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

In the Matter of: Personnel Security Hearing)
)
Filing Date: June 15, 2016)
_____)

Case No.: PSH-16-0055

Issued: September 6, 2016

Administrative Judge Decision

Steven L. Fine, Administrative Judge:

This Decision concerns the eligibility of XXXX XXXX XXXXXXXXXX (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 November 5, 2016. 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 him that he was entitled to a hearing before an Administrative Judge in order to resolve the substantial doubt regarding his eligibility for a security clearance. See 10 C.F.R. § 710.21. The Individual requested a hearing and the LSO forwarded his request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from a personnel security specialist (the PSS), the Individual, his spouse, and one of his friends. See Transcript of Hearing, Case No. PSH-16-0055 (hereinafter cited as “Tr.”). The LSO submitted five exhibits, marked as Exhibits 1 through 4, and Exhibit 8. The Individual submitted no exhibits.

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>.

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 his eligibility for a security clearance. That information pertains to paragraph (I)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, and associates with members of her family, who are also undocumented immigrants. Ex. 1 at 1. These circumstances, the LSO alleges, adequately justify the LSO's invocation of Criterion L, and raise significant security concerns. "Conduct involving questionable judgment 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 . . . 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.

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 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

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(I).

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. His spouse of two years is an undocumented immigrant, as well as the mother of his child. Ex. 8 at 9, 11, 27. She came to this country as a six-month old infant, from a country that is not on the Sensitive List, to the United States, and has not left the country since then. Ex. 8 at 7, 20. She considers herself an American. Tr. at 26, 32, 42. The Individual and his spouse are committed to first obtaining legal residency and then citizenship for his spouse. Ex. 8 at 13; Tr. at 28, 33-35, 49, 52-54. To this end, the Individual and his spouse have consulted with attorneys in the hope of obtaining proper documentation. Ex. 8 at 13; Tr. at 33-35, 49. Those legal advisors advised them that while there is no guarantee that she will be able to obtain legal residency, or citizenship, she is a good candidate because she has no criminal record, a high-school diploma, is the parent and spouse of American citizens, and has lived here since her infancy. Ex. 8 at 33-34; Tr. at 30, 33, 35-36. The Individual did testify, however, that this is a very expensive and time-consuming process. Ex. 52-56.

V. ANALYSIS

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. The question before me is whether the Individual's relationship with his spouse creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

At the hearing, I asked the PSS to articulate why the LSO considers the Individual's marriage to an undocumented immigrant a security concern. The PSS explained that, in the LSO's opinion, the security risks associated with being married to an undocumented immigrant are twofold: (1) the Individual's spouse's undocumented status makes the Individual vulnerable to coercion and exploitation, since a hostile intelligence or terrorist operative could threaten to report her status to the Immigration and Naturalization Service (INS), and (2) the Individual has exhibited poor judgment by allowing himself to be placed in a position where he could be vulnerable to a hostile intelligence or terrorist operative's threats. Tr. at 10, 13-14, 20.

While it is within the realm of possibility that a hostile intelligence agent or terrorist might threaten the Individual with reporting his wife's status to the INS, in order to induce the Individual to engage or assist in espionage or sabotage,⁴ the testimony in this case indicates that such a threat would likely be ineffective. The Individual and his spouse have testified that his spouse intends to apply for a travel permit, a green card, and eventually for citizenship. These applications will require the Individual's spouse's undocumented status to be disclosed to the INS, which will extinguish any

⁴ Moreover, this scenario appears no more likely than a scenario in which a hostile intelligence agent would threaten an individual's family member with physical harm.

possibility that a hostile intelligence agent or terrorist might threaten the Individual with reporting his wife's status to the INS in order to induce the Individual to engage or assist in espionage or sabotage.

Moreover, the testimony in this case resolves any concern that the Individual exhibited "poor judgement" by marrying an undocumented immigrant, as the PSS opined. In his testimony, the PSS opined that the Individual exhibited "poor judgment by knowingly allowing himself to be in a situation where he could be exploited." Tr. at 15. The record, however, shows that the Individual married his spouse two years before he applied for work at a DOE facility. More importantly, the Individual's spouse's undocumented status does not create a substantial risk that he could be exploited, as discussed above. The PSS further opined that the Individual's showed poor judgment by marrying his spouse because her "status is unlawful."⁵ Tr. at 15. However, according to the Supreme Court of the United States, it is not a crime for an undocumented immigrant to reside 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). Moreover, the Individual's spouse was brought to this country as an infant, so it is clear that she did not commit any criminal acts to facilitate her entrance into the United States.

For the reasons set forth above, 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 his 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 6, 2016

⁵ During the PSI, the PSS repeatedly informed the Individual that his spouse's (and his spouse's family's) residence without proper documentation in the United States constituted criminal activity, inaccurately characterized the Individual's spouse as a criminal, and repeatedly accused the Individual with associating with a criminal and disregarding the law. Exhibit 8 at 46-50, 53.