



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



In the matter of:)	
)	
)	ISCR Case No. 21-02423
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Andrew H. Henderson, Department Counsel
For Applicant: *Pro se*

March 3, 2023

Decision

Lokey Anderson, Darlene D., Administrative Judge:

On October 17, 2019, Applicant submitted a security clearance application (e-QIP). (Government Exhibit 1.) On May 10, 2022, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline H, Drug Involvement and Substance Misuse; and Guideline E, Personal Conduct. The action was taken under Executive Order 10865 (EO), *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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective within the DoD after June 8, 2017.

Applicant answered the SOR on May 30, 2022, and requested a hearing before an administrative judge. The case was assigned to me on July 18, 2022. The Defense Office of Hearings and Appeals issued a notice of hearing on July 21, 2022, and the hearing was convened as scheduled on August 25, 2022. On July 8, 2022, the Government motioned to amend the Statement of Reasons to strike “Applicant for

Public Trust Position” and to replace it with “Applicant for Security Clearance”. At the hearing, the Government’s proposed amendment was addressed. Applicant had not objection to the proposed amendment, and the amendment was made. At the hearing, the Government offered two exhibits, referred to as Government Exhibits 1 and 2, which were admitted without objection. The Applicant offered six exhibits, referred to as Applicant’s Exhibits A through F, which were admitted without objection. He called one witness and testified on his own behalf. The record remained open until close of business on September 1, 2022, to allow Applicant to submit additional supporting documentation. Applicant submitted three Post-Hearing exhibits, referred to as Applicant’s Post-Hearing Exhibits G through I, which were admitted into evidence. DOHA received the transcript of the hearing (Tr.) on September 6, 2022.

Procedural Rulings

The Government requested I take administrative notice of certain facts relating to the country of Colombia. Department Counsel provided a six-page summary of the facts, supported by seven Government documents pertaining to Colombia, identified as Government Exhibit H-I. The documents provide elaboration and context for the summary. Applicant had no objection. (Tr. p. 18.) I took administrative notice of the facts included in the U.S. Government reports. They are limited to matters of general knowledge, not subject to reasonable dispute. They are set out in the Findings of Fact.

Findings of Fact

Applicant is 48 years old. He is unmarried, but resides with his girlfriend, and has no children. He has a Bachelor’s degree in Engineering. He is co-owner of an Aerospace company that does defense contracting. He is seeking to obtain a security clearance in connection with his employment.

Guideline H - Drug Involvement and Substance Misuse

The SOR alleges that the Applicant has used 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 and can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and raise questions about a person’s ability or willingness to comply with laws, rules, and regulations. Applicant admits each of the allegations set forth under this guideline.

1.a. Applicant used marijuana with varying frequencies from about October 1992 through at least October 2019. He stated that he began using marijuana in his early teens and through college. After college he continued to use it, but not as often, averaging once every few years. In 2017, he used it to treat pain for a chronic back condition, but it did not help. He continued to use it about twice a month or so to help

him sleep. This use continued up until October 2019. Applicant stated that his most recent use of marijuana he believed to be legal based on his state law and the Federal non-enforcement stance. (Applicant's Exhibit B.) He stated that he now understands that this was not correct. He stated that he had no intention to do anything illegal or against Federal law. (Tr. pp. 46-49, and Applicant's Answer to SOR.)

1.b. In March 2017, Applicant provided a 1.75 million dollar loan to a company that was in the business of cultivating marijuana. He states that he has done about 45 of those real estate loans over the past 10 to 15 years. (Tr. pp. 60-67, and Applicant's Answer to SOR.)

1.c. A few months later in July 2017, he made another loan to a company to allow them to build a marijuana greenhouse and cultivate marijuana. The borrower ran out of money, could no longer make the payments on the greenhouse, and the project dissolved. In the beginning, Applicant's intent was to become a part-owner in the business. This was not a real estate loan, but a convertible note. It was a loan in the beginning, with the option of converting into ownership of the company once it became an operating company cultivating marijuana. Applicant was unable to exercise the option, which would have given him 10 percent of the company, had it become successful. (Tr. pp. 64-67, and Applicant's Answer to SOR.)

Applicant states that he has no intention of being involved in the marijuana industry again, nor is he sensitive to having his past involvement be known by others or vulnerable to coercion due to his past involvement. (Applicant's Exhibit D, and Answer to SOR.)

Guideline B – Foreign Influence

The SOR alleges that the Applicant has foreign contacts and interests, including but not limited to, business, financial, and property interests, that are of 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. Applicant admits allegations 2.b., and 2.c., and denies allegation 2.a.

2.a. Applicant's girlfriend is a citizen of Colombia. He met her in October 2014. Since 2015, she has resided with the Applicant. He denies that she is an undocumented immigrant, or that she was an undocumented immigrant when he met her. Applicant submitted copies of her work permits from June 2016 to June 2017. (Applicant's Exhibit A.) When he met her, she was working to obtain her residency. It was his understanding that she came to the United States on a fiancée visa. The relationship failed and she overstayed her visa. He states that she was granted her residency in 2020. She is now working towards obtaining her green card. (Tr. pp. 70-71.)

2.b. Applicant's girlfriend's brother is a career member of the Colombian Army. He recently retired as a Sergeant Major. (Tr. p. 71.) Applicant stated that he does not provide any financial support to his girlfriend's brother. However, he does pay for medical school tuition in Colombia for his girlfriend's brother's daughter. She got into medical school at sixteen. Applicant offered to pay for her tuition. Medical school (university) in Colombia is six years. Applicant pays the tuition with his credit card. He has already provided about \$25,000 in tuition over the past two years. (Tr. pp. 72-74.)

Applicant stated that he has visited Colombia on two occasions, and his most recent visit was in March 2022. During his visit he met some of his girlfriend's family. Her mother passed away many years ago, and her father is not in the picture. She has eight siblings. All but three of them live in Colombia. Applicant is not sure if any of his girlfriend's siblings, other than her brother, are affiliated in any way with the Colombian Government. (Tr. pp. 76-77.)

2.c. Since 2017, Applicant has provided multi-million dollar financial investments and loans to some foreign national business partners. (Tr. pp. 79-83, and Applicant's Answer to the SOR.) The following information provides some background:

After graduating from college, in 1998, Applicant started a business that sold vitamins and supplements on-line. Over the years, he has grown the company to be very successful. At its peak in 2014, the business was worth about 77 million dollars. He states that his company is currently worth about 20 million dollars. He continues to own and operate the company. (Tr. pp. 57-58.)

In 2015/2016, Applicant was introduced to his now partner who owned a defense contracting company. At that time, they began discussing partnership possibilities. In mid-2018, Applicant formally joined his partner and started their company working with the defense industry. Applicant had been using marijuana, and continued using it up until October 2019, when he completed a security clearance application. Applicant is the co-owner of a company that does contracting with the Defense Department. Applicant states that there are three full-time employees, Applicant's partner and co-owner, who is also the Facility Security Officer, and two aircraft mechanics. The company owns 10 aircraft, and leases a few more. Applicant requires a security clearance in order to perform his duties for the company. He admits that he entered this industry later in life, and that he did not always follow Federal law. (Tr. pp. 46-50, and Applicant's Post-Hearing Exhibit H.)

Over the years, Applicant has also made other financial investments which have amplified his income. Applicant has been in the business of providing first and second trustee loans on real estate investments. He explained that he loans money to investors and takes ownership of the deed of title as collateral. On various occasions, he has funded multi-million dollar financial investments and provided loans to foreign nationals for their businesses. He explained that at times there are multiple private investors in a deal, sometimes up to four, and he does not know if they are foreign nationals. He does know that on many occasions, owners of the real estate have foreign names and may be foreign nationals. In the past, Applicant has not been

concerned as to who he is giving the loan to. There are several scenarios in which Applicant may loan money to a foreign national. Applicant is either loaning money to an individual to purchase the real property, or is loaning money to a property owner to allow them to renovate or flip it. However, he does not vet these people. Typically, his broker finds the deal for him, and then contacts him to see if he is interested. Applicant's only concern about the deal is the value of the property. In the event that the loan goes unpaid, he gets the property, and the property must be worth his loan. The largest loan that Applicant has funded has been 2.5 million dollars. (Tr. pp. 60-67, and Applicant's Exhibit H.)

Applicant states that he has been a "pretty active investor." He has funded at least 45 secured trust deed loans through a licensed broker where he participates as the investor. He has met only two of the borrowers since he started funding loans about nine years ago. Some of the borrowers are likely foreign citizens. The loans are made at conservative loan-to-value ratios and a deed of trust is recorded with the county. Applicant states that in the event of non-payment, a foreclosure process is initiated, and the property liquidated to return funds to the lender, eliminating any risk of them withholding fund to exert leverage. (Applicant's Answer to SOR.)

Applicant owns 16 rental units, which generate half a million dollars per year in rent, about half of which is income. He also owns half of a large industrial building in another state which is used for his vitamin company, but would rent for approximately one million per year to a third party. His assets are on average, one third stocks, one third loans/cash, and one third real estate equity. He stated that his total assets are currently valued at about 30 million dollars. His goal is to divest himself of the vitamin company within a year and concentrate on defense contracting and passive investments (real estate ownership, real estate lending, and publicly traded stocks). (Applicant's Exhibit H.)

In assessing the heightened risk created by holding a security clearance, the Applicant's ties to a country are important. Under the particular facts of this case, I have taken administrative notice of the information provided concerning the Country of Colombia. Colombia is a constitutional, multi-party republic. Colombia has endured a decades-long conflict between government forces, paramilitaries, and antigovernment insurgent groups heavily funded by the drug trade, principally the Revolutionary Armed Forces of Colombia (FARC). Recently, there has been a significant uptick of violent incidents targeting Colombian security forces in various parts of the country. The Department of State has issued a level 3: Reconsider travel advisory for Colombia due to crime, terrorism, and COVID 19, and to exercise increased caution due to civil unrest, and kidnapping. Violent crime, such as homicide, assault, and armed robbery is widespread. Organized criminal activities, such as extortion, robbery, and kidnapping, are common in some areas. The Department of State has assessed Bogato, as being a high threat location and Cartagena as being a medium threat location for terrorism directed at or affecting official U.S. government interests. There are significant human rights violations including unlawful or arbitrary killings; reports of torture and arbitrary detention by government security forces and illegal armed groups; rape and abuse of women and children, as well as unlawful recruitment of child soldiers by illegal armed

groups, criminalization of libel, widespread corruption; violence against and forced displacement of Afro-Colombian and indigenous persons; violence against lesbian, gay, bisexual, transgender, and intersex persons; child labor; and killings and other violence against trade unionists. (H-1)

A letter of recommendation from his partner and co-owner of his company, who also serves as the Facility Security Officer, considers Applicant to be extremely ethical, trustworthy, hardworking, and an excellent business partner. He believes that Applicant is transparent with him. He supported Applicant's full disclosure of the all of the information about his marijuana use and his prior investment in a marijuana business. He believes that Applicant understands that he will be held to the highest standards while involved in classified work. (Applicant's Post-Hearing Exhibit G.)

A witness, who has a security clearance and military background, testified that he has known the Applicant since high school and college. He has also worked for his vitamin company by providing programming services. He considers Applicant to be honest, trustworthy and responsible. (Tr. pp. 20-26.)

Applicant submitted a Statement of Intent dated August 16, 2022. He stated that he has not been involved in any illegal drug use since the security clearance process. He further stated that he is committed to abstaining from all future drug involvement. He understands that any future drug involvement is grounds for revocation of his national security eligibility. (Applicant's Exhibit D.)

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 to be 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, 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. 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. Under Directive ¶ E3.1.15, the 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.” The applicant has the ultimate burden of persuasion to obtain 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 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 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 H - Drug Involvement and Substance Misuse

The security concern relating to the guideline for Drug Involvement and Substance Misuse is set forth at 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. *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.

The guideline at AG ¶ 25 contains two conditions that could raise a security concern and may be disqualifying:

- (a) any substance misuse (see above definition); and

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The guideline at AG ¶ 26 contains conditions that could mitigate security concerns:

(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 started using marijuana in 1992, knowing it was illegal under state law. When it became legal in the state, he continued to use it, notwithstanding the fact that it remained illegal under Federal law. He stated that he last used marijuana in 2019. Applicant became a partner of a defense contracting company in 2018. Applicant used marijuana while working for, and then becoming a partner of, a company that contracts with the defense industry. Applicant knew or should have known that the use of marijuana is prohibited by the Defense Department. Applicant's misconduct shows immaturity and irresponsibility, that is not tolerated by the Government under any circumstances. Accordingly, Guideline H, Drug Involvement and Substance Misuse is found against the Applicant.

Guideline B, Foreign Influence

The security concern relating to the guideline 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. Two 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; and

(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.

Applicant resides with his Colombian girlfriend and maintains close contact with her foreign relatives in Colombia, specifically, her brother and her brother's daughter. Applicant's girlfriend's brother is now retired, but he was a career Colombian military non-commissioned officer for the Colombian military. His daughter attends medical school in Colombia and Applicant pays her medical school tuition. These are close foreign contacts. These contacts with his girlfriend's family in Colombia and the unique nature of their relationship may pose a threat and negatively influence Applicant's decision making, impacting the interests and security of the United States. Under the particular circumstances here, the risk-benefit analysis is applicable, and these contacts in Colombia do pose a significant security risk to the U.S. government. They may manipulate, induce, or influence the Applicant to help a foreign person or government in a way that is inconsistent with the U.S. interests.

AG ¶ 8 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 8 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 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 and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

Applicant lives with his Colombian girlfriend, who is not yet a naturalized citizen, and he maintains close contacts with not just her, but with her brother and her brother's daughter in Colombia. This close relationship could present a problem for the Applicant and a potential risk for foreign influence. Applicant provides financial support to his girlfriend's niece for her medical education in Colombia. This close relationship could result in a situation that may create a divided allegiance. Full mitigation under AG ¶ 8(a), 8(b), and 8(c), has not been established. Accordingly, Guideline B, Foreign Influence, is found against Applicant.

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 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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and B in my whole-person analysis. An individual who holds a security clearance is expected to comply with the law at all times. Applicant is not a young man. He is 48 years old, and is expected to comply with both Federal and state laws at all times. As the owner and head of the company, one would expect much more. Applicant has not demonstrated the requisite good judgment or level of maturity needed

for access to classified information. Applicant knew or should have known the requirements associated with holding a security clearance and should have known that any illegal drug use is not tolerated by the Defense Department under any circumstances. Under the particular facts of this case, Applicant is not an individual in whom the Government can be confident to know that he will always follow rules and regulations and do the right thing, even when no one is looking. Applicant does not meet the qualifications for a security clearance.

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 Applicant failed to mitigate the Drug Involvement and Substance Misuse, and Foreign Influence 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 H:	AGAINST APPLICANT
Subparagraphs 1.a., 1.b., and 1.c.	Against Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraphs 2.a., 2.b., and 2.c.	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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge