



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



In the matter of:)
)
) ISCR Case No. 20-02571
)
Applicant for Security Clearance)

Appearances

For Government: Kelly Folks, Esq., Department Counsel
For Applicant: *Pro se*

02/23/2022

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigated the Guideline B, foreign influence and Guideline H, drug involvement and substance misuse security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On December 31, 2020, the Defense Counterintelligence and Security Agency (DCSA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence, and Guideline H, drug involvement and substance misuse. The action was taken 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 (AG) effective on June 8, 2017.

Applicant answered the SOR on February 18, 2021, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the

Government's file of relevant material (FORM), and Applicant received it on September 28, 2021. He was afforded an opportunity to file objections and submit material in refutation, extenuations or mitigation within 30 days of receipt of the FORM. The Government's evidence is identified as Items 1 through 6. Applicant did not provide a response to the FORM or any objections. Items 1 through 6 are admitted into evidence. The case was assigned to me on December 2, 2021.

In the FORM, Department Counsel requested that I take administrative notice of certain facts about the People's Republic of China (China). (Item 5). Without objection, I have taken administrative notice of the facts contained in the request. The facts are summarized in the written request and will not be repeated verbatim in this decision. Of particular note is the significant threat of espionage, cyber-espionage, and cyber-attacks against the United States. Also noted is the exploitation of Chinese citizens or persons with family ties to China to gain insider access to military and defense contract secrets; economic espionage; and the significant ongoing human rights problems in China.

In the FORM, Department Counsel requested I take administrative notice of 21 U.S.C. § 802; 21 U.S.C. § 812; 21 U.S.C. § 813; and Adherence to Federal Laws Prohibiting Marijuana Use, Director of National Intelligence, dated October 24, 2014. (Item 5) I have taken administrative notice of the requested laws and policy.

Findings of Fact

Applicant admitted all of the SOR allegations. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 28 years old. He earned an associate's degree in 2015 and a bachelor's degree in 2017. Applicant has worked for his current employer, a federal contractor, since August 2018. Prior to then he was self-employed full-time. The nature of his business was to assist foreign students with the admissions process for attending college in the United States. In his January 2019 security clearance application (SCA), he disclosed nine foreign contacts, all Chinese nationals, for whom he provided services in 2018. Since becoming employed full-time with his present employer, he indicated he only works part-time in this business. (Items 4, 6)

Applicant married a Chinese national in 2018. She was on an F-1 student visa at the time of their marriage. He is sponsoring her for legal permanent resident status in the U.S. They have no children. No information was provided about Applicant's wife's background, contacts, or affiliations with government entities in China. No information was provided regarding her current employment, if any.

Applicant's wife's mother is a resident and citizen of China. No background information or details were provided about her. No information was provided about Applicant's contacts and associations within China, including his and his wife's contact with her mother, and any other family members. Applicant noted that he visited China in

December 2018 to January 2019, presumably with his wife and presumably to see her mother. (Item 6)

Applicant used marijuana from about March 2017 to at least February 2020 with varying frequency. During his May 2019 background interview with a government investigator, he said he used marijuana on average about twice a week. In response to May 2020 government interrogatories, he stated his last use was February 2020. He said he uses marijuana for medicinal purposes for migraines, anxiety and tremors due to Torrents syndrome. Medicinal marijuana is legal in the state where Applicant resides. He has a valid medical marijuana card from the state. (Items 3, 6)

In his background interview, Applicant stated that for career purposes he was attempting to find an alternative to marijuana use. In his government interrogatories, he responded that his employer has a drug use policy, but does not require him to undergo random or periodic tests. He further indicated he understood that marijuana use remains illegal under Federal law and any future use of marijuana may affect his security clearance eligibility. In response to the question, do you intend to illegally use drugs or a controlled substance in the future, he responded yes, he would use medical marijuana. (Items 3 6)

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. 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(c), the entire process is a conscientious scrutiny 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states 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 as to obtaining 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 as to 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

The security concern for foreign influence is set out in AG ¶ 6:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. The following are potentially applicable 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

(e) shared 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.

There are significant espionage concerns and ongoing human rights problems in China. Applicant's foreign contacts create a potential conflict of interest and a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion, through his wife, who is a citizen of China living with him in the United States, and his mother-in-law who is a citizen and resident of China. The above disqualifying conditions have been raised by the evidence.

Conditions that could mitigate foreign influence security concerns are provided under AG ¶ 8. The following is potentially applicable:

(a) the nature of the relationships with foreign persons, the country in which these personal are located, or the positions or activities of those person 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 United States;

(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

(c) contact or communication with foreign citizens is so casual or infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

I considered the totality of Applicant's ties to China. 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 family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, and the country is known to conduct intelligence operations against the United States. Applicant's wife and mother-in-law are citizens of China. His mother-in-law resides in China. No information was provided regarding either person's background, employment, affiliations, and financial interests in China. Applicant obviously has contact with his wife. However, no information was provided regarding his wife's contact with her mother or any other relatives in China. It appears Applicant traveled to China in December 2018-January 2019, but additional evidence was not provided,

such as who they had contact with while there. It is presumed they visited her mother. China is a country that actively engages in espionage and exploits Chinese citizens or persons with family ties to China to gain insider access to sensitive and classified information. Applicant failed to provide evidence to mitigate the foreign influence security concerns raised. None of the mitigating conditions apply.

Guideline H: Drug Involvement and Substance Misuse

The security concern relating to the guideline for drug involvement and substance misuse is set out in AG ¶ 24:

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.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

- (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 admits he used marijuana from March 2017 until at least February 2020. He disclosed he uses it for medicinal purposes and it is legal in the state where he resides. He is also aware that under Federal law it remains illegal. He expressly stated his intention to continue to use marijuana in the future. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 26 are potentially applicable:

- (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 to overcome the 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 being 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 intends to continue using marijuana despite it being a violation of Federal law and the requirement of abstinence to hold a security clearance. The above mitigating conditions 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. I have incorporated my comments under Guidelines B and H, in my whole-person analysis.

Applicant failed to meet his burden of persuasion. The record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline B, foreign influence and Guideline H, drug involvement and substance misuse.

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:

AGAINST APPLICANT

Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline H:	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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge