



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



In the matter of:)
)
) ADP Case No. 23-00714
)
Applicant for Public Trust Position)

Appearances

For Government: Nicholas Temple, Esq., Department Counsel
For Applicant: *Pro se*

12/06/2023

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guidelines B (Foreign Influence) and H (Drug Involvement and Substance Misuse). Eligibility for assignment to a public trust position is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on December 2, 2022, seeking eligibility for a public trust position. On April 28, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) sent him a Statement of Reasons (SOR), citing trustworthiness concerns under Guidelines B and H. The DCSA CAS acted under Department of Defense (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 (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on May 8, 2023, and requested a decision on the written record without a hearing. Department Counsel submitted the Government’s written case on August 16, 2023. On August 18, 2023, a complete copy of the file of relevant

material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He responded in an undated 23-page document that was received on September 14, 2023. His response is included in the record as Applicant's Exhibit (AX) A. The case was assigned to me on November 9, 2023.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about the Philippines, based on the U.S. Department of State, *Philippines Travel Advisory*, October 5, 2022; and various country reports on terrorism for the years 2020, 2021, and 2022. I have taken notice as requested. In addition, I have *sua sponte* taken administrative notice of the facts set out in the U.S. Department of State Bilateral Fact Sheet, dated February 23, 2023, regarding the relations between the United States and the Philippines. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

Applicant is a 48-year-old systems engineer employed by a defense contractor since January 2006. He received a security clearance in December 2013. (FORM Item 4) He is a native-born U.S. citizen. In January 2000, he married a naturalized U.S. citizen who was born in the Philippines, and they have two children, ages 16 and 12, who were born in the United States.

Applicant's father-in-law and mother-in-law are citizens and residents of the Philippines. His father-in-law is self-employed in an engineering and trading business. The record does not reflect the occupation, if any, of his mother-in-law. His brother-in-law is a dual U.S.-Philippine citizen, residing in the Philippines and serving as an elected official of a province, similar to a county commissioner in the United States. Applicant's in-laws all reside in a northern province of the Philippines. He states that his wife and her brother are estranged, but he provided no details of the nature or reasons for their estrangement.

In Applicant's answer to the SOR, he stated that he and his father-in-law do not speak, "as it is our nature." He and his mother-in-law "cordially greet each other" when his wife talks with her mother. He declared that he has no meaningful contact with his in-laws, and he has no emotional ties to them. His wife speaks with her mother weekly, her father monthly, and her estranged brother quarterly.

The Philippines is a multi-party, constitutional republic with a bicameral legislature. The United States recognized the Philippines as an independent state and established diplomatic relations in 1946. The United States has designated the Philippines as a major non-NATO ally, and there are close and abiding security ties between the two nations, based on strong historical and cultural links and a shared commitment to democracy and human rights. The Manila Declaration of 2011 reaffirmed the 1951 U.S. Philippines Mutual Defense Treaty as the foundation for a robust, balanced, and responsive security partnership. The U.S.-Philippine Bilateral Strategic Dialogue (BSD) is an annual forum for

forward planning across the spectrum of the relationship. The most recent BSD was in January 2023, when senior Philippine and U.S. foreign affairs and defense officials convened in Manila. There is no evidence that the Philippines engages in economic or military intelligence activity directed toward the United States.

The United States is among the Philippines' top trading partners, and it traditionally has been the Philippines' largest foreign investor. The United States and the Philippines have a bilateral trade and investment framework and a tax treaty. Philippine imports from the United States include raw and semi-processed materials for the manufacture of semiconductors, electronics and electrical machinery, transport equipment, cereals, and cereal preparations.

Philippine national elections have been generally free and fair, but independent observers have noted widespread vote buying, and dynastic political families have monopolized elective offices at the national and local level.

The most significant human rights problems in the Philippines are extrajudicial killings, enforced disappearances undertaken by security forces and vigilante groups, a weak and overburdened criminal justice system, widespread official corruption and abuse of power, and impunity from prosecution for human rights abuses. Other human rights problems include prisoner and detainee torture and abuse by security forces, violence and harassment against human rights activists by security forces, warrantless arrests, lengthy pretrial detentions, poor prison conditions, killings and harassment of journalists, violence against women, abuse and sexual exploitation of children, and trafficking in persons.

More than four million Filipino-Americans live in the United States, and almost 300,000 U.S. citizens reside in the Philippines, including a large number of U.S. military veterans. Additionally, Manila is home to the only Veterans Administration regional office outside the United States, and the American Cemetery in Manila is the largest American military cemetery outside the United States.

Muslim separatists, communist insurgencies, and terrorist organizations are active in the Philippines; and they have killed Philippine security forces, local government officials, and other civilians. Through joint U.S.-Philippine cooperation, the ability of these various groups to operate in the Philippines has been constrained but not eliminated. Gangs of kidnappers have targeted foreigners, including Filipino-Americans.

The State Department has issued a Level 2 travel advisory (exercise increased caution) for the Philippines. It has issued a Level 4 travel advisory (do not travel) for the Sulu Archipelago and areas of Mindanao province, located in the southern Philippines, due to the high threat of kidnapping and violent activities of terrorist and insurgent groups. In Applicant's response to the FORM, he attached a map of the Philippines and pointed out that his wife's family members live in a northern province of the Philippines, and the Level 4 travel advisory pertains only to the Sulu Archipelago and Mindanao areas, about 640 miles away from where his wife's family members live and work. (AX A at 1, 2, 23)

The SOR alleges that Applicant used marijuana on several occasions in October 2021, while granted access to classified information. He admitted this allegation in his answer to the SOR. He described his experience with marijuana as “fake happiness for one hour,” followed by a return to reality. He explained that he was in deep grief after the loss of both parents and was under stress from having tendered a resignation from his employment due to a conflict with his boss. He asked his wife to purchase edible marijuana for him, and she complied. He admitted using the marijuana more than once during October 2021, “out of a silly notion of not wasting resources.” He returned to his job when his coworkers and a new boss invited him back before his resignation was accepted. In Applicant’s response to the FORM, he submitted a statement promising to abstain from future illegal drug involvement and substance abuse, with the understanding that failure to uphold his promise to abstain from drug involvement and substance abuse will be grounds for revocation of his national security eligibility. (AX A at 2)

Policies

The standard set out in the adjudicative guidelines for assignment to sensitive duties is that the person’s loyalty, reliability, and trustworthiness are such that assigning the person to sensitive duties is clearly consistent with the interests of national security. SEAD 4, ¶ E.4. A person who seeks access to sensitive 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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. The administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The protection of the national security is the paramount consideration. Under AG ¶ 2(b), any doubt will be resolved in favor of national security. The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. 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 national security to grant or continue eligibility for access to sensitive information.

Analysis

Guideline B, Foreign Influence

The trustworthiness 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 following disqualifying conditions are relevant:

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.

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). It 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”).

When family ties are involved, the totality of an applicant’s family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). There 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 (App. Bd. Feb. 20, 2002); see *a/so* ISCR Case No. 09-06457 at 4 (App. Bd. May 16, 2011). Applicant's declared lack of meaningful contact with his in-laws is sufficient to rebut this presumption.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified or sensitive 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).

An applicant's ties, either directly or through a family member, to persons of high rank in a foreign government or military are of particular concern, insofar as it is foreseeable that through an association with such persons the applicant could come to the attention of those interested in acquiring U.S. protected information. See, *e.g.*, ISCR Case No. 08-10025 at 2 and 4 (App. Bd. Nov. 3, 2009) (Applicant's brother was a high-level foreign government official); ISCR Case No. 11-04980 at 2 and 6 (App. Bd. Sep. 21, 2012) (Applicant's sister-in-law was married to a retired high-ranking official in a foreign army); and ISCR Case No. 11-12632 at 2 and 5 (App. Bd. Feb. 2, 2015) (Applicant's niece was an employee of a high-ranking foreign government official). In this case, Applicant's brother-in-law occupies a local government position, but not one in which foreign policy or national security matters are involved.

Based on all the above considerations, I conclude that the low threshold of evidence required to raise "heightened risk" under AG ¶¶ 7(a) and 7(e), and the potential conflict of interest under AG ¶ 7(b) is established.

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.

Based on all the evidence, I conclude that all three mitigating conditions are established, based on Applicant's lack of a meaningful connection with his in-laws, the geographical separation of his in-laws from the areas where insurgents and terrorists are active, the lack of evidence that the Philippines targets the United States for economic or military information, and Applicant's deep and longstanding relationships and loyalties in the United States.

Guideline H, Drug Involvement and Substance Abuse

The trustworthiness under this guideline 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 following disqualifying conditions under this guideline are relevant:

AG ¶ 25(a): any substance misuse (see above definition);

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(f): any illegal drug use while granted access to classified information or holding a sensitive position.

AG ¶¶ 25(a) and 25(c) are established by Applicant's admissions. However, AG ¶ 25(f) is not established, because the evidence does not establish that Applicant had actual access to classified information when he used marijuana. His response to the SOR indicates that he used marijuana while he was on leave and waiting for his tendered resignation to be accepted. There is no evidence that he used marijuana after he returned to work. See ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022).

The following mitigating conditions are relevant:

AG ¶ 26(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;

AG ¶ 26(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.

AG ¶ 26(a) is established. Applicant's marijuana use occurred more than two years ago, but it was frequent, albeit for a short duration, during the month of October 2021. It happened under a confluence of stressful situations which are not likely to recur, *i.e.*, the death of both parents and his belief that he had lost a job that he had held since 2006.

AG ¶ 26(b) is partially established. Applicant has not changed his associates or his environment. Applicant's wife was complicit in his marijuana use, and they continue to live together. However, he has submitted a statement of intent in accordance with AG ¶ 26(b)(3).

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position 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 public trust position 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 H and B in my whole-person analysis. I have noted that Applicant has worked for the same defense contractor since January 2006 and has held a security clearance since December 2013, apparently without incident until his marijuana use in October 2021. Because he requested a determination on the record without a hearing, I had no opportunity to question him or evaluate his credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003).

After weighing the disqualifying and mitigating conditions under Guidelines H and B and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the trustworthiness concerns based on his foreign family connections and short-lived use of marijuana. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with national security to grant him eligibility for a public trust position.

Formal Findings

Paragraph 1, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Paragraph 2, Guideline H (Drug Involvement):	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

I conclude that it is clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is granted.

LeRoy F. Foreman
Administrative Judge

