



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



In the matter of:)
)
) ISCR Case No. 19-00217
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se*

11/07/2019

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the security concerns under Guideline B, foreign influence, but failed to mitigate the drug involvement and substance misuse concerns under Guideline H. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On June 14, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines B and H. The DOD CAF acted 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 implemented on June 8, 2017 (AG).

Applicant answered (Ans.) the SOR on July 25, 2019, and requested a hearing before an administrative judge. On September 3, 2019, the case was assigned to me.

On September 10, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 26, 2019. I convened the hearing as scheduled. Government exhibits (GE) 1 through 3 were admitted in evidence without objection. The Government's exhibit list and request for administrative notice were marked as hearing exhibits (HE) I and II. Applicant testified, but did not offer exhibits at the hearing. The record was held open until October 25, 2019, and Applicant timely submitted exhibits (AE) A and B, which were admitted without objection. DOHA received the transcript (Tr.) on October 7, 2019.

Procedural Rulings

I took administrative notice of facts concerning India. Department Counsel provided supporting documents that verify, detail, and provide context for the requested facts. The specific facts noticed are included in the Findings of Fact.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. Usually administrative notice in ISCR proceedings is accorded to facts that are either well known or from U.S. Government reports. (See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986); Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice))

Findings of Fact

In Applicant's answer to the SOR, he denied the Guideline E allegation and admitted the Guideline H allegations with explanations. His admissions are incorporated into the findings of fact. After a thorough and careful review of the evidence, I make the following additional findings of fact.

Applicant is 49 years old. He is a native-born U.S. citizen. His father was a major in the U.S. Army. He is the owner and chief executive officer (CEO) of his own business. He has a bachelor's degree from a U.S. university. He has never held a security clearance. He married for the second time in 2016. He was married to his first wife from 1998 to 2009. He has three children, ages 19, 17, and 16. His ex-wife, wife, and children are U.S. citizens and residents. (Tr. 6, 39; GE 1)

The SOR alleged that Applicant's ownership and control over an information systems (IT) company located in India create a conflict of interest under Guideline B. The SOR further alleged under Guideline H that Applicant used marijuana with varying frequency from October 1988 to February 2017, and that Applicant stated, in August 2018, his intent to continue using marijuana in the future.

Foreign Influence

In 2009, Applicant became the sole owner of his U.S.-based IT company (C1), which has customers throughout the world. C1 was built to implement out-of-the-box packaged software, such as Oracle, to help companies improve the way they do business. Applicant, through C1, also owns an IT company established and located in India (C2). Applicant describes C2 as merely a “tool” for his overall business to use to reduce costs. Many large multinational companies such as Accenture, Deloitte, and IBM use the same business structure. C2 performs technical information tasks that their global clients require. C2 is a virtual company which has no servers of its own and therefore does not store any customer data itself. The Indian government has no regulatory control over C2. Applicant estimated the 2018 revenues for C1 at \$18 million and for C2 at \$1.9 million. Applicant has never been to India. Applicant credibly stated that if C1 were to win a U.S. government contract with security implications, C2 would be excluded from any participation in the administration of that contract. C1 currently has such contracts with other U.S. government agencies and C2 is excluded from participation in those contracts. (Tr. 22, 24-32, 34-36; Ans.; GE 2-3)

India

India is a sovereign, socialist, secular, democratic republic. It is a multiparty, federal parliamentary democracy with a bicameral parliament and a population of approximately 1.1 billion.

The Indian government generally respects the rights of its citizens, but serious problems remain. Police and security forces have engaged in extrajudicial killings of persons in custody, disappearance, torture, and rape. The lack of accountability permeated the government and security forces, creating an atmosphere in which human rights violations went unpunished. A number of violent attacks were committed in recent years by separatist and terrorist groups. In November 2008, terrorists coordinated an attack at a hotel in Mumbai, frequented by westerners.

The United States recognizes India as key to strategic interests and has sought to strengthen its relationship with it. The two countries are the world's largest democracies, both are committed to political freedom protected by representative government, and share common interests in the free flow of commerce, in fighting terrorism, and in creating a strategically stable Asia. However, differences over India's nuclear weapons program and pace of economic reform exist. There are also concerns about India's relations with Iran, including their increasing cooperation with the Iranian military.

There have been cases involving the illegal export or attempted illegal export of U.S. restricted, dual-use technology to India, including technology and equipment which were determined to present an unacceptable risk of diversion to programs for the development of weapons of mass destruction or their means of delivery. Foreign government and private entities, including intelligence organizations and security

services, have capitalized on private-sector acquisitions of U.S. technology. In March 2008, an American businessman pleaded guilty to conspiring to illegally exporting technology to entities in India.

The United States views India as a growing world power with which it shares common strategic interests. There is a strong partnership between the two countries and they are expected to continue addressing differences and shaping a dynamic and collaborative future. The United States and India seek to elevate the strategic partnership further to include counterterrorism, defense, education, and joint democracy promotion. (HE II)

Drug Involvement and Substance Misuse

Applicant admitted to using marijuana approximately 100 times in the past 30 years. He testified that his latest use of marijuana was in July or August of 2019. Before that it was in February 2019. He described his use as limited social use, two to three times a year, such as when he went to a concert. Applicant lives in a state where marijuana is legal under state law. He purchased marijuana from legal dispensaries in his state and has done so two to three times. He was specifically asked if he would use marijuana in the future and he replied “yes.” (Tr. 32-33, 37; Ans.; GE 2)

Character Evidence

Applicant testified about his community involvement with local youth organizations, including his significant fund-raising efforts for disadvantaged children. His testimony was bolstered in that regard by a letter from the organization’s CEO, who further described Applicant’s philanthropic efforts. (AE A-B)

Policies

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 used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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(a), the entire process is a careful weighing 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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 B, Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” as follows:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

AG ¶ 7 indicates conditions that could raise a security concern and may be disqualifying in this case:

(a) contact, regardless of method, with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology; and

(f) substantial business, financial, or property interests in a foreign country, or in any foreign owned or foreign-operated business that could subject the individual to a heightened risk of foreign influence or exploitation or personal conflict of interest.

The nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an Applicant's business relationship in India may create vulnerabilities to government coercion or inducement. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member or friend is associated with or dependent upon the government, the country is known to conduct intelligence collection operations against the United States, or the foreign country is associated with a risk of terrorism. The relationship between India and the United States places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his business relationship with C2 in India does not pose a security risk. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist C2 in India which might be coerced by governmental entities, or pressured to assist India.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." (ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004)) Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields.

While there is no evidence that intelligence operatives from India seek or have sought classified or economic information from or through Applicant or C2 in India, it is

not possible to rule out such a possibility in the future. AG ¶¶ 7(a), 7(b), and 7(f) apply based upon Applicant's relationship with C2 and its business interests in India.

AG ¶ 8 lists conditions that could mitigate foreign influence security concerns, including:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

Applicant credibly testified about the nature of his business relationship with C2 in India. He presented sufficient evidence to establish that it is unlikely that he would be placed in a position to choose between the interest of C2 in India and those of the United States. AG ¶ 8(a) applies.

Applicant has met his burden to establish his "deep and longstanding relationships and loyalties in the U.S." He is a native-born U.S. citizen whose father was an officer in the U.S. Army. He graduated from a U.S. university and went on to start a highly successful U.S.-based IT company, C1. He works and lives in the United States with his wife and three children. He has never been to India. The evidence supports that Applicant has longstanding ties to the United States and would resolve any conflict of interest in favor of the United States. AG ¶ 8(b) applies.

Applicant's financial interests in this country, namely C1, which had revenues of \$18 million in 2018 are much more substantial than his interests in India, where C2's 2018 revenues amounted to only \$1.9 million. AG ¶ 8(f) applies.

Guideline H, Drug Involvement and Substance Abuse

AG ¶ 24 expresses the security concern pertaining to drug involvement:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Controlled substance means any "controlled substance" as defined in 21 U.S.C. 802. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

In addition to the above matters, I note that the Director of National Intelligence (DNI) issued an October 25, 2014 memorandum concerning adherence to federal laws prohibiting marijuana use. In doing so, the DNI emphasized three things. First, no state can authorize violations of federal law, including violations of the Controlled Substances Act, which identifies marijuana as a Schedule I controlled drug. Second, changes to state law (and the laws of the District of Columbia) concerning marijuana use do not alter the national security adjudicative guidelines. And third, a person's disregard of federal law concerning the use, sale, or manufacture of marijuana remains relevant when making eligibility decisions for sensitive national security positions.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

(a) any substance misuse; and

(g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant used marijuana on numerous occasions over the past 30 years. He used marijuana as recently as July or August of 2019. He has no intention of stopping his occasional social use of marijuana. Specifically, he testified that he would use marijuana in the future. I find both of the above disqualifying conditions apply.

AG ¶ 26 provides conditions that could mitigate security concerns. Two potentially apply in this case:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant's marijuana use was frequent and as recent as July or August of 2019. He intends to continue his marijuana use in the future. The recency of his past use and his recent statement of intent to continue his use casts doubt upon his current reliability, trustworthiness, and good judgment. AG ¶¶ 26(a) and AG 26(b) do not apply.

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 the 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. The circumstances tending to support denying Applicant's clearance are more significant than the factors weighing towards granting his clearance. Applicant mitigated the foreign influence concerns. I considered Applicant's business success and his community involvement. I also appreciated the candor with which Applicant described his marijuana use. However, I

also considered that he used marijuana on numerous occasions over the past 30 years, including as recently as July or August 2019, and his expressed intent to continue using marijuana in the future.

Overall the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that the security concerns arising under Guideline B, foreign influence, were mitigated, but that the concerns under Guideline H, drug involvement and substance misuse, were not mitigated.

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 B: Subparagraph 1.a:	FOR APPLICANT For Applicant
Paragraph 2, Guideline H: Subparagraphs 2.a – 2b:	AGAINST APPLICANT Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

Robert E. Coacher
Administrative Judge