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**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing)

Filing Date: July 9, 2015)

Case No.: PSH-15-0058

Issued: September 29, 2015

Administrative Judge Decision

Steven L. Fine, Administrative Judge:

This Decision concerns the eligibility of XXX X. XXX (hereinafter referred to as “the Individual”) for access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ For the reasons set forth below, after carefully considering the record before me in light of the relevant regulations and the Adjudicative Guidelines, I conclude that the Individual’s request for a security clearance should be granted.²

I. BACKGROUND

During an initial background investigation of the Individual, a Local Security Office (LSO) obtained information that raised security concerns. In order to address those concerns, the LSO conducted a Personnel Security Interview (PSI) of the Individual on March 26, 2015. Because the PSI did not resolve these concerns, the LSO began the present administrative review proceeding by issuing a Notification Letter to the Individual informing her that she was entitled to a hearing before an Administrative Judge in order to resolve the substantial doubt regarding her eligibility for a security clearance. *See* 10 C.F.R. § 710.21. The Individual requested a hearing and the LSO forwarded her request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter.

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will also be referred to in this Decision as a security clearance.

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.energy.gov/OHA>.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the Individual, her supervisor, her sister, and three of her co-workers. *See* Transcript of Hearing, Case No. PSH-15-0058 (hereinafter cited as “Tr.”). The LSO submitted four exhibits, marked as Exhibits 1 through 4. The Individual submitted two exhibits, which appear in the record as (LSO) Exhibit 2, and Exhibits A and B.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE created a substantial doubt concerning her eligibility for a security clearance. That information pertains to paragraph (l)³ of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8 (Criterion L).

To justify its reliance on Criterion L, the LSO alleges that the Individual is married to an undocumented immigrant. Exhibit 1 at 1. These circumstances, as alleged, adequately justify the LSO’s invocation of Criterion L, and raise significant security concerns. “Conduct involving questionable judgment . . . or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.” Guideline E of the Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines) at ¶ 15. The Adjudicative Guidelines also state that association with persons involved in criminal activity could raise a security concern and may be disqualifying. Adjudicative Guideline E at ¶ 16(g).

III. REGULATORY STANDARDS

The Administrative Judge’s role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that “[t]he decision as to access authorization is a comprehensive, common sense judgment, made after consideration of all the relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). In rendering this opinion, I have considered the following factors: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual’s age and maturity at the time of the conduct; the voluntariness of the Individual’s participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of

³ Criterion L refers to information indicating that the Individual has “engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. Such conduct or circumstances include, but are not limited to, criminal behavior, a pattern of financial irresponsibility, conflicting allegiances, or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility.” 10 C.F.R. § 710.8(l).

continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

The Revised Adjudicative Guidelines are not inflexible rules of law. Instead, recognizing the complexities of human nature, administrative judges apply the guidelines in conjunction with the information available in the adjudicative process. The Administrative Judge's overarching adjudicative goal is to reach a fair, impartial, and commonsense decision.

IV. FINDINGS OF FACT

The Individual is an applicant for a security clearance. Her spouse of eight years is an undocumented immigrant, as well as, the father of three of her children. Exhibit 4 at 9, 26. He came, in 1991, from a country that is not on the Sensitive List, to the United States to escape poverty. Exhibit 4 at 14. The Individual and her spouse have, over the past eight years, consulted a number of attorneys in the hope of obtaining proper documentation. Exhibit 2; Exhibit 4 at 19. The choice presented by those legal advisors was a difficult one: her spouse could either return to his country of origin for ten years, and then apply for legal residence, or he could continue to reside with his spouse and young children while awaiting expected changes in the law (that have not materialized). Exhibit 4 at 9-10, 12. The Individual's husband is currently working with an attorney in hopes of obtaining legal residence. Exhibit 4 at 36, 48.

V. ANALYSIS

The Notification Letter states:

During a personnel security interview conducted on March 26, 2015, [the Individual] admitted that she is aware that her husband is a citizen of [another country] and has been residing in the U.S. illegally since 1991, which is a violation of federal law. She further admitted that they have resided together since they were married on November 17, 2006.

Exhibit 1 at 1. This is the sole basis provided in the Notification Letter for concluding that there exists a substantial doubt about the Individual's eligibility for a security clearance.

The Adjudicative Guidelines do not specifically include residing with, or being married to, an undocumented immigrant as a condition that could raise a security concern and may be disqualifying. Adjudicative Guideline B at ¶ 7(d) states that "sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion" could raise a security concern and may be disqualifying. However there is no information in the record suggesting that the Individual's relationship with her spouse creates a heightened risk of foreign inducement, manipulation, pressure, or coercion. To the contrary, the testimony provided by the Individual, her supervisor, her sister, and three of her co-workers, at the hearing, indicates that the Individual is a conscientious employee and a loyal American. Moreover, it is unlikely that the Individual will be placed in a position of having to choose between the interests of her spouse's government and the

interests of the U.S. *See* Adjudicative Guideline B at ¶ 8(a).⁴ The testimony of the Individual and her sister indicates that her husband’s loyalties lie with the United States, rather than his country or origin. Nor does the record indicate that the Individual has acted in “such a way as to indicate a preference for a foreign country over the United States, [or that she] she may be prone to provide information or make decisions that are harmful to the interests of the United States.” *See* Adjudicative Guideline C at ¶ 9.

There is no information in the record indicating that the Individual herself has engaged or facilitated any criminal activity. Merely cohabitating with an undocumented immigrant does not constitute criminal conduct. *United States v. Costello*, 666 F.3d 1040 (7th Cir. 2012); *See also United States v. Vargas*, 733 F.3d 366 (2nd Cir. 2013) (harboring an undocumented immigrant under 8 U.S.C. § 1324 (a)(1)(A)(iii), requires an intention to prevent the undocumented immigrant from being detected by immigration officials or police). There is no information in the record indicating that the Individual has done anything to interfere with the activities of immigration officials or police.

Guideline E states that “association with persons involved in criminal activity” could raise a security concern and may be disqualifying. Guideline E at ¶ 16(g). During her PSI, the Individual was erroneously informed that her spouse’s residence without proper documentation in the United States constituted criminal activity. Exhibit 4 at 42, 48. As a general rule, it is not a crime for an undocumented immigrant to remain in the United States. *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) (*Arizona*); *United States v. Costello*, 666 F.3d 1040, 1047 (7th Cir. 2012). “Removal of undocumented immigrants is a civil, not criminal matter.” *Arizona*, 132 S. Ct. at 2499.

Accordingly, I find that the Individual has resolved the security concerns set forth in the notification letter.

VI. CONCLUSION

For the reasons set forth above, I conclude that the LSO properly invoked Criterion L. However, after considering all the evidence, both favorable and unfavorable, in a common sense manner, I find that Individual has resolved all of the Criterion L security concerns. Accordingly, the Individual has demonstrated that granting her request for a security clearance would not endanger the common defense and would be clearly consistent with the national interest. Therefore, the Individual should be granted a security clearance. The National Nuclear Security Administration may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Administrative Judge
Office of Hearings and Appeals

Date: September 29, 2015

⁴ The Individual has “promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country.” *See* Guideline B at ¶ 8(e).