was pertinent to the loan requests." He later testified that they informed the first loan officer of the loan, who advised them that it did not have to be reported because Mr. A did not have a lien on the property. Applicant acknowledged that the loan officer

² Tr. at 13-14, 24, 30-40, 47, 51, 61, 71-76, 82, 87-98, 120-121, 141-142; Applicant's response to SOR; GE 2; AE 1, 4.

³ AE 8.

⁴ AE 8.

⁵ Tr. a 40-44, 62-63, 81, 104-106, 110-111, 116-117, 152-155; Applicant's response to SOR; GE 2; AE 1, 4.

was not the approval authority for the loans. They had a different loan officer for the second home equity loan.⁶

Applicant stated that he and his wife repaid Mr. A about \$10,000 in 2003. Mr. A then told them not to pay anymore, and that he would recoup the amount owed when the house sold. Applicant stated that the plan was that after the house sold and any home equity loans were paid off, Mr. A would receive his remaining \$740,000 from the loan and split the profit. That is inconsistent with the statement of facts that Mr. A would receive 60% of the appreciated value of the property. Applicant's explanation for why the home equity loans, minus the cost of improvements, would come out of Mr. A's profit was that Applicant "did not think [Mr. A] really cared."⁷

Applicant and his wife sold the house in 2008 for \$875,000. Mr. A was never repaid because the proceeds, after paying off the costs and home equity loans, went to the U.S. Government as part of the plea agreement. Mr. A forgave the loan. Applicant estimated that they paid about \$125,000 for improvements to the property. Applicant initially asserted that he and his wife never benefitted financially from the deal. When confronted with the math that showed they made about \$200,000 (loan (\$750,000) plus home equity loans (\$275,000) minus cost of house (\$675,000), repayment to Mr. A (\$10,000), and cost of improvements (\$125,000) equals \$215,000), he admitted that he had not thought of that as profit because it went to pay their attorneys.⁸

Character evidence

Applicant submitted documents and letters attesting to his excellent performance of duties. He is praised for his leadership, personal courage, and lasting dedication.⁹

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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.

⁶ Tr. at 52-56, 67-68, 110; Applicant's response to SOR; GE 2; AE 1.

⁷ Tr. at 135-139; GE 2; AE 2, 4.

⁸ Tr. at 53, 56-61, 64-65, 114, 128-131, 135-139; GE 2; AE 2, 4, 19.

⁹ AE 6, 15.

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 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 national security eligibility will be resolved in favor of the national security."

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 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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. The following disqualifying conditions are potentially applicable:

(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;

(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; and

(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.

Applicant was involved in events that led to his wife's felony conviction. He and his wife accepted \$750,000 from an individual with substantial foreign connections, part of which they used to buy a house for \$675,000. Applicant's wife regularly adjudicated visa applications submitted by employees of Companies X and Y and close associates and relatives of Mr. A throughout her tenure as a consular associate, including the periods before and after the loan agreement with Mr. A. Neither of them informed any member of the U.S. Government about the payment. They provided false information on applications for two home equity loans when they failed to divulge the loan from Mr. A. As part of his wife's plea agreement, the United States agreed not to prosecute Applicant.

Applicant's conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(a), 16(c), and 16(e) are applicable.

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

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

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

(f) the information was unsubstantiated or from a source of questionable reliability.

The events in question occurred more than 13 years ago. However, despite the passage of time, I have lingering concerns. Applicant accepts little responsibility for the events leading to his wife's conviction. He contended that they were victims of a "witch-hunt," and she was unfairly prosecuted. He also stated that his wife's statement of facts and his letter agreement were inaccurate and that he "believe[s] witnesses were coerced." I found much of Applicant's testimony to be self-serving and not credible.

Among the many things that concern me are that Applicant initially stated that he and his wife did not benefit financially from the deal. When applying the figures supplied by Applicant, they profited somewhere in the area of \$200,000. The fact that they had expensive legal fees does not change the profit equation.

Another matter of concern is why Mr. A would agree that the home equity loans would be paid in full before the profits would be split. This is a subtle but significant change from what was in the statement of facts. By analysis, the house sold in 2008 for \$875,000, which was \$200,000 more than the \$675,000 that was paid for the house. After paying the liens and sales costs, the sale netted \$505,000, which went to the United States. Under the terms of the agreement described by Applicant, if the sale went through without having to pay the United States, even with the house appreciating by \$200,000, the proceeds of \$505,000 would have been \$235,000 short of being able to pay Mr. A back the remaining \$740,000 owed on the loan. In other words, Applicant would have profited about \$200,000 (which is the same amount he actually profited), while Mr. B would have lost \$235,000 (which is still less than the \$740,000 he actually

lost). Applicant could not supply a good reason why a successful business person would agree to such a one-sided deal.

Applicant's conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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 Guideline E in my whole-person analysis. I also considered Applicant's character evidence and his otherwise honorable military service.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the 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 E:	Against Applicant
Subparagraphs 1.a-1.c:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge