



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



In the matter of: )  
)  
) ISCR Case No. 23-00913  
)  
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Applicant for Security Clearance )

**Appearances**

For Government: Brittany White, Esquire, Department Counsel  
For Applicant: *pro se*

03/15/2024

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**Decision**

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HOGAN, Erin C., Administrative Judge:

On May 2, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented within the Department of Defense (DOD) on June 8, 2017.

On July 16, 2023, Applicant timely answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on July 12, 2023. The case was assigned to me on January 3, 2024. On January 25, 2024, a Notice of Hearing was issued scheduling the hearing on February 15, 2024. The hearing was held as scheduled. During the hearing, the Government offered four exhibits which were admitted as Government Exhibits (GE) 1 – 4 without objection. Applicant testified, called one witness and offered six exhibits which were admitted as Applicant Exhibits (AE) A – F without objection. The transcript was received on February 29, 2024, and the record closed on that date. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

## **Procedural Issue**

During the hearing Department Counsel motioned to amend SOR ¶ 1.a in order to conform with the evidence in accordance with paragraph E3.1.17 of the Directive. The proposed amendment read:

1.a. You used marijuana with varying frequency from about July 2012 to at least 2020, to include after being granted a security clearance in November 2018.

The SOR amendment replaced the language that read, “while granted access to classified information beginning in about November 2018” with “to include after being granted a security clearance in November 2018.” Applicant did not object to the proposed amendment. The motion to amend the SOR was approved. (Tr. 68-69)

## **Findings of Fact**

Applicant is a 27-year-old employee for a DOD contractor who seeks a security clearance. He has been employed with the DOD contractor since February 2020. He previously worked for another DOD contractor from April 2018 to February 2020. He initially applied for security clearance in April 2018. He was granted a secret clearance in November 2018. His highest level of education is a Bachelor of Science degree. He is engaged and lives with his fiancé. (Tr.16-19; GE 1) (Note: The facts in this decision do not specifically describe employment, names of witnesses, locations or other details in order to protect the privacy of Applicant and his family. The cited sources contain more specific information.)

Under the drug involvement concern, the SOR alleged Applicant used marijuana with varying frequency from July 2012 to 2020. The SOR was amended during the hearing to add that the marijuana use occurred after being granted a security clearance in November 2018. (SOR ¶ 1.a: GE 1, Section 23 at 27-28; GE 3, Section 23 at 25) The SOR also alleged Applicant used THC with varying frequency from about 2020 to about March 2022 while being granted access to classified information (SOR ¶ 1.b: GE 1, Section 23 at 27-28); Applicant purchased marijuana in about January 2014 and from about 2018 to at least 2020, while granted access to classified information. (SOR ¶ 1.c: GE 3, Section 23 at 26); and that he continued to use and purchase marijuana after completing an Electronic Questionnaires for Investigations Processing (e-QIP) on April 18, 2018, to obtain a security clearance with the DOD. (SOR ¶ 1.d: GE 1, Section 23 at 27-28).

Additional allegations under the drug involvement concern include an allegation that Applicant used and purchased the prescription medication Percocet without a prescription in October 2016, (SOR ¶ 1.e: Gov 1, Section 23 at 28); and that Applicant used the prescription drug Vicodin without a prescription in about January 2017. (SOR ¶ 1.f: GE 1, Section 23 at 29) The allegations in SOR ¶¶ 1.a - 1.c are cross-alleged under Guideline E, Personal Conduct. (SOR ¶ 2.a: GE 1, Section 23 at 27-28; GE 3, Section 23 at 25-26)

Applicant testified that he has never handled classified information. He needed the security clearance because it was required by his employer. He acknowledged that he encountered classified information on one occasion during a classified briefing provided by another agency in 2021. It was work-related and the level of the briefing was secret. (Tr. 28-30)

Applicant admits to purchasing two Percocet tablets and trying them in October 2016. He was 20 and it was the only time he used Percocet. (Tr. 28) In January 2017, Applicant used the prescription drug Vicodin without a prescription to treat pain caused by an orthodontic treatment. A friend gave him the pill. It was the only time he took Vicodin. It relieved his mouth pain. (Tr. 49-50)

Applicant started using marijuana in July 2012 when he was 16 and in high school. He used marijuana on a frequent basis during his college years between 2014 and 2018. In his October 2022 e-QIP, he states he used marijuana at social gatherings. He estimates he used marijuana at least 75 times since his first use of marijuana. From 2018 to 2020, he estimates he used marijuana infrequently, around 3 or 4 times during this two-year timeframe. This occurred at social gatherings when a joint was being passed around. He stopped smoking marijuana in 2020. (Tr. 10, 32-35) Applicant only purchased marijuana on one occasion in July 2014. He purchased about 2 grams of marijuana from another student when he was in high school. He used the marijuana with his friends. He denies purchasing marijuana between 2018 and 2020. (Tr. 23, 44; GE 3 at 26)

From 2020 to early 2022, Applicant used cannabidiol (CBD)-low THC supplements as a sleep aid and anxiety reducer. He has anxiety and sleep issues. He did not experience any psychoactive effects from the CBD supplements, but they helped him sleep. He stopped using them in March 2022. He found other ways to deal with his anxiety and sleep issues. He has matured and has become a provider for himself and his fiancé. (Tr. 10-11, 38-43; GE 1 at 27-28)

On his 2018 security clearance application, Applicant stated that he did not intend to use marijuana in the future. He indicated that he did not enjoy using it very much and it was not worth losing a job. (GE 3, Section 23, at 25) During the hearing, he admitted that despite his intentions, he used marijuana on 3-4 occasions between 2018 and early 2020. He said he did not respect the guidelines regarding marijuana use and rationalized that it was okay because he used marijuana responsibly. He testified that he learned to appreciate the guidelines more because he understands them better and the reasons for them. He now respects the purposes for holding a security clearance. (Tr. 45-46)

On June 8, 2023, Applicant signed a Statement of Intent to refrain from misusing controlled substances in the future. The statement says:

I admit to misusing controlled substances while possessing a security clearance. I understand this has reflected poor judgment and noncompliance with rules and regulations conditional upon obtaining a security clearance. Since these decisions, I have changed as a person

and have renewed dedication to upholding commitments in my work as well as my personal life. I cannot change the past, but I can commit to putting forth my best efforts in the future in whatever I do.

I have established a period of abstinence from all substances in my Statement of Reasons. I, [Applicant], intend to continue this abstinence so long as I hold a security clearance of any level. I, [Applicant], acknowledge that future misuse of controlled substances is grounds for revocation of my security clearance.

I believe this Statement of Intent is binding and uphold it with unwavering certainty. (AE A)

Applicant's fiancé testified. She is a full-time college student and is scheduled to graduate this Spring. She has known Applicant since they were 17. They got engaged in March 2023 and will marry this summer. She uses marijuana several times a week. She uses with friends from college after class. She occasionally uses marijuana at home in the backyard outside of Applicant's presence. She claims marijuana helps her relax and believes it keeps her grade-point average up. She has gone long periods without marijuana use. She intends to stop using marijuana if her future employment after graduation has a no marijuana policy. She is going to stop using marijuana approximately one month before she is scheduled to start an internship this summer. (Tr 54-62)

Applicant's fiancé purchased the CBD-low THC supplements Applicant used from 2020 to early 2022 while she and her sister were driving through a state where the use of marijuana was legal. They stopped at a dispensary. She purchased the CBD-low THC products to help with pain relief and sleep. She testified the THC level in the CBD supplements was low, but still at a level that would be considered illegal. She estimated the amount of THC in the CBD supplement was .5%. (Tr. 57-63)

Applicant's fiancé also wrote a letter on Applicant's behalf. She states his use of marijuana while holding a security clearance between 2019 and early 2020 was extremely infrequent. She affirms that he used CBD-low THC supplements from 2020 to early 2022. He decided to stop using the CBD supplements for sleep because of the rules required for holding a security clearance. When he applied for his top-secret clearance in 2022, he chose to be honest and self-reported his marijuana use. He owned up to his mistake. He deeply values his integrity. He has matured and found different coping mechanisms for dealing with life's stressors such as mindfulness and faith. He is an active volunteer in the community. (AE C)

### **Whole-person Factors**

Ms. H., Applicant's former project lead at his current employer, provided a letter on his behalf. She has been his project lead since April 2021. She recently moved to another project but interacts with him several times a week on a professional basis. She is aware of Applicant's security clearance concerns. She is not in his supervisory chain but works with him from a technical project execution standpoint. She describes

Applicant as “friendly, trustworthy and reliable.” She stated that he has grown his technical and soft skills. He has stepped up over the past year to take more task ownership within the team and is willing to help others and to help with training the new employees. He has never given her reason to doubt his ability to secure proprietary or classified information. (AE B)

Applicant’s performance evaluations for FY 21-FY 23 were favorable. In 2021, his quality of work was described as “exceptional.” “His attention to detail, his work ethics, and his people skills has gained his client’s trust.” His rater recommended him for a promotion. (AE F at 1-2) In 2022, he “continued to grow, challenge himself, and increase his technical capabilities.” He is pleasant to work with, has creative ideas, and a good teammate. (AE F at 3) In 2023, he worked on three different projects. He improved in his ability to understand the big picture. He continues to develop his skills. (AE F at 4-5)

Two of Applicant’s friends provided letters on his behalf. They describe him as a good friend and mentor. He contributes to his community through his active volunteer work. (AE D- AE E)

## **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining 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 that the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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).

### **DOD and Federal Government Policy on Marijuana Use**

On October 25, 2014, the Director for National Intelligence, issued a memorandum titled, “Adherence to Federal Laws Prohibiting Marijuana Use” addressing concerns raised by the decriminalization of marijuana use in several states and the District of Columbia. The memorandum states that changes to state and local laws do not alter the existing National Security Adjudicative Guidelines. “An individual’s disregard for federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations.”

On May 26, 2015, the Director of the United States Office of Personnel Management (OPM) issued a memorandum titled, “Federal Laws and Policies Prohibiting Marijuana Use.” The Director of OPM acknowledged that several jurisdictions have decriminalized the use of marijuana, allowing the use of marijuana for medicinal purposes and/or for limited recreational use but states that Federal law on marijuana remains unchanged. Marijuana is categorized as a controlled substance under Schedule I of the Controlled Substances Act. Thus, knowing or intentional marijuana possession is illegal, even if the individual has no intent to manufacture, distribute, or dispense marijuana.

On December 21, 2021, the Director of National Intelligence signed the memorandum, *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production, and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

The December 21, 2021, memo also states the use of CBD products may be relevant to adjudication 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 under federal law and policy. Additionally, agencies should be aware that 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. 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 of random drug testing programs. Should an individual test positive, they will be subject to an investigation under specific guidelines established by their home agency.

### **Guideline H, Drug Involvement**

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription drug 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 disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions potentially apply to Applicant’s case.

AG ¶ 25(a) any substance misuse; and

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

The SOR alleges and Applicant admits he used marijuana on various occasions from 2012 to 2020. He also admits to using Percocet in 2016 and Vicodin in 2017 without a prescription. He used marijuana on a regular basis during college. His marijuana use tapered off upon his graduation from college when Applicant began to focus on his career. He admits to smoking marijuana on 3-4 occasions between November 2018 to 2020, after he was granted a security clearance. These uses occurred at social gatherings when a joint was being passed around. He indicated on

his October 2022 security clearance application that his last use was in 2020. He acknowledged that he attended a classified briefing in 2021. This is the only time he had access to classified information. He possessed the illegal drugs when he used them and purchased marijuana on one occasion in 2014 while in high school. AG ¶¶ 25(a) and 25(c) apply.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (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. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions apply to the Applicant's case:

AG ¶ 26(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

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) applies because Applicant last smoked marijuana in 2020, approximately four years ago. He last used CBD-low THC supplements in March 2022, about two years ago. His use of Percocet was experimental and occurred over eight years ago. His use of Vicodin was for pain treatment and only occurred once more than seven years ago. Applicant stopped using illegal marijuana and CBD-low level THC products on his own. He has matured and sufficient time has passed to conclude his conduct is unlikely to recur. He fully disclosed his marijuana use on his March 2022 security clearance application. His disclosures demonstrate that he is reliable and trustworthy. It is unlikely he will use marijuana in the future.

AG ¶ 26(b) applies. Applicant acknowledged his illegal drug use on his most recent security clearance application and during the hearing. He has established a pattern of abstinence. The last time he smoked marijuana was over four years ago. It is unlikely Applicant's use of a CBD-low THC supplement caused psychoactive effects. However, the amount of THC was .5% which is above the legal cut-off level. I considered this but also considered that he stopped using these supplements two years ago.



While Applicant's fiancé continues to use marijuana, she avoids using marijuana in front of Applicant. She will soon graduate from college and most likely will reduce or refrain from using marijuana once she graduates and obtains full-time employment. Finally, Applicant signed a statement of intent to abstain from illegal drugs. He acknowledged that any future use of illegal drugs may result in the revocation of his security clearance.

Applicant was forthcoming about his marijuana use on his security clearance application and during the hearing. He admits he was wrong when he used marijuana between 2018 and 2020 after being granted a security clearance. He stopped smoking marijuana in 2020 and stopped using CBD-low THC supplements in March 2022. He demonstrated an appropriate period of abstinence. While Applicant used marijuana at various times over a period of 10 years, his use was highest during his college years. He has not smoked marijuana in over four years. He met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

### **Guideline E, Personal Conduct**

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

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during the national security or adjudicative processes. . . .

The following disqualifying condition under AG ¶ 16 potentially apply to Applicant's case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, 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.

Applicant's past illegal marijuana use from high school (2014) to at least 2020 raise a whole-person assessment of questionable judgment, unreliability, unwillingness to comply with rules and regulations. In particular, his decision to continue using marijuana after being granted a security clearance indicates he has issues with following rules and regulations. He continued to use marijuana after indicating his intent to stop using marijuana on his April 2018 security clearance application. His history of marijuana use raises concerns under AG ¶ 16(c) about his judgment, trustworthiness, reliability, and ability to properly safeguard classified information.

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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant's decision to occasionally use marijuana after applying for and being granted a security clearance showed poor judgment. I considered that he was young and just starting out in the civilian employment world. He fully disclosed his illegal marijuana use on his October 2022 security clearance application. He accepts full responsibility for his poor choices. He stopped smoking marijuana approximately four years ago in 2020. He stopped using the CBD-low THC supplements two years ago in March 2022. Applicant has matured and his current employer speaks highly of him. AG ¶¶ 17(c) and 17 (d) apply. He mitigated the concerns raised under the Personal Conduct Concern.

### **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(a):

(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.

There are reasons that support not granting a security clearance to Applicant. Questions are raised about Applicant's judgment because of his admitted history of illegal drug use as well his decision to use marijuana after being granted a security clearance. I find the mitigating reasons outweigh the disqualifying reasons in Applicant's

case. He fully disclosed his marijuana use on his October 2022 security clearance application. He has not smoked marijuana since 2020 and he has not used CBD-low THC supplements since March 2022. He signed a statement of intent to refrain from all drug involvement and substance misuse and acknowledged that any future substance misuse could result in the revocation of his security clearance. Applicant has built a successful career and is highly regarded at his place of employment.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has learned a significant lesson. While his marijuana use showed poor judgment, especially after being granted a security clearance, he fully disclosed his marijuana use on his most recent security clearance application. He accepted responsibility and expressed remorse over his decision to use marijuana after being granted a security clearance. I considered that his marijuana use between 2018 and 2020 was infrequent, only 3 to 4 times in social settings. He learned from his mistake in judgment and took steps to demonstrate his intent to refrain from illegal marijuana use. Applicant is aware that should he illegally use marijuana in the future, it is likely that his security clearance will be revoked. Concerns raised by Applicant's illegal marijuana use are mitigated.

### **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 H:	FOR APPLICANT
Subparagraphs 1.a-1.f:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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ERIN C. HOGAN  
Administrative Judge