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

In the Matter of: Personnel Security Hearing)	
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Filing Date: February 13, 2020)	Case No.: PSH-20-0042
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Issued: July 21, 2020

Administrative Judge Decision

Janet R. H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXX (the Individual) to hold an access authorization under the United States Department of Energy's (DOE) regulations, set forth at 10 C.F.R. Part 710, "Procedures for Determining Eligibility for Access to Classified Matter and Special Nuclear Material."¹ As discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (Adjudicative Guidelines), I conclude that the Individual's access authorization should not be restored.

I. BACKGROUND

A DOE contractor employs the Individual in a position that requires him to hold access authorization. The Individual signed a Questionnaire for National Security Positions (2017 QNSP) on July 10, 2017, in connection with seeking access authorization. Exhibit (Ex.) 10 at 1. The Individual indicated on the QNSP that his wife, parents, one of his sisters, and several of his other relatives were foreign nationals. *Id.* at 6–13. The Individual reported that his sister was a lawful permanent resident and provided a document number to substantiate this assertion. However, the Individual admitted that his parents and wife resided in the U.S. without authorization. *Id.*

The Office of Personnel Management (OPM) conducted a background investigation of the Individual. During an interview with an OPM investigator, the Individual acknowledged that several of his family members had entered the U.S. without authorization, and he was unable to provide documentation establishing that his father, sister, or wife had authorization to remain in the U.S. Ex. 13 at 63–65. The investigation also revealed discrepancies between information

¹ The regulations define access authorization as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). This Decision will refer to such authorization as access authorization or security clearance.

provided by the Individual on the 2017 QNSP and a QNSP that the Individual completed in 2008 (2008 QNSP).

On December 26, 2019, the LSO issued the Individual a letter in which it indicated that it possessed reliable information that created substantial doubt regarding the Individual's eligibility to hold a security clearance. Ex. 4 at 1. In a summary of security concerns attached to the letter (SSC), the LSO explained that the derogatory information raised security concerns under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of the Adjudicative Guidelines. *Id.* at 4–9.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 5. The Director of the Office of Hearings and Appeals (OHA) appointed me as the Administrative Judge in this matter, and I subsequently conducted an administrative hearing. The LSO submitted fourteen exhibits (Ex. 1–14) into the record. The Individual submitted four exhibits (Ex. A–D). The Individual presented his own testimony and the LSO did not call any witnesses.

II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS

The LSO cited Guideline E (Personal Conduct) of the Adjudicative Guidelines as the first basis for denying the Individual a security clearance. Ex. 4 at 4. Conduct involving questionable judgement, lack of candor, 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. Adjudicative Guidelines at ¶ 15. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. *Id.* The SSC listed as relevant facts the Individual's providing discrepant information concerning the citizenship and residency status of his wife and relatives during the security investigative process and the Individual's association with his wife and other relatives despite their residing in the U.S. without authorization. Ex. 4 at 4–9. These allegations raise security concerns under Guideline E of the Adjudicative Guidelines. Adjudicative Guidelines at ¶ 16(a), (g).

The LSO also cited Guideline J (Criminal Conduct) of the Adjudicative Guidelines as a basis for denying the Individual a security clearance. Ex. 4 at 9. Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Adjudicative Guidelines at ¶ 30. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations. *Id.* The SSC listed as relevant facts the Individual's association with foreign nationals and his travel between the U.S. and her native country with his wife, and asserted that the Individual's actions constituted criminal conduct in violation of 8 U.S.C. § 1324 (Bringing In and Harboring Certain Aliens). The evidence that the Individual may have engaged in criminal conduct raises security concerns under Guideline J. Adjudicative Guidelines at ¶ 31(b).

III. REGULATORY STANDARDS

A DOE administrative review proceeding under Part 710 requires me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after

consideration of all of the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that granting or restoring access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

IV. FINDINGS OF FACT

On February 21, 2008, the Individual signed the 2008 QNSP and certified that the answers he had provided to the questions in the 2008 QNSP were true, complete, and correct to the best of his knowledge and belief, and acknowledged that he understood that providing false information could subject him to criminal penalties. Ex. 10 at 1. The Individual disclosed that his wife was a foreign national, and represented that she was "in the process of completing paperwork to gain residency and/or citizenship." *Id.* at 21–22. The Individual also disclosed that his parents were foreign nationals residing in the U.S., and provided naturalization certificate numbers for each of them. *Id.* at 23–24. The Individual also identified one of his sisters as a foreign national residing in the U.S., and represented that "she [was] in the process of getting a permanent resident card." *Id.* at 28. The Individual reported that he had last travelled to his wife's native country in 1998. *Id.* at 30.

On February 17, 2010, the LSO conducted a personnel security interview (PSI) of the Individual concerning the information that he provided on the 2008 QNSP. Ex. 11 at 3. During the PSI, the Individual admitted that his wife was arrested on February 1, 2010, while trying to enter the U.S. from her foreign country. *Id.* at 6. According to the Individual, his wife had previously been arrested while trying to use false documents to enter the U.S. and had been unable to obtain authorization to remain in the U.S. as a result of that prior arrest. *Id.* at 7. The Individual reported that, as a result of her 2010 arrest, his wife was prohibited from entering the U.S. and that he expected to "[j]ust wait the five years." *Id.* at 9–10. However, the Individual traveled to his wife's native country in April 2010 for the funeral of his father-in-law and returned to the U.S. with his spouse. Ex. 13 at 65.

The Individual's 2017 QNSP indicated that, with respect to his wife, her immigration status was currently deemed as "denied." However, he identified his address as her current location. Ex. 12 at 6. The Individual also disclosed that one of his daughters was born in his wife's native country and that he did not have documentation establishing her U.S. citizenship. *Id.* at 6, 11–12. The

Individual represented that his mother was a lawful permanent resident, not a naturalized citizen as he had reported on the 2008 QNSP, and he provided a different document number than he had on the 2008 QNSP to establish her authorization to remain in the U.S. *Id.* at 8. The Individual also indicated that his father had been “denied resident status,” but listed a U.S. address as his current location. *Id.* at 8–9. The Individual represented that his sister had been granted permanent resident status and provided a document number as proof of her authorization to remain in the U.S. *Id.* at 11.

During an interview with an OPM investigator in 2017, the Individual was unable to provide documentation establishing that his wife or parents were authorized to remain in the U.S. Ex. 13 at 64. According to the Individual, his wife last sought authorization to reside in the U.S. in 2006, but the application was unsuccessful. *Id.* OPM later requested that the Individual provide documentation concerning his wife’s, parents’, and sister’s authorization to reside in the U.S., but the Individual was unable to produce any supporting documents. Ex. 14 at 49.

V. HEARING TESTIMONY

The Individual confirmed the accuracy of the facts alleged in the SSC. Transcript (Tr.) at 15–30.² The Individual acknowledged that his wife and father continued to reside in the U.S. despite not having legal authorization to do so. *Id.* at 31–32. The Individual testified that he did not recall the circumstances under which he provided a naturalization certificate number for his father, and acknowledged that his father had not had authorization to remain in the U.S. since at least 1997. *Id.* at 22. Regarding the LSO’s allegations that aiding his father and wife was unlawful, the Individual testified “my kids can’t do without my wife. And my mom cannot do without her husband So if that’s a criminal offense I do apologize but I cannot separate my spouse or my father from being together.” *Id.* at 31. The Individual indicated that he did not have many friends, and that he had only told one co-worker about the reasons for the suspension of his clearance. *Id.* at 32–33. The Individual also acknowledged that his wife was at constant risk of detention and deportation if she was stopped by local law enforcement. *Id.* at 39–40.

The Individual offered permanent resident cards for his mother and sister demonstrating their lawful presence in the U.S. Ex. B, Ex. C. The DOE Counsel agreed that the Individual’s Ex. B and Ex. C resolved the security concerns related to the immigration status of his mother and sister. Tr. at 21, 24, 27. Regarding his daughter, the Individual testified that she was a U.S. citizen with a Social Security Number and valid U.S. passport. Tr. at 25.³

The Individual testified to his excellent work ethic and effectiveness as an employee. *Id.* at 35. The Individual argued that his wife and father had not harmed anyone through their actions and did not pose any threat to others or the U.S. *Id.*

² Each page of the transcript includes a page number in the upper right corner. However, due to the inclusion of an unnumbered cover page, the page numbered “1” is the second page of the transcript. This decision refers to the page number indicated on the upper right corner of the cited pages when citing to the transcript.

³ I authorized the Individual to submit his daughter’s U.S. passport following the hearing which demonstrates her U.S. citizenship. Ex. D.

VI. ANALYSIS

A. Guideline E Considerations

The LSO's allegations that the Individual deliberately omitted or falsified information concerning the immigration status of his family members during the security investigative process and knowingly associated with persons engaged in criminal activity raise security concerns under Guideline E. Adjudicative Guidelines at ¶ 16(a), (g). An individual may mitigate security concerns under Guideline E if:

- (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;
- (f) the information was unsubstantiated or from a source of questionable reliability; and
- (g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Id. at ¶ 17(a)–(g).

As an initial matter, I must distinguish this case from previous cases in which OHA administrative judges concluded that individuals' cohabitation with immigrant spouses or family members who lacked authorization to reside in the U.S. did not raise security concerns under Guideline E. In those cases, the LSO asserted that the undocumented immigrants' residence in the U.S., in of itself, was unlawful conduct. *See Personnel Security Hearing*, OHA Case No. PSH-18-0058 at 3 (2015) (noting that the sole basis for the LSO's security concerns under Guideline E was the allegation that the Individual resided with her husband, who was an unauthorized immigrant residing in the U.S. in "violation of federal law"); *see also Personnel Security Hearing*, OHA Case No. PSH-16-0055 at 4 (2016) (finding that the individual's spouse, who was an unauthorized immigrant, was not committing a crime merely by residing in the U.S. and that she "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"). This case is factually distinct from those prior cases because the Individual's wife has been detained unlawfully crossing into the U.S. multiple times as an adult and, on at least

one occasion, the Individual traveled with her knowing that she was not authorized to enter the U.S. *Supra* p. 3. Moreover, OHA administrative judges have recognized that close association with unauthorized immigrants represents a security concern under Guideline E when that association leads individuals to act in an untrustworthy or unreliable manner. *See Personnel Security Hearing*, OHA Case No. PSH-14-0097 at 5–6 (2015) (finding that an individual’s association with his wife and in-laws, who were undocumented immigrants, raised security concerns under Guideline E because he sought to obfuscate their legal status on a QNSP and in interviews with an OPM investigator).

At the hearing, the Individual provided documentation satisfactorily establishing that his mother, sister, and daughter are authorized to reside in the U.S. Ex. B, Ex. C; Ex. D. However, security concerns related to his wife and father, who he acknowledges lack authorization to reside in the U.S., remain.

The Individual provided a Naturalization Certificate number for his father on the 2008 QNSP, despite knowing that his father did not have authorization to reside in the U.S., and offered no explanation for this falsification at the hearing. Furthermore, there is no indication in the record that the Individual attempted to correct this falsification until he completed the 2017 QNSP. Accordingly, I find that the first mitigating condition under Guideline E is not applicable. Adjudicative Guidelines at ¶ 17(a).

The Individual acknowledged at the hearing that his father and wife remain at constant risk of deportation if law enforcement apprehends them, and indicated that he would continue to assist them to avoid detection to prevent separating the family. The Individual is aware his wife has been detained for attempting to reenter the U.S. on multiple occasions, and on at least one occasion he assisted her in travelling between her native country and the U.S. while knowing that she was not authorized to do so. *Supra* p. 3. As the conduct giving rise to the security concerns was knowing and is likely to recur, three of the mitigating conditions are inapplicable. Adjudicative Guidelines at ¶ 17(c), (d), (g).

The Individual also testified that he had only told one person outside of his family about his wife’s and father’s immigration status. Whether due to social stigma, concern about their risk of deportation, or both, the Individual’s lack of transparency regarding his family’s immigration status puts him at a non-negligible risk of exploitation. Therefore the fifth mitigating condition under Guideline E is inapplicable. Adjudicative Guidelines at ¶ 17(e). The remaining two mitigating conditions, concerning acting on the advice of legal counsel and unsubstantiated allegations, are clearly not applicable to the facts of this case. *Id.* at ¶ 17(b), (f).

As described above, the Individual has not established that any of the mitigating conditions under Guideline E are applicable in this case. Therefore, I find that the Individual has not resolved the security concerns asserted by the LSO under Guideline E.

B. Guideline J Considerations

The Individual’s assistance to his wife in avoiding detection of her unlawful presence in the U.S., particularly in connection with crossing into the U.S., raises security concerns under Guideline J.

Adjudicative Guidelines at ¶ 31(b). An individual may mitigate security concerns under Guideline J if:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) no reliable evidence to support that the individual committed the offense; and
- (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Id. at ¶ 32(a)–(d).

The Individual's behavior following his wife's detention in 2010 and his testimony during the hearing as to his intent to take necessary action to prevent the separation of his family suggest that the behavior is likely to recur. While the Individual's desire to provide a stable life for his family is admirable on a personal level, the Individual's judgment that the needs of his family outweigh his obligation to abide by laws, rules, and regulations is precisely the judgment that raises security concerns under Guideline J. *Id.* at ¶ 30. Eligibility for access authorization requires an individual to be "unquestionably loyal to the U.S.," even when that loyalty conflicts with what is in the personal interests of the individual. *Id.* at ¶ 1(b). The Individual's stated willingness to continue aiding his wife, as well as his father, to avoid detection to prevent the separation of his family is inconsistent with this obligation. Thus, I find that the first mitigating condition under Guideline J is inapplicable. *Id.* at ¶ 32(a). The Individual did not assert that he was pressured or coerced into committing the alleged criminal behavior, nor did he deny that it occurred. Thus, I find the second and third mitigating conditions inapplicable as well. *Id.* at ¶ 32(b)–(c).

The Individual asserted that his good employment record, and the lack of harm caused to others by his and his family's conduct, mitigated the security concerns. While the Individual's employment record is relevant, both as part of the "whole person" evaluation under the Part 710 regulations and under the mitigating conditions set forth in Guideline J, I find that the uncontested testimony of the Individual as to the quality of his work is not enough to overcome the security concerns asserted by the LSO. Evidence of rehabilitation shows a change in an individual, such that DOE can confidently conclude that the circumstances giving rise to the security concerns are unlikely to recur because the individual has changed. Merely showing that the collective good qualities of the Individual are weightier than the concerning behaviors does not resolve the security concerns. *See Personnel Security Hearing*, PSH-13-0124 at 12 (2014) ("the Part 710 regulations do not permit excellent behavior in one part of one's life to exempt from scrutiny or to excuse conduct in another part of one's life."). The Individual's stated intention to prioritize the wellbeing of his family over compliance with laws casts doubt on his judgment and trustworthiness, and the Individual's excellent job performance does not satisfy the fourth mitigating condition under Guideline J. Adjudicative Guidelines at ¶ 32(d).

Having concluded that none of the mitigating conditions under Guideline J is applicable in this case, I find that the Individual has not resolved the security concerns asserted by the LSO.

VII. CONCLUSION

In the above analysis, I found that there was sufficient derogatory information in the possession of the DOE that raised security concerns under Guidelines E and J of the Adjudicative Guidelines. After considering all of the relevant information, favorable and unfavorable, in a comprehensive, common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I find that the Individual has not brought forth sufficient evidence to resolve the security concerns set forth in the Summary of Security Concerns. Accordingly, I have determined that the Individual's access authorization should not be restored. Either party may seek review of this Decision by an Appeal Panel pursuant to 10 C.F.R. § 710.28.

Janet R. H. Fishman
Administrative Judge
Office of Hearings and Appeals