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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: July 21, 2015) Case No.: PSH-15-0060
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Issued: October 13, 2015

Administrative Judge Decision

Janet R. H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (“the Individual”) to hold an access authorization¹ under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” As discussed below, after carefully considering the record before me in light of the relevant regulations and the Adjudicative Guidelines, I have determined that the DOE should grant the Individual access authorization.

I. Background

The Individual is an employee of a DOE contractor in a position that requires that he hold a DOE security clearance. 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 summoned the Individual for an interview with a personnel security specialist in April 2015. Because the Personnel Security Interview (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.

¹ Access authorization, also known as a security clearance, is an administrative determination that an Individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

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On July 13, 2015, the Individual exercised his right under the Part 710 regulations to request an administrative hearing. The LSO forwarded this request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me the Administrative Judge. At the hearing I convened pursuant to 10 C.F.R. 710.25 (e) and (g), the DOE introduced five exhibits (DOE Exs. 1-5) into the record. The Individual presented the testimony of three witnesses, including his own testimony, and three exhibits (Ind. Exs. A-C). *See* Transcript of Hearing, Case No. PSH-15-0060 (Tr.).

II. Regulatory Standard

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictates that in these proceedings, an Administrative Judge must undertake a careful review of all of the relevant facts and circumstances, and make a “common-sense judgment...after consideration of all relevant information.” 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting or restoring a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the Individual’s conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the Individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording [the Individual] an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the Individual to produce evidence sufficient 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 regulations further instruct me to resolve any doubts concerning the Individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

III. Notification Letter and Associated Security Concerns

The Notification Letter cited derogatory information within the purview of one potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsection (l) (hereinafter referred to as Criterion L).² DOE Ex. 1. In support of its Notification Letter, the LSO cited the following: 1) the Individual admitted that in March 2010 he became aware that his spouse is an undocumented immigrant; 2) in 2013 or 2014, the U.S. Forest Service (USFS) issued

² 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).

a citation to the Individual for illegally cutting down a ponderosa pine tree; 3) in October 2013, the USFS issued the Individual a citation for Open Container of Alcoholic Beverage in a Motor Vehicle; 4) in May 2011, the USFS issued the Individual a citation for removing timber in violation of the law without a valid permit after he failed to complete his permit properly; and 5) in July 2010, the USFS issued the Individual a citation for simple possession of marijuana. DOE Ex. 1.

The Individual does not dispute any of these claims. I find that each of these allegations is valid and well supported by the record in this case. See 10 C.F.R. § 710.27(c) (requiring Administrative Judge to “make specific findings based upon the record as to the validity of each of the allegations contained in the notification letter”). I further find that this information regarding the Individual’s undocumented spouse adequately justifies the DOE’s invocation of Criterion L, as it raises significant security concerns related to whether the Individual follows rules and regulations. See *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005)*, Guideline E. The several citations received by the Individual also justified the DOE’s invocation of Criterion L, as they raise significant security concerns related to the Individual’s criminal activity thereby raising a doubt about his judgment, reliability, and trustworthiness. *Adjudicative Guidelines*, Guideline J.

IV. Findings of Fact

The facts of this case are essentially undisputed. The Individual is an applicant for a security clearance. His spouse of two years is an undocumented immigrant and the mother of one of his sons. Tr. at 24. She came to the United States in 2001 from a country that is not on the Sensitive List. DOE Ex. 5 at 16. The Individual and his wife first consulted with an attorney in 2013 about obtaining proper documentation. Tr. at 38. They actually began the process in 2014. Ind. Ex. C. They are presently on step four in the process, awaiting a response from the National Visa Center confirming that the application can move forward. Ind. Ex. C.

As criminal conduct, the Individual was charged with 1) illegally cutting down a ponderosa pine tree; 2) open container of alcoholic beverage in a motor vehicle; 3) removing timber, tree, or other forest product in violation of the law without a valid permit; and 4) simple possession of marijuana after a marijuana joint was found in his vehicle. DOE Ex. 1. These charges are discussed below, seriatim.

Regarding the first charge, the Individual testified that he and the USFS Officer disagreed about the type of wood that he had taken from the forest. The USFS Officer believed that some of the wood was ponderosa pine, which could not be legally removed. Tr. at 43, 48. The Individual testified, and provided pictures of the product, that it was actually red pine. Tr. at 42-48. The Individual continued that because the USFS Officer confiscated his chain saws, worth approximately \$2,000, it was easier and more cost effective for the Individual to pay the \$250 citation and have his saws returned. Tr. at 47. Therefore, the Individual paid the citation. Tr. at 47-48.

The Individual admitted that he was guilty of number two, the open container violation, and number three, removing timber without a valid permit. Tr. at 49-52. As to number two, he explained that after a long hike hunting for deer, when he returned to his car, he opened a bottle of wine and took a drink. Tr. at 49-50. When he attempted to return it to the cooler, his father

suggested they were only driving a mile down the road, so he placed it at his feet. Tr. at 51-52. They were stopped by the USFS Officer, who noticed the bottle. Tr. at 52. The USFS Officer charged the Individual with an open container in a motor vehicle. Tr. at 52. As to number three, removing timber without a valid permit, the Individual explained that his pen had run out of ink and he was unable to properly complete the permit. Tr. at 52. The logs were properly tagged, but the permit was not properly completed. Tr. at 52. In regard to the marijuana charge, the Individual and his brother-in-law testified that the marijuana joint belonged to the brother-in-law, not the Individual. Tr. at 19-20. The brother-in-law also testified that he has never seen the Individual smoke marijuana. Tr. at 20. The Individual's brother-in-law testified that the USFS Officer saw the marijuana in the car and that he was scared so he did not claim ownership.³ Tr. at 19. Therefore, the USFS Officer cited the Individual, who owned the car. Tr. at 19.

V. Administrative Judge's Analysis

A. The Individual's Undocumented Spouse

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 his spouse creates a heightened risk of foreign inducement, manipulation, pressure, or coercion. It is unlikely that the Individual will be placed in a position of having to choose between the interests of his spouse's government and the interests of the U.S. See Adjudicative Guideline B at ¶ 8(a).⁴ The record does not 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 he] he 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 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. The Individual and his wife own a home together and are purchasing another home together. Tr. at 33.

³ In his response to the Notification Letter requesting a hearing, the Individual stated that his brother-in-law was only 16 or 17 at the time of the marijuana charges. DOE Ex. 2 at 2. Even during the hearing, the brother-in-law hesitated before admitting that the marijuana was his until told that no charges would be brought against him. Tr. at 19-20.

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).

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). As a general rule, however, 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 regarding his undocumented spouse.

B. Criminal Activity

The LSO properly raised the security concerns under Criterion L in regard to the Individual’s criminal conduct. Guideline J of the Adjudicative Guidelines stated that “conditions that could raise a security concern and may be disqualifying include: (a) a single serious crime or multiple lesser offenses.” Adjudicative Guidelines, ¶ 31(a). However, the Guidelines continue that conditions that could mitigate the concerns include: (a) so much time has elapsed or the behavior happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s reliability, trustworthiness, or good judgment and (c) evidence that the person did not commit the offense. Adjudicative Guidelines, ¶ 32(a), (c).

The Individual admitted guilt in two of the charges, the open container and improperly completing the permit for the timber removal. I find that these behaviors happened under such unusual circumstances that they are unlikely to recur. I found credible the Individual’s explanation regarding the open container charge. In the future, it is likely that the Individual will return the alcoholic beverage to the cooler prior to entering the motor vehicle. In addition, it is likely that he will confirm that he a working pen when he goes to collect timber under a permit. I find that he has resolved the concern raised by these two criminal charges under ¶ 32 (a) in that neither of the behaviors underlying the concerns are likely to recur.

My analysis of the evidence presented at the hearing shows that the Individual did not commit the offense of possession of the marijuana joint. The Individual and his brother-in-law both persuasively testified that the joint belonged to the brother-in-law. Tr. at 19. The brother-in-law further testified that he has never seen the Individual smoking marijuana. Tr. at 20. I find that he has resolved the concern raised by this criminal charge under ¶ 32 (c), because there is evidence that the Individual did not actually commit the offense.

The final charge raised by the LSO regards whether the timber he collected was ponderosa pine or not. The Individual stated that he paid the fine, although he believes he was innocent, in order to reacquire his chain saws, which were worth more than the fine for the alleged violation. Further, he provided photos of the two different types of timber, including photos of the timber actually involved in the situation. Finally, the Individual testified that he asked another USFS Officer if the Officer who wrote the violation was still in the area and was told he was not. Tr. at 47. The Individual’s testimony regarding the type of timber was compelling and earnest. I find that the Individual has resolved this concern under ¶ 32 (a), in that it is unlikely to recur.

I found the Individual to be credible in all his testimony. In reviewing all the exhibits in this matter, along with the hearing testimony, the Individual's account of what occurred during the various incidents has not wavered. DOE Ex. 5; Tr. at 22-52. The Individual appears to be trying to do the best he can for his family. He has taken responsibility for his actions. His supervisor testified that she is able to trust him. Tr. at 10. He has not hidden any aspect of his wife's status. Tr. at 13. He tried to follow all rules and regulations. Tr. at 14. She trusts him to train other employees in dangerous machinery. Tr. at 10.

Accordingly, I find that the Individual has resolved the security concerns set forth in the Notification Letter regarding the four minor criminal charges.

Conclusion

For the reasons set forth above, I find that the Individual has resolved the security concerns under Criterion L. After considering all 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 have found that the Individual has brought forth sufficient evidence to resolve all of the security concerns at issue. I therefore find that granting the Individual access authorization will not endanger the common defense and be consistent with the national interest. Accordingly, I have determined that the Individual should be granted access authorization. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. §710.28.

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

Date: October 13, 2015