



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



In the matter of: )  
)  
) ISCR Case No. 20-01150  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Andrew Henderson, Esq., Department Counsel  
For Applicant: *Pro se*  
05/17/2021

**Decision**

LYNCH, Noreen A., Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate personal conduct security concerns or drug involvement security concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

**Statement of the Case**

On June 27, 2020, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the personal conduct and the drug involvement guidelines the DoD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, DoD Directive 5220.6 (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR (undated), and elected to have his case decided on the basis of the written record, in lieu of a hearing. Applicant received the File of

Relevant Material (FORM) on February 1, 2021, and interposed no objections to the materials in the FORM (Items 1-3). Applicant supplemented the record with a letter of recommendation and a personal explanation for his drug use. (Item A)

### **Summary of Pleadings**

Under Guideline E, Applicant allegedly resides with his mother and father in the United States, who are undocumented aliens. Applicant admitted the SOR allegations (1.a and 1.b). He disclosed his parents have jobs and driver's licenses. (Item 2) He provided no other information to substantiate they have U.S. residency. His parents are aware that Applicant is attempting to obtain a security clearance. (GE 2) Without updated information from Applicant, his parents ensuing residency continues to be illegal in violation of U.S. immigration laws.

Under Guideline H, Applicant denied in his answer to the SOR allegation that he used marijuana with varying frequency from August 2013 to at least November 2019. He provided no explanation. (2.a) He later admitted the allegation in his security clearance application. (GE 2) He noted he used weed, hashish and THC. Applicant stated that it does not catch his interest. He knows that he did not do the right thing by using illegal drugs on a recreational basis.

### **Findings of Fact**

Applicant is a 24-year-old assembler technician who is applying for a position with a government contractor. He graduated from high school and has taken some college classes and trade courses. He is single and has no children. He is seeking a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

### **Drug Involvement**

Applicant admitted that he did not do the right thing by using recreational drugs. He stated it is one of his biggest regrets. He wants to learn from his mistakes. However, Applicant confirmed that the reason for his most recent use of marijuana in 2019 was due to a coworker at a concert. (Response to FORM) When he was younger, he used marijuana because his friends smoked the substance. He continues to see the coworker every day at work. (GE3)

Applicant assured his marijuana use never had a negative effect on his personal or professional life. Whether he has continued using marijuana after 2019 is unclear. Without more information, it is difficult to determine whether his claimed monthly use of marijuana between 2013 and 2019 was accurately reported.

To be sure, state law covering marijuana activities in Applicant's state of residence does legalize marijuana use. See State A's Proposition 64 (approved by voters in 2016). However, whatever law Applicant might claim compliance with in his state of residence is preempted by federal law when evaluating the compatibility of drug

involvement (marijuana included) with eligibility requirements for holding a DoD-covered security clearance. Whenever the state law legalizing marijuana use in Applicant's state of residence conflicts with the federal law, the federal ban detailed in the Controlled Substance Act (CSA) is controlling.

Under the terms and conditions of the CSA (21 U.S.C. ¶ 801 *et seq.*), Congress generally prohibited the cultivation, distribution, and possession of marijuana. (Item 10) It established significant penalties for these crimes. (21 U.S.C. ¶ 841 *et seq.*) These statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime. DoD guidelines implementing the federal legal ban covering marijuana use and possession require federal prosecutors to weigh all relevant considerations when making prosecution decisions. (Item 10)

While the CSA has been challenged on federalism grounds, the courts have not attempted to validate the enabling provisions of the state's enabling medicinal exception. Instead, the Supreme Court in *Oakland Cannabis Buyers Court* (532 U.S. 483 (2001)) reaffirmed the federal preemption of the state's competing law legalizing marijuana use for medicinal purposes. In doing so, the *Oakland Cannabis Buyers Court* extended its oversight role in ensuring that federal preemption jurisdiction over illegal drug violators without regard to the state's marijuana exception.

Building on its *Oakland Cannabis Buyers* precedent, the Supreme Court seized the opportunity to refine and clarify the reach of its *Oakland Cannabis Buyers* precedent in *Raich v. Gonzales*, 545 U.S. 1, 8-14 (2005) In *Raich*, the Court addressed the claims of two state residents who suffered from a variety of serious medical conditions and sought to avail themselves of medical marijuana pursuant to the terms of their state's medial exception. Notwithstanding that county investigating officials had found that one respondent's medical use of marijuana was entirely lawful, federal agents seized and destroyed all six of her cannabis plants.

In validating the federal seizure, the *Raich* Court held that the regulation of marijuana under the CSA was fully within Congress' commerce power (U.S., art. 1, ¶ 8), because marijuana production intended for home production could have a substantial effect on the supply and demand in the national market. The *Raich* Court reasoned that federal failure to regulate the interstate manufacturing and possession of marijuana would leave a considerable gap in the CSA. In turn, the Court vacated the Ninth Circuit's judgment. Federal law has and continues to control any marijuana use initiated by Applicant.

## **Policies**

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." As Commander in Chief, "the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. Eligibility for access to classified information may only be granted "upon a finding that it

is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant’s life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant’s conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

## **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, and trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes . . . AG ¶ 15.

## **Drug Involvement**

*The Concern:* Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability and willingness to comply with laws, rules, and regulations. AG ¶ 24

## **Burdens of Proof**

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the 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. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No.

02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

### Analysis

Security concerns are raised over Applicant’s residing with his parents who are undocumented aliens residing with him in the United States and continued residency in the country is in violation of the federal immigration laws in force. Applicant’s continued residing with undocumented Mexican nationals in violation of U.S. immigration laws warrants the application of disqualifying (DC), ¶ 16(g). He disclosed that they had jobs and drivers’ licenses. Residing in the United States and continued residency in the country is in violation of the federal immigration laws in force. Applicant’s continued residing with an undocumented Mexican national in violation of U.S. immigration laws warrants the application of disqualifying condition (DC), ¶ 16(g), “association with persons involved in criminal activity” of the personal conduct guideline.

Applicant’s continuous residing with his parents constitutes a *per se* violation of Guideline ¶16(g). This conclusion is reached after examination of both the plain text of DC ¶16(g) and case precedents. See, e.g., ISCR Case No. 06-20084 (Aug. 16, 2007)(knowingly employing an illegal immigrant); ISCR Case No. 07-07645 (Jan. 7, 2009)(married to an illegal immigrant); ISCR Case No. 07-05407 (March 31, 2008)(engaged to an illegal immigrant); ISCR Case No. 08-03647(Feb. 19, 2009)(married to an illegal immigrant); and ISCR Case No. 18-00753( Oct. 31, 2018)(married to an illegal immigrant). Applicant’s answer fails to appropriately mitigate SOR allegations 1.a and 1.b.

While these cited decisions lack precedential authority, they draw support from the Appeal Board (ISCR Case No. 07-07645 at 5 (App. Bd. March 25, 2009) and provide persuasive authority for finding Applicant’s residing with an undocumented Mexican national to be incompatible with the trust requirements for holding a security clearance.

Additionally, Applicant has an admitted history of marijuana use that predates the drug’s legalization on January 1, 2018. “When a person’s life history shows evidence of unreliability or untrustworthiness, questions arise whether the person can be relied on and trusted to exercise the responsibility necessary for working in a secure environment where protecting classified information is paramount.” Directive, Enclosure 2 (Appendix A) 1.b

On the strength of the evidence presented, two disqualifying conditions of the Adjudicative Guidelines (DCs for drug involvement apply to Applicant’s situation: DC 25(a) “any substance misuse”; 25(c), “illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia. Applicant used marijuana to relax with his peers, and now knows that it was the wrong thing to do.

## Whole-person Assessment

Whole-person assessment of Applicant's clearance eligibility requires consideration of whether his history of association with his undocumented parents with whom he resides in the United States, and who are citizens of Mexico, without any demonstrated compliance with federal immigration laws is otherwise compatible with DoD requirements for holding a security clearance. While Applicant is entitled to credit for his honesty and candid reply, he has not provided information to mitigate the SOR allegations. They are in violation of federal immigration laws.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude personal conduct and drug involvement security concerns are not mitigated. Eligibility for access to classified information is denied.

## 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:

Guideline E (PERSONAL CONDUCT):	AGAINST APPLICANT
Subparagraphs 1.a-1:b:	Against Applicant
Guideline H (Drug Involvement)	Against Applicant
Subparagraph 2.a:	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.

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Noreen A. Lynch  
Administrative Judge