



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



In the matter of:)
)
) ISCR Case No. 22-01858
)
Applicant for Security Clearance)

Appearances

For Government: William H. Miller, Esq., Department Counsel
For Applicant: Carl A. Marrone, Esq.

11/12/2024

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the security concerns under Guidelines B (foreign influence), but he did not mitigate the security concerns under Guidelines D (sexual behavior) and E (personal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On November 18, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines B, D, and E. Applicant responded to the SOR on May 17, 2023, and requested a hearing before an administrative judge. The case was assigned to me on March 5, 2024. The hearing was convened as scheduled on May 15, 2024.

Evidentiary Rulings

Evidence

Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Applicant testified, but he did not submit any documentary evidence beyond the

documents that were attached to his SOR response and admitted without objection as Applicant Exhibits (AE) A to K.

Administrative Notice

Department Counsel requested that I take administrative notice of certain facts about the People's Republic of China and Country A. (Hearing Exhibits (HE) I and II) Over Applicant's objection, I have taken administrative notice of the facts contained in the requests. Without objection, I have *sua sponte* taken administrative notice of facts about relations between the United States and Country A as provided in a document published on the U.S. Department of State website (HE III). The pertinent facts are summarized in the written requests and fact sheets and will not be repeated verbatim in this decision.

Of note is that China is an authoritarian state dominated by the Chinese Communist Party, with a poor record with respect to human rights. The United States faces a serious threat to its national security from Chinese intelligence operations. China aggressively targets U.S. sensitive and protected information, and Chinese actors are the world's most active perpetrators of economic espionage.

The United States has friendly relations with Country A. They cooperate on a full range of issues including defense, counterterrorism, non-proliferation, trade, law enforcement, energy policy, and cultural exchange. There is a significant threat of terrorism and ongoing human rights problems in Country A. Restricted dual-use, military and electronic components, and internet technology have passed through Country A on their way to restricted destinations, such as Iran and Iraq.

Without objection, I have taken administrative notice of the reporting requirements established in Security Executive Agent Directive 3 (SEAD 3), *Reporting Requirements for Personnel with Access to Classified Information or Who Hold a Sensitive Position*, effective on June 12, 2017. (HE IV)

Findings of Fact

Applicant is a 60-year-old employee of a defense contractor. He has worked for his current employer or a predecessor company since 2005. He seeks to retain a security clearance, which he has held for at least 18 years. He earned a bachelor's degree in 2009 and a master's degree in 2012. His wife passed away in 2017. He has two adult children. (Transcript (Tr.) at 23, 34-35, 57-58; Applicant's response to SOR; GE 1, 2; AE E)

In 2015, Applicant worked for a defense contractor in Country A providing services for Country A with the approval of the U.S. Government. He had a top secret security clearance with access to sensitive compartmented information (SCI). He engaged prostitutes to provide sexual services for money while in Country A. He met Ms. X, a prostitute with Chinese citizenship, in Country A. He knew she had Chinese citizenship because she showed him her passport. They had sexual relations for money

about 15 to 20 times while he was in Country A. He paid about \$200 on each occasion, or more if she spent the night with him. He left Country A at the end of 2015. He stated he did not receive any specific training about prostitution and human trafficking, but he and his coworkers were briefed that “even though they were working for [Country A], the [Country A] entities would be watching [them].” (Tr. at 24-31, 58-59, 62-69, 85, 92; Applicant’s response to SOR; GE 2)

Applicant paid other prostitutes for sexual services on two to three other occasions while he was in Country A. They were Asian, but he did not know if they were Chinese or from another Asian country. (Tr. at 37-39, 83-85; Applicant’s response to SOR; GE 2)

Applicant returned to Country A on personal travel in March 2016. He again paid Ms. X for sexual services. He stated that after returning to the United States, Ms. X sent him a text asking him to help finance her relocation back to China. He sent her about \$7,500 in April 2016. He denied that it was a blackmail payment. He stated that he sent the money out of compassion. Ms. X continued to send requests for additional money, but he did not send her any additional funds. He told her that he did not want her to contact him again. (Tr. at 25, 31-37, 66-71; Applicant’s response to SOR; GE 2)

Applicant did not tell his work colleagues in Country A or his company’s security officials about his involvement with foreign prostitutes. He knew his conduct could jeopardize his security clearance, but he stated that was not why he did not tell his colleagues. He stated that he does not discuss his personal life, including his sexual activities, with colleagues. He does not believe those conversations are appropriate in the workplace. He stated that he told his wife about his involvement with prostitutes in about March 2016 after he returned from Country A. She was very upset. She passed away in 2017. There is no evidence as to whether his children are aware of his conduct. Three of his character references, including two who are also his friends, are unaware of his conduct. Applicant stated that he “is not proud of what [he] did.” (Tr. at 35, 53, 71-75, 78-80, 97-99; Applicant’s response to SOR; GE 2; AE G-1)

Applicant testified that he reported his involvement with foreign prostitutes to his security officer in about March 2016, shortly after he told his wife. The Government did not present authority, such as a directive or an order, that Applicant had a duty to report his conduct, but Applicant admitted that he felt that he had an obligation to do so. He also reported the conduct during polygraph examinations in the second half of 2016. His security clearance for another government agency was revoked by another government agency in 2018 because of his sexual behavior. He stated the revocation was still under appeal. (Tr. at 52-55, 71-77, 99-100; Applicant’s response to SOR; GE 1, 2)

Applicant submitted a Questionnaire for National Security Positions (SF 86) in September 2018. He listed Ms. X as one of his foreign contacts. He reported that his security clearance was suspended, revoked, or denied by another government agency in 2018 for sexual behavior. He discussed his transactions with Ms X during his background interview in January 2019.

Applicant created a profile for an online dating service for mature individuals in about September 2020. He shared that he was an engineer, but he did not share that he worked for a defense contractor. He met Ms. Y through the dating service. Ms. Y is a Chinese citizen who had been living in the United States as a permanent resident for about seven years when they met. They dated several weeks and became intimate in late October 2020. They maintained a dating and intimate relationship through January 2021. He stated that he did not know she was a Chinese citizen when they started dating, and only learned that later in their relationship. (Tr. at 39-51, 87-91; Applicant's response to SOR; GE 2)

The SEAD 3, effective on June 12, 2017, provides the reporting requirements for personnel with access to classified information. The reporting requirement: for association with foreign nationals is as follows:

2) Continuing association with known foreign nationals that involve bonds of affection, personal obligation, or intimate contact; or any contact with a foreign national that involves the exchange of personal information. This reporting requirement is based on the nature of the relationship regardless of how or where the foreign national contact was made or how the relationship is maintained (i.e. via personal contact, telephonic, postal system, Internet, etc.). The reporting of limited or casual public contact with foreign nationals is not required absent any other reporting requirement in this directive. Following initial reporting, updates regarding continuing unofficial association with known foreign nationals shall occur only if and when there is a significant change in the nature of the contact. Heads of agencies or designees may provide specific guidance and examples of updated reporting situations.

Applicant stated that he informed his security officer about Ms. Y when their "relationship went to the next level," and within about two weeks or less of his learning that she is a Chinese national. The security officer told him that if he was getting serious with Ms. Y then he needed to report it, which he did. He stated that he stopped dating Ms Y because she is a Chinese national. (Tr. at 40, 47-51, 55-56, 93-95. 99-100)

Applicant expressed remorse for his involvement with foreign prostitutes. He stated that he was "7,000 miles away from [his] family, feeling lonely, and the opportunity presented itself. And yes, it was a poor choice on [his] part." He stated that his conduct in Country A was the only time he ever frequented prostitutes, he has not done so since, and the conduct will not be repeated. He asserted that his behavior has never affected his ability to protect classified information, and that he will never allow his conduct to be used to extort or coerce him into divulging classified information. (Tr. at 16, 26, 29, 56, 66-67, 84-86; Applicant's response to SOR; GE 2)

Applicant submitted letters attesting to his excellent job performance and strong moral character. The authors praised his trustworthiness, honesty, dedication, professionalism, work ethic, diligence, and loyalty to the United States. (GE 2; AE F-K trustworthiness

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;

(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

(i) conduct, especially while traveling or residing outside the U.S., that may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

Applicant held a top secret security clearance with access to SCI while working for a defense contractor in Country A in 2015. He engaged prostitutes to provide sexual services for money, including about 15 to 20 times with a Chinese citizen. He returned to Country A on personal travel in March 2016. He again paid the Chinese citizen in exchange for sexual services. Applicant's foreign contacts and conduct created a heightened risk and a potential conflict of interest, and made him vulnerable to exploitation, pressure, and coercion by a foreign person, group, government, or country. AG ¶¶ 7(a), 7(b), and 7(i) have been raised by the evidence.

Applicant engaged in a romantic and intimate relationship with Ms. Y, a Chinese citizen, in 2020. China is an authoritarian state dominated by the Chinese Communist

Party, with a poor record with respect to human rights. The United States faces a serious threat to its national security from Chinese intelligence operations. China aggressively targets U.S. sensitive and protected information, and Chinese actors are the world's most active perpetrators of economic espionage. Applicant's relationship with Ms. Y created a potential conflict of interest and a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion. AG ¶¶ 7(a) and 7(b) are applicable to that relationship.

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.

Applicant does not have any ongoing contact with foreign prostitutes, nor with Ms. Y. At this time, it is unlikely he 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(a) and 8(b) are applicable.

Guideline D, Sexual Behavior

The security concern for sexual behavior is set out in AG ¶ 12:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

(d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

Applicant paid foreign prostitutes for sex while working in Country A. That criminal conduct reflected a lack of judgment and made him vulnerable to coercion, exploitation, and duress. AG ¶¶ 13(a), 13(c), and 13(d) are applicable.

Conditions that could mitigate sexual behavior security concerns are provided under AG ¶ 14. The following are potentially applicable:

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment;

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress; and

(d) the sexual behavior is strictly private, consensual, and discreet.

The SOR cross-alleged the sexual behavior under the personal conduct guideline. I will discuss mitigating conditions for both guidelines in the personal conduct analysis.

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;

(2) while in another country, engaging in any activity that is illegal in that country;

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States; and

(g) association with persons involved in criminal activity.

SOR ¶ 3.a

SOR ¶ 3.a cross-alleges the foreign influence allegations under personal conduct. Applicant's involvement with foreign prostitutes in Country A, including with Ms. X, a Chinese citizen, reflects questionable judgment and an unwillingness to comply with rules and regulations. The conduct also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable, because the conduct is sufficient for an adverse determination under the sexual behavior guideline (see below). However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established for that conduct.

SOR ¶ 3.a also cross-alleges Applicant's relationship with Ms. Y, a Chinese citizen, as personal conduct. While I believe this relationship is most appropriately addressed under Guideline B, several factors raise questions about Applicant's judgment. He shared that he was an engineer on his profile for the online dating service on which he met Ms. Y. His security clearance with another government agency was revoked in 2018 because of his involvement with foreign prostitutes, with at least one a Chinese citizen. He then became involved with a woman who he learned was a Chinese citizen. That is sufficient to establish AG ¶ 16(c).

SOR ¶ 3.b

SOR ¶ 3.b alleges that Applicant's security clearance was revoked by another government agency in 2018 because of his sexual behavior. That sexual behavior is already alleged under SOR ¶ 3.a. There is no additional conduct alleged under SOR ¶ 3.b, only the consequences of that conduct. When the same conduct is alleged twice in

the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005). Additionally, the decision of another agency to revoke Applicant's security clearance more than six years ago is not relevant to my decision, which must be made independently. SOR ¶ 3.b is concluded for Applicant.

SOR ¶ 3.c

SOR ¶ 3.c alleges that Applicant concealed his conduct with the foreign prostitutes in Country A from his coworkers because he was concerned that it would be reported to his security department. This allegation fails for several reasons. Applicant has no obligation to report his conduct to his coworkers. This allegation, even if true, is part and parcel of the concerns connected to the underlying conduct. As such, it does not raise any independent security concerns. SOR ¶ 3.c is concluded for Applicant.

SOR ¶ 3.d

SOR ¶ 3.d alleges that Applicant "failed to timely report to [his] security office the conduct alleged in paragraphs 1.a and 1.b above [frequenting foreign prostitutes in Country A]." The Government did not submit evidence that Applicant had a duty to report his conduct to his security office. The SEAD 3 became effective on June 12, 2017, long after the conduct. There was no evidence of a predecessor order or directive that might have required Applicant to report the conduct. Additionally, there was no evidence to rebut Applicant's testimony that he reported the conduct to his security officer in March 2016 after he returned to the United States. SOR ¶ 3.d is concluded for Applicant.

SOR ¶ 3.e

SOR ¶ 3.e alleges that Applicant "failed to timely report to [his] security office the relationship alleged in Paragraph 1.c above [relationship with Ms. Y]." Applicant had a duty to report his relationship with Ms. Y once they developed bonds of affection and became intimate. Applicant testified that he reported his relationship with Ms. Y to his security officer. The Government did not prove by substantial evidence that Applicant failed to report his relationship with Ms. Y. SOR ¶ 3.e is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate personal conduct 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;

(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; and

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

There is no evidence that Ms. Y was a prostitute. Applicant's vulnerability to exploitation, manipulation, or duress was reduced or eliminated when he broke up with her. AG ¶ 17(e) is applicable to that conduct, but the judgment aspects of the relationship will be discussed further.

Applicant has not been involved with prostitutes in more than eight years. He apparently informed his wife of his conduct before she passed away, and the DoD is aware of it. All of these things have reduced Applicant's vulnerability to exploitation, manipulation, and duress. However, there is no evidence that his children and other members of his family know about it, and many of his friends do not know about it. As Applicant stated, he "is not proud of what [he] did." While the passage of time since an applicant last engaged in conduct is a relevant factor that should be considered, even dated conduct can be the source of an applicant's current vulnerability to coercion or influence. See ISCR Case No. 22-01002 at 3 (App. Bd. Sep. 26, 2024).

Applicant has attempted to avoid the stigma attached to his involvement with prostitutes by not telling his friends. That is understandable, but it means that the conduct continues to serve as a basis for coercion, exploitation, and duress. Additionally, I have serious concerns about Applicant's judgment. He held a top secret security clearance with access to SCI when he was engaged the services of prostitutes, including a Chinese citizen, in a country that had a significant threat of terrorism, ongoing human rights problems, and was monitoring him. He compounded the problem by returning to Country A and reengaging the services of Ms. X. Finally, knowing his clearance was revoked because of his involvement with a Chinese prostitute, he became romantically involved with My Y, a Chinese woman he met through an online dating service.

I am unable to conclude that problematic conduct is unlikely to recur. Applicant's conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. None of the sexual behavior and personal conduct mitigating conditions are sufficiently applicable to overcome security concerns about his poor judgment and vulnerability to exploitation, manipulation, and duress.

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, D, and E in my whole-person analysis. I also considered Applicant's favorable character evidence.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the security concerns under Guideline B, but he did not mitigate security concerns under Guidelines D and E.

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.c:	For Applicant
Paragraph 2, Guideline D:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against Applicant (except for the language "1.a through 1.c," and finding against him on the language "1.a and 1.b")
Subparagraphs 3.b-3.e:	For Applicant

Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge