



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 20-03554
)
 Applicant for Security Clearance)

Appearances

For Government: Raashid S. Williams, Esq., Department Counsel
For Applicant: Mark S. Zaid, Esq.

06/27/2022

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines B (Foreign Influence), G (Alcohol Consumption) and J (Criminal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on November 20, 2019. On January 22, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines B, G, and J. The DCSA CAF acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on February 23, 2021, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on a date not

reflected in the record. The case was assigned to me on March 17, 2022. On April 22, 2022, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on June 1, 2022. I convened the hearing as scheduled. Government Exhibits (GX) 1, 3, and 4 were admitted in evidence without objection. GX 2, an unauthenticated summary of subject interviews, was not admitted. (Tr. 7.) Applicant testified and submitted Applicant's Exhibits (AX) A through O, which were admitted without objection. DOHA received the transcript (Tr.) on June 14, 2022.

I granted Department Counsel's request that I take administrative notice of facts pertaining to the Kingdom of Thailand. Department Counsel's request and supporting documentation are attached to the record as a hearing exhibit. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. His admissions are incorporated in my findings of fact.

Applicant is a 39-year-old communications operator employed by a defense contractor since May 2012. He served on active duty in the U.S. Army from March 2008 to February 2012 and received an honorable discharge. He has held a security clearance since March 2010.

Applicant has been married since December 2014. He has no children. He received a bachelor's degree in June 2011, while he was on active duty.

In 2012 and 2013, Applicant worked overseas as a contractor, working as the site lead of a satellite communications facility. He was laid off from September 2013 to December 2013 due to a reduction in force. He was offered a job in the United States, drove across the country on the way to his new job, and visited a close friend from his Army service. While visiting his friend, where he met his future wife, a citizen of Thailand living in the United States. In May 2014, they married on Veterans Day. (Tr. 37-39.)

In January 2019, Applicant decided to accept a job overseas in order to earn more income. His wife stayed in the United States. (GX 1 at 24.) He anticipates staying overseas until his company's contract expires in 2025. (Tr. 42.)

Applicant's spouse became a U.S. citizen in December 2020. (Tr. 41.). She currently works and lives in the United States. Her parents never married. Her father is a citizen and resident of Thailand. He did not attend their wedding. He was a Buddhist monk, and at some time he worked as a pipefitter on a farm until he lost a leg in an accident. (AX J at 2; Tr. 44-45.) He does not speak English and Applicant does not speak Thai. Applicant had no contact with him until June 2019, when his father-in-law "friended" him and his wife, using an emoji instead of text. (Tr. 47.) Applicant and his wife have had no contact with his wife's mother, who currently lives in Sweden, since 2016. (AX J at 2.)

In August 2007, Applicant was stopped by police for driving without his headlights turned on. A breathalyzer registered a blood-alcohol level of 0.136. He was arrested and charged with driving under the influence of alcohol (DUI). The headlight charge was dismissed because his vehicle had automatic headlights. The DUI charge was reduced to having physical control of a motor vehicle. He completed a two-day intervention program and completed four sessions with a psychiatrist. He was fined \$1,000, with \$800 suspended, and was placed on unsupervised probation for two years, which he completed. (Tr. 50-51; AX F.)

In September 2013, Applicant was arrested and charged with having physical control of a vehicle while under the influence of alcohol. This incident happened after Applicant was laid off and returned to the United States. He spent a night drinking and reminiscing with an old high school friend. He realized that he was intoxicated and should not try to drive. Instead, he decided to sleep in his vehicle with the motor running to operate the car's air conditioner. He was charged with having physical control of a vehicle while under the influence of alcohol. He was convicted, fined \$250, sentenced to 30 days in jail, with 27 days suspended, and placed on probation for one year. (Tr. 53-55; GX 4 at 1; AX G.)

In April 2016, Applicant was arrested and charged with operating a vehicle under the influence of an intoxicant. He testified that this incident occurred after his best friend from high school visited him and his wife. Applicant consumed a mixed drink and two beers over a period of about six hours. He drove his guests from the restaurant to their hotel, which took about 45 minutes. After leaving his guests at the hotel, he started to drive home. On the way home on a four-lane highway, he encountered a construction zone where the right three lanes were closed at the point where there was an exit ramp on the right. Applicant parked his car behind a police vehicle and took photographs of what he considered a dangerous situation. (AX H.) A police officer approached him and asked what he was doing, and he explained that he thought the conflicting road signs created a dangerous situation. Another police officer approached, said that he smelled alcohol, asked Applicant if he had been drinking, and then arrested him for DUI. (Tr. 58-61.) Applicant's best friend submitted a statement corroborating Applicant's description of their moderate consumption of alcohol during the hours preceding Applicant's arrest. (AX K.)

Applicant hired an attorney, who requested discovery of the recordings from body cameras and traffic camera and subpoenaed the two police officers involved. According to Applicant, no evidence was disclosed and the police officers did not appear to testify. (Tr. 62.) The record does not reflect a police report, field sobriety test, breathalyzer test, or any other evidence reflecting that he was under the influence of an intoxicant. In February 2017, the charge was dismissed with prejudice. (GX 4 at 2; AX I.) Applicant reported his arrest to his supervisors and his security manager. (Tr. 63-64.)

Applicant was diagnosed with non-alcoholic fatty liver disease in 2019. He has last seen by a medical professional in October 2021, when his laboratory tests showed mildly elevated liver enzymes. His medical management program includes lifestyle

modifications including diet, exercise, and weight loss. He is scheduled for a follow-up examination in October 2022. (AX C.) He presented evidence that a DeRitis Ratio, known as AST: ALT, that is greater than 1 may indicate long-term complications such as fibrosis and cirrhosis. (AX E.) Applicant's ratio has remained below 1.00 for about six years. (AX D.) Applicant testified that he intends to avoid consuming alcohol and control his diet in order to control his liver disease. (Tr. 66.) He has found avoiding alcohol easy, because he has other interests that do not involve use of alcohol. (Tr. 68.) He does not consume hard liquor, and he limits himself to one or two beers with family or close friends on rare occasions. (Tr. 71.)

Applicant attended two meetings of Alcoholics Anonymous (AA) in October and November 2021. (AX B.) He testified that he attended the meetings on advice from his attorney to see if they would be useful. He did not feel like he "fit in," because he does not consider himself an alcoholic. He did not attend any further meetings. (Tr. 67, 70.)

Applicant's team leader since February 2022 has been a team leader for three and a half years and has been working on an overseas contract for 15 years. He described Applicant as a "stellar" performer, one of the few basically bright team members that he has encountered during his 15 years of overseas service. Applicant is his "second," meaning that he takes over the day-to-day functions of the site in the team leader's absence. The team leader has not observed Applicant being intoxicated, in large part because alcohol is not allowed on the team base and is not available in the country. He recommends that Applicant be granted eligibility for access to classified information. (Tr. 16-22.)

Applicant's co-worker from late 2017 to early 2022 submitted a statement that he never observed any indications of alcohol abuse during the time they worked together. (AX M.) A close friend of Applicant, who has known him since 2020 and is aware of the previous alcohol-related incidents, believes that Applicant has moved on from his past alcohol-related behavior. (AX O.) Applicant's operations support manager, who has held a security clearance for 21 years on active military duty and 18 years as a defense contractor, submitted a stating describing Applicant's duty performance as "superior to his peers." (AX L.)

A friend and co-worker, who has known Applicant since 2016 and worked with him daily at two overseas locations, worked as Applicant's subordinate in June 2021 and has been a co-worker since February 2022. They spend much of their off-duty time together at movies or looking for good restaurants. He described Applicant as a "number one team player," highly respected among his peers, subordinates, and supervisors. He recommends "without a doubt" that Applicant be granted a security clearance. (Tr. 23-33.)

Thailand is a constitutional monarchy. In March 2019, it held its first national elections after five years of rule by a junta-led National Council for Peace and Order. The election was generally peaceful with few reported irregularities. However, observers

noted that the restrictive legal framework and selective enforcement of campaign regulations favored certain parties.

In Thailand, the king is the head of government, and individuals are legally precluded from publicly criticizing the ruling government and monarchy. However, in July to December 2020, there were numerous anti-government protests. The U.S. Department of State has issued a Level 3 (Reconsider Travel) advisory for the southernmost provinces of Thailand due to civil unrest and terrorist attacks.

The Royal Thai Police and Royal Thai Armed Forces share responsibility for law enforcement. Although the civilian authorities were given more authority after the March 2019 elections, they do not maintain full authority over security forces, who continue to commit a variety of abuses. Thailand continues to have significant human rights abuses.

China is seeking to expand its power projection in the region. The Chinese Navy conducted recent port calls in Thailand, and China conducts regular military exercises that include Thailand. There is no evidence that Thailand targets the United States for military or economic intelligence and no evidence that China uses resources in Thailand to gather intelligence or technology from the United States.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

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, an administrative judge applies these guidelines 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 and reliable information about the person, past and present, favorable and unfavorable.

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 that 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 made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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 (4th 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. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline B, Foreign Influence

The security concern under this guideline 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 maybe 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 evidence establishes the following disqualifying conditions:

AG ¶ 7(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;

AG ¶ 7(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

AG ¶ 7(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.

[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002); *see also* ISCR Case No. 09-06457 at 4 (App. Bd. May 16, 2011). Although Applicant has no personal connection to his wife's father, he has not rebutted the presumption that he has some sense of obligation to him.

Applicant's father-in-law is a disabled former monk with no apparent connections to the government of Thailand. However, the relative obscurity of family members does not provide a meaningful measure of whether an applicant's family connections pose a security risk. ISCR Case No. 07-13696 at 5 (App. Bd. Feb. 9, 2009).

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, "even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security." ISCR Case No. 00-0317 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, 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, or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. *See generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where

administrative judge did not consider terrorist activity in area where family members resided).

AG ¶¶ 7(a) and (e) require substantial evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in having a family member living under a foreign government. See, e.g., ISCR Case No. 12-05839 at 4 (App. Bd. Jul. 11, 2013). “Heightened risk” is not a high standard. See, e.g., ISCR Case No.17-03026 at 5 (App. Bd. Jan. 16, 2019). It is a level of risk one step above a State Department Level 1 travel advisory (“exercise normal precaution”) and equivalent to the Level 2 advisory (“exercise increased caution”). The State Department Level 3 travel advisory for Thailand due to civil unrest is sufficient to raise these two disqualifying conditions as well as the potential conflict of interest in AG 7(b).

The following mitigating conditions are potentially applicable:

AG ¶ 8(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 United States;

AG ¶ 8(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

AG ¶ 8(c): contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

AG ¶ 8(a) is established. Applicant’s connection to his father-in-law is solely by virtue of his marriage. They are unable to communicate, except by emoji. Although Thailand has defense-related and commercial contacts with China, it is not hostile to the United States. There is no evidence that Thailand targets the United States for military or industrial intelligence, and no evidence that China seeks to use citizens of Thailand or former citizens of Thailand to gain military or industrial intelligence from the United States.

AG ¶ 8(b) is established. Applicant met his wife while she was living and working in the United States. Although she has cultural ties to Thailand, evidenced by the fact that she chose to have a marriage ceremony in Thailand, followed by a ceremony in the United States a month later, she has strong ties to the United States, demonstrated by

her decision to come to the United States in 2011 and become a U.S. citizen in 2020. Her father is her only family member in Thailand. Her sister owns a business in the United States, and her mother lives and works in Sweden.

Guideline G, Alcohol Consumption

The concern under this guideline is set out in AG ¶ 21: "Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness." Applicant admitted all three alcohol-related arrests alleged in the SOR. However, at the hearing, he submitted evidence that he was not guilty of the offense in April 2016. Based on my review of the evidence, I conclude that the evidence was insufficient to establish that he was under the influence of an intoxicant on this occasion. However, the evidence establishes the alcohol-related conduct alleged in SOR ¶¶ 2.a and 2.b and raises the following disqualifying conditions under this guideline:

AG ¶ 22(a): alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder; and

AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

The following mitigating conditions are potentially applicable:

AG ¶ 23(a): so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;

AG ¶ 23(b): the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations; and

AG ¶ 23(d): the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

AG ¶ 23(a) is established. Applicant's last arrest was more than six years ago, and the evidence of maladaptive alcohol use for that incident is sparse. The last arrest for an alcohol-related incident supported by substantial evidence was in September 2013.

AG ¶ 23(b) is established. Applicant has acknowledged his maladaptive alcohol use, and he has modified his drinking, motivated in large part by his health problems.

AG ¶ 23(d) is partly established. Applicant received court-ordered psychiatric counseling in 2007, but no other treatment other than his attendance at two AA meetings. However, he has established a pattern of modified consumption based on the advice of the medical professionals treating his liver disease.

Guideline J, Criminal Conduct

The concern under this guideline is set out in AG ¶ 30: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations."

Applicant's alcohol-related arrests establish the following disqualifying conditions under this guideline:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

The following mitigating conditions are potentially relevant:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(d): there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Both mitigating conditions are established for the reasons set out in the discussion of Guideline G and the evidence of his outstanding performance at work.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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.

I have incorporated my comments under Guidelines B, G, and J in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Applicant was candid, sincere, remorseful, and credible at the hearing. After weighing the disqualifying and mitigating conditions under Guidelines B, G, and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his foreign family connections, alcohol consumption, and criminal conduct.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Guideline B, Foreign Influence:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Guideline G, Alcohol Consumption:	FOR APPLICANT
Subparagraphs 2.a-2.c:	For Applicant
Guideline J, Criminal Conduct:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge