



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



In the matter of:)
)
) ISCR Case No. 20-03491
)
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: Sean M. Bigley, Esq., Applicant’s Counsel

May 3, 2022

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On July 20, 2021, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines D and E. The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant’s security clearance.

Applicant answered the SOR on September 10, 2021, and requested a hearing before an administrative judge. (Answer.) The case was assigned to me on February 1, 2022. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 1, 2022, scheduling the hearing for March 1, 2022. The hearing was convened as scheduled. The Government offered Exhibits (GXs) 1 through 3, which were admitted without objection. GX 4 was admitted over objection, but with limited probative value. (Transcript (TR) at page 12 line 18 to page 16 line 25.) Applicant testified on his own behalf. He offered six exhibits, marked Applicant Exhibit (AppX) A

through F, which were admitted without objection. The record then closed. DOHA received the transcript of the hearing on March 8, 2022.

Findings of Fact

Applicant denied the allegations in SOR ¶¶ 1.c., 1.e. and, in part, 2.a. The Government withdrew SOR ¶ 2.b. (TR at page 6 lines 13~19.) After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 44-year-old employee of a defense contractor. He has been married since June of 2016, and has two children. (TR at page 22 line 20 to page 23 line 9, and at page 59 lines 14~17.)

Guideline D, Sexual Behavior & Guideline E, Personal Conduct

1.a. and 2.a. Applicant admits that he engaged in prostitution at massage parlors in the United States from about 2003 until early 2017, after he was married in June of 2016. His wife is unaware of this admission by Applicant, or of the allegations in the SOR. (TR at page 39 line 22 to page 43 line 19, at page 59 lines 5~8, and at page 59 lines 18~25.)

1.b. and 2.a. Applicant admits that he engaged in prostitution in Thailand at a bachelor party in March of 2016. (TR at page 30 line 19 to page 31 line 17, at page 44 line 14 to page 50 line 9, and at page 52 lines 1~5.) His wife is unaware of this admission by Applicant, or of the allegations in the SOR. (TR at page 39 line 22 to page 43 line 19, at page 59 lines 5~8, and at page 59 lines 18~25.)

1.c. and 2.a. Applicant admits that he engaged in prostitution in the Dominican Republic in November of 2016, after he was married in June of 2016. (TR at page 31 line 18 to page 32 line 10, at page 50 line 10 to page 52 line 1, and at page 60 line 1 to page 61 line 9.) His wife is unaware of this admission by Applicant, or of the allegations in the SOR. (TR at page 39 line 22 to page 43 line 19, at page 59 lines 5~8, and at page 59 lines 18~25.)

1.d. and 2.a. Applicant admits that he engaged in prostitution in Hong Kong and in Macau in about 2003, and again in 2008. (TR at page 43 line 20 to page 44 line 13, and at page 52 line 6 to page 54 line 7.) His wife is unaware of this admission by Applicant, or of the allegations in the SOR. (TR at page 39 line 22 to page 43 line 19, at page 59 lines 5~8, and at page 59 lines 18~25.)

1.e. and 2.a. Applicant admits that he engaged in prostitution in Vietnam in about 2008. (TR at page 32 line 11 to page 33 line 11, and at page 54 line 8 to page 57 line 1.) His wife is unaware of this admission by Applicant, or of the allegations in the SOR. (TR at page 39 line 22 to page 43 line 19, at page 59 lines 5~8, and at page 59 lines 18~25.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing 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 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.

Directive ¶ E3.1.14, requires the Government to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 the applicant may deliberately or inadvertently fail to protect or 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 Executive Order 10865 provides that adverse 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 D, Sexual Behavior

The security concern relating to the guideline for Sexual Behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

The guideline notes several conditions that could raise security concerns under AG ¶ 13. Two are potentially applicable in this case:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted; and
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress.

Applicant received sexual gratification at massage parlors in the United States on numerous occasions. He also engaged in prostitution in at least four other countries. His wife is unaware of said conduct, which creates a vulnerability to coercion. The evidence is sufficient to raise these disqualifying conditions.

AG ¶ 14 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 14 including:

- (a) the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature;
- (b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment;
- (c) the behavior no longer serves as a basis for coercion, exploitation, or duress;
- (d) the sexual behavior is strictly private, consensual, and discreet; and
- (e) the individual has successfully completed an appropriate program of treatment, or is currently enrolled in one, has demonstrated ongoing and

consistent compliance with the treatment plan, and/or has received a favorable prognosis from a qualified mental health professional indicating the behavior is readily controllable with treatment.

None of the above mitigating conditions apply. Applicant engaged in acts of prostitution over a period of about 14 years from 2003~2017; and on at least two occasions, after he was married. His wife still does not know of this conduct, which makes him susceptible to coercion, exploitation, or duress. He has not attended any counseling.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. One is potentially applicable in this case:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant engaged in acts of prostitution early in 2017. His wife does not know of this conduct. As a result, he is vulnerable to exploitation, manipulation, and duress. The evidence is sufficient to raise this disqualifying condition.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 including:

(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; 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.

Applicant remains vulnerable to coercion. He produced no evidence of counseling. None of the above mitigating conditions 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 relevant 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 common-sense 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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines D and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. Applicant is well respected in the workplace and in his community. (AppXs B-F.) However, Applicant remains vulnerable to coercion. Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the sexual behavior, and personal conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline D:	AGAINST APPLICANT
Subparagraphs 1.a~1.e:	Against Applicant
Paragraph 2, Guideline E:	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.

Richard A. Cefola
Administrative Judge