



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



In the matter of:)
)
) ISCR Case No. 21-02870
)
Applicant for Security Clearance)

Appearances

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

05/30/2023

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the security concerns under Guidelines B (foreign influence), E (personal conduct), and H (drug involvement and substance misuse). Eligibility for access to classified information is granted.

Statement of the Case

On April 13, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines B, E, and H. Applicant responded to the SOR on April 28, 2022, and requested a decision based on the written record in lieu of a hearing. On December 5, 2022, he changed his request to a hearing before an administrative judge. The case was assigned to me on March 22, 2023. The hearing was convened as scheduled on April 7, 2023.

Evidence

Government Exhibits (GE) 1, 2, 3, 5, and 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through J, which were admitted without objection.

Department Counsel requested that I take administrative notice of certain facts about Laos. (GE 4) Without objection, I have taken administrative notice of the facts contained in the request. The pertinent facts are summarized in the written request and will not be repeated verbatim in this decision. Of note, a communist government came to power in Laos in 1975, but after the fall of the Soviet Union, the government sought to improve relations with other countries, including the United States, and move towards a market economy. The United States and Laos continue to broaden cooperation on a range of issues. The two countries share a commitment to ensuring a prosperous and sustainable future for the Mekong sub-region.

Findings of Fact

Applicant is a 41-year-old employee of a defense contractor. He has worked for his current employer since 2005. He has held a security clearance since about 2005 or 2006. He has a General Educational Development (GED) high school equivalency diploma. He is engaged to be married and has two children, ages seven and four. (Transcript (Tr.) at 26-31, 46; GE 1)

Applicant is a native-born U.S. citizen. He travels extensively for work. He lives in the United States when he is not on an overseas assignment. His fiancée and his two children are citizens and residents of Laos. He met her in about 2014 when he was working on a project in Laos. He talks with her daily over the Internet, and he spends as much time as he can in Laos. Their two children were born in Laos. His fiancée also has two older children from another relationship. Applicant provides her with regular support of at least \$1,000 per month and sometimes much more. (Tr. at 22-28, 31-38, 41-43; Applicant's response to SOR; GE 1, 2; AE A, B, H)

Applicant's fiancée used to work in a restaurant. She then tried some small businesses. She now relies primarily on his support. Because he travels so much for work, it is impractical at this time for her to immigrate with the children to the United States. She is better off in Laos with her family and support system in place. (Tr. at 39-45; GE 2)

Applicant smoked marijuana when he was in high school. He did not smoke it again until late 2010 or early 2011 when he was drunk at a New Year's Eve party. He held a security clearance at the time. He tested positive on a test administered by his employer. As discipline, he was suspended for two weeks without pay. (Tr. at 46-50; Applicant's response to SOR; GE 1-3; AE F)

Applicant credibly testified that he has not knowingly smoked or otherwise ingested marijuana since the failed drug test in 2011. He tested positive for THC, the active ingredient in marijuana, in a test administered by his employer in April 2020. He smoked cigarettes for years, and for some time before the failed drug test, he used a vape pen to inhale the vapor of liquids, primarily with nicotine. He purchased vape liquid without noticing that it was a cannabidiol or CBD. He lives in a state where marijuana is illegal, so he did not expect a legitimate store to sell a product with marijuana or THC.

He used the vape to smoke the CBD product, which must have contained some amount of THC, resulting in the positive test. (Tr. at 50-58; Applicant's response to SOR; AE I)

The Security Executive Agent for the United States Government provided clarifying guidance concerning marijuana on December 21, 2021. Part of that guidance addressed CBD products:

With respect to the use of CBD products, agencies should be aware that using these cannabis derivatives may be relevant to adjudications in accordance with SEAD 4. Although the passage of the Agricultural Improvement Act of 2018 excluded hemp from the definition of marijuana within the Controlled Substances Act, products containing greater than a 0.3 percent concentration of delta-9 tetrahydrocannabinol (THC), a psychoactive ingredient in marijuana, do not meet the definition of "hemp." Accordingly, products labeled as hemp-derived that contain greater than 0.3 percent THC continue to meet the legal definition of marijuana, and therefore remain illegal to use under federal law and policy. Additionally, agencies should be aware that the Federal Drug Administration does not certify levels of THC in CBD products, so the percentage of THC cannot be guaranteed, thus posing a concern pertaining to the use of a CBD product under federal law. Studies have shown that some CBD products exceed the 0.3 percent THC threshold for hemp, notwithstanding advertising labels (Reference F). Therefore, there is a risk that using these products may nonetheless cause sufficiently high levels of THC to result in a positive marijuana test under agency-administered employment or random drug testing programs. Should an individual test positive, they will be subject to an investigation under specific guidelines established by their home agency. (GE 5)

The Substance Abuse and Mental Health Services Administration (SAMSHA) provided a warning about CBD products on July 24, 2019:

Studies have shown that some CBD products' labeling does not accurately reflect their content. Cannabis based products containing a THC level greater than 0.3% on a dry weight basis do not fall under the Farm Bill's definition of hemp even if they are labeled as such. In one study, the amount of CBD in 69% of the 84 tested CBD products was inconsistent with that on the label, and some products contained unlabeled cannabinoids, including THC in amounts up to 6.4 mg/mL. As such, an employee's drug test may be positive for the THC metabolite, delta-9-tetrahydrocannabinol-9-carboxylic acid (THCA), due to THC in the CBD product. (GE 6)

SAMSHA further advised that "federal agencies should make every effort to inform applicants and employees of the risk that using such products may result in a positive marijuana test." (GE 6)

Applicant passed a number of drug tests. He is now extremely cautious when purchasing vape products to ensure that he does not purchase any CBDs or marijuana-related products. (Tr. at 58-59; Applicant's response to SOR; AE G, I)

Applicant called a witness, and he submitted documents and letters attesting to his excellent job performance and strong moral character. He is praised for his work ethic, reliability, trustworthiness, dependability, honesty, judgment, and integrity. (Tr. at 60-63; AE D, E)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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 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."

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 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 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; 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's fiancée and two children are citizens and residents of Laos. While his children have the right to be United States citizens, there is no evidence that he has ever registered them as U.S. citizens. Laos is not an overtly hostile country, but it has a communist government. 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.

The distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly. Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. 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, the country is known to conduct intelligence operations against the United States, or the foreign country is associated with a risk of terrorism.

Applicant's family in Laos creates a potential conflict of interest and a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion. AG ¶¶ 7(a) and 7(b) have been raised by the evidence.

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

(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; and

(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.

I considered the totality of Applicant's ties to Laos. There is nothing in the administrative notice documents to indicate that Laos is known to conduct intelligence operations against the United States or is associated with a substantial risk of terrorism. His fiancée and children are not associated with or dependent upon the Laotian government. She has run a few small businesses and receives support from Applicant. He is a native-born U.S. citizen.

I find that Applicant's ties to Laos are outweighed by his deep and long-standing relationships and loyalties in the United States. It is unlikely he will be placed in a

position of having to choose between the interests of the United States and the interests of Laos. There is no conflict of interest, because he can be expected to resolve any conflict of interest in favor of the United States. AG ¶¶ 8(a) and 8(b) are applicable.

Guideline H, Drug Involvement and Substance Misuse

The security concern 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. 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 notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition);
- (b) testing positive for an illegal drug; and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant possessed and used marijuana, and he tested positive for THC, the active ingredient in marijuana, in tests administered by his employer. AG ¶¶ 25(a), 25(b), and 25(c) are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following 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 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 readily admits culpability for the 2011 marijuana use and positive test. That is serious misconduct for someone holding a security clearance, but it was more than 12 years ago.

The April 2020 positive test is potentially more concerning, but Applicant's denial of knowingly using marijuana or THC in 2020 was credible, and it is accepted. He purchased vape liquid without noticing that it was a cannabidiol or CBD. He lives in a state where marijuana is illegal, so he did not expect a legitimate store to sell a product with marijuana or THC. As addressed in the Government's documents, CBD products are not illegal as long as they do not contain a THC level greater than 0.3%. It is extremely unlikely that a store in Applicant's state would knowingly sell a CBD product that exceeded .3%.

The Government's documents also show that some CBD products' labeling does not accurately reflect their content, and that the amount of CBD in 69% of the 84 tested CBD products was inconsistent with that on the label. As such, a drug test may be positive for the THC metabolite due to THC in the CBD product. That is why SAMSHA advised that "federal agencies should make every effort to inform applicants and employees of the risk that using such products may result in a positive marijuana test."

I am not convinced that Applicant knowingly used a controlled substance in 2020. The 2020 conduct is refuted, and the 2011 drug use is mitigated.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(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.

The SOR cross-alleged the drug involvement allegations under the personal conduct guideline. Applicant possessed and used marijuana, and he tested positive for THC, the active ingredient in marijuana. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. The conduct also created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(d) and 16(e) are applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

The discussion above under drug involvement is incorporated here. I find the conduct is unlikely to recur, and it no longer casts doubt on Applicant's reliability, trustworthiness, or good judgment. The above mitigating conditions are applicable.

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 have incorporated my comments under Guidelines B, E, and H in my whole-person analysis. I also considered Applicant's favorable character evidence.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the security concerns under Guidelines B, E, and H.

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:	For Applicant
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline H:	For Applicant
Subparagraphs 2.a-2.b:	For Applicant
Paragraph 3, Guideline E:	For Applicant
Subparagraph 3.a:	For Applicant

Conclusion

It is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge