DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-13010
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Gina Marine, Esquire, Department Counsel
For Applicant: Henry A. Sullivan, Esquire

October 29, 2008

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on April 28, 2006. On May 30, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline H and Guideline E that provided the basis for its decision to deny him a security clearance. The action was taken under Executive Order 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense as of September 1, 2006.

Applicant answered the SOR in writing on July 21, 2008, and requested a hearing before an administrative judge. The case was assigned to me on August 12, 2008, to consider whether it is clearly consistent with the national interest to grant or

continue a security clearance for him. On September 4, 2008, I scheduled a hearing for October 2, 2008. Due to scheduling issues, I moved the hearing to October 7, 2008, neither party having any objections.

At the hearing held on October 7, 2008, the government withdrew SOR ¶ 2.a under Guideline E, and submitted four exhibits (Ex. 1-4), which were entered without any objections. Applicant and his company's executive vice president/facility security officer (FSO) testified on his behalf, as reflected in a transcript (Tr.) received on October 20, 2008. Applicant submitted no documents.

Findings of Fact

DOHA alleged under Guideline H, drug involvement, that Applicant used marijuana approximately twice a year from June 1999 through at least October 2006 (SOR ¶ 1.a), including after he had been granted a secret security clearance on June 18, 2004 (SOR ¶ 1.b). Under Guideline E, personal conduct, DOHA alleged that Applicant admitted he falsified his February 1995 security clearance application by denying any illegal drug use (SOR ¶ 2.b).[1] When he initially responded to the SOR, Applicant admitted the Guideline H allegations and denied the Guideline E allegation. Before any evidence was introduced at the hearing, Applicant amended his answer by admitting SOR ¶ 2.b. After considering the evidence of record, I make the following findings of fact.

Applicant is a 44-year-old chief executive officer (CEO), president, and chairman of the board of an imaging technologies company that he cofounded with four others in January 2003 (Ex. 1, Tr. 28, 80).[2] As president/CEO, Applicant works directly with the firm's customers, including the Department of Defense and Department of Homeland Security, on understanding security threats and developing the technologies to address those threats (Tr. 28-29). He has held a security clearance at the secret level since about September 1995 (Ex. 1),[3] with the possible exception of a brief period in 2002 when he was starting up his company (Tr. 51).

After graduating from high school, Applicant attended college from 1982 to 1986 (Tr. 30). He first tried marijuana in 1982 when someone passed him a marijuana cigarette at a social function. Applicant continued to smoke marijuana out of enjoyment

[1]DOHA alleged in SOR ¶ 2.b that Applicant admitted during an August 31, 1995, interview that he had lied on his February 6, 1995, EPSQ. Department Counsel clarified that the concern was that Applicant had falsified his February 1995 security clearance application (Tr. 13).

[2]Applicant testified that he has been at the company since its inception in 2002 (Tr. 28). His e-QIP indicates he has been employed there since January 2003 (Ex. 1). Applicant later clarified that he founded the company in October 2002, but that he and four others formally established the company in January 2003 (Tr. 28-29).

[3]At his hearing, Applicant testified he was granted his initial clearance in 1996 (Tr. 30, 51), although he gave a date of September 1995 on his e-QIP (Ex. 1).

about monthly throughout college. He purchased the drug from street dealers at a cost of less than $50 about once or twice a year for his own consumption and also to share with his friends who had provided him marijuana (Ex. 3, Tr. 62). Applicant also used cocaine once to twice a year while in college. The drug was provided by others (Ex. 3). In December 1986, he was awarded his bachelor of science degree in physics (Ex. 1, Tr. 30).

After college, he worked as a marketing engineer with a semiconductor company (Tr. 30).[4] He continued to smoke marijuana from 1987 until spring 1994, about three to six times a year (Ex. 3).

In October 1994, Applicant went to work as director of marketing for a new company founded by his father that developed technology to detect explosive devices in baggage (Ex.1, Tr. 39). Applicant executed a National Agency Questionnaire (DD Form 398-2) on February 6, 1995.[5] He was asked about use or possession of any narcotic, depressant, stimulant, hallucinogen or cannabis, "even one-time or on an experimental basis except as prescribed by a licensed physician." Applicant responded "No." He also denied that he had ever been involved in the "illegal purchase, manufacture, trafficking, production, or sale of any narcotic depressant, stimulant, hallucinogen, or cannabis." (Ex. 4, Tr. 35). Applicant feared he would not obtain a security clearance if he admitted to illegal drug use, and he did not want to tell his father the reason should his clearance be denied (Tr. 39).

Applicant was interviewed about his history of illegal drug use by a government investigator on August 31, 1995. Applicant discussed his involvement with marijuana and cocaine in college, and his continued use of marijuana until spring 1994. He explained that he had stopped using marijuana because he had been prescribed medication, and cocaine because he lost interest in it. Applicant denied any use of other illicit substances and any intention of using any illegal drug, including marijuana or cocaine, in the future. Applicant admitted that he had deliberately not disclosed his past drug use on his security clearance application because he felt an affirmative response to the drug usage inquiry would prevent him from obtaining a security clearance (Ex. 5). Applicant was granted his secret clearance shortly thereafter (Ex. 1, Tr. 30).

Applicant resumed his involvement with marijuana sometime after his interview.[6] He had a roommate who smoked marijuana, and Applicant used the drug on average

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[4]Applicant testified he went to work for the semiconductor right out of college (Tr. 30). On his February 1995 DD Form 398-2, he listed his employment with the company from March 1987 to September 1994 (Ex. 4). It is unclear whether he had held previous employment with the company that was not reflected on the 398-2.

[5]The form was identified in the SOR as an "EPSQ." The form signed by Applicant on February 6, 1995, was a National Agency Questionnaire (Form 398-2) (*see* Ex. 4).

[6]Applicant could not recall for how long he abstained from marijuana after his August 1995 interview other than to state that his use was "very infrequent" and it was 13 years ago (Tr. 56).

four to six times per year to 1999 (Tr. 54-55). Following his marriage in October 1999 (Ex. 1), Applicant's use of marijuana was limited to once or twice yearly on average until October 2006 while socializing with friends from college. He did not purchase any marijuana during that time and the drug was always provided to him by others (Ex. 1, Ex. 2, Tr. 35, 41, 44, 54-55, 63, 68). Applicant knew that using marijuana was illegal (Tr. 64).

Applicant's employer was acquired in 2000, and he stayed on with the new company for the next two years as a vice president of product and business development (Ex. 1, Tr. 31). During that time, he and his spouse moved to their present residence in January 2001 (Ex. 1, Tr. 27), and they started a family. Their first child, a son, was born in October 2001 (Ex. 1). They have two other children who were born in April 2004 (Ex. 1) and in March 2007 (Tr. 76).

In June 2002, his division at work was sold to a security and detections company. Applicant and his new employer did not agree on plans for the company, and in August 2002, he left its employ. That October, he started his own imaging technology business (Ex. 1, Ex. 2, Tr. 28-29, 61).

Applicant's company prospered into a business that now employs about 100, with about 22 of its employees holding a security clearance (Tr. 103-04). To update his security clearance, Applicant executed an e-QIP on April 28, 2006. Applicant responded "Yes" to question 24.a: "Since the age of 16, or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?." He also answered "Yes" to question 24.b: "Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting the public safety?." Applicant indicated that he used marijuana two times per year from about June 1999 to present (Ex. 1, Tr. 37).

On April 3, 2007, Applicant was interviewed by a government investigator about his use of marijuana. Focusing on the preceding seven years (Tr. 58-60), Applicant stated that he used marijuana two times per year from June 1999 to October 2006 in social settings with a group of friends when he took two or three puffs off a marijuana cigarette passed to him. Applicant indicated that he had stopped using marijuana, and that he did not intend any future use. He denied ever using it during work hours and maintained it never hindered his ability to handle classified information (Ex. 2).

On one occasion in summer 2007, Applicant was offered marijuana during a reunion with his friends from college. One of his companions passed a joint around and Applicant "let it pass" without smoking it (Tr. 45, 66). Applicant told those friends present that he could no longer use marijuana due to security clearance issues (Tr. 67). He didn't think to leave while the others smoked, although he now realizes that he should

have (Tr. 68-69). After that incident, Applicant resolved to avoid the situations conducive to marijuana use, and he did not attend a similar gathering of his college friends that took place in summer 2008 (Tr. 46). Applicant denies any interest in using marijuana (Tr. 46). In the event Applicant finds himself in a situation where marijuana is offered or being used, he plans to walk away without participating (Tr. 47). Applicant still associates with the college friends with whom he used marijuana in the past, about once or twice per year individually (Tr. 77), but there is no marijuana involved in their visits.

The company's executive vice president, who has had additional duties as the FSO for the last two to three years (Tr. 93), met Applicant in 1994 at a trade show (Tr. 85). After becoming coworkers for the first time in 1996, they developed a close friendship (Tr. 87). The FSO joined Applicant as a cofounder of their present company in January 2003 (Tr. 81). He and Applicant interact daily at work and multiple times during the course of a month outside of work. He has never seen Applicant use marijuana (Tr. 88, 94). He became aware that Applicant had used marijuana back in 1995 or 1996 when he learned from Applicant that he had admitted to a government investigator that he had used marijuana. The FSO assumed Applicant had not used it after that (Tr. 92) until he reviewed Applicant's e-QIP in April 2006 and noted Applicant's disclosure of marijuana use since June 1999 (Tr. 92). Disappointed in Applicant, the FSO told Applicant that he needed "to grow up," that it was a serious offense, and he should never use it again. Applicant gave the FSO the impression that he understood that (Tr. 104-06). Before Applicant's security clearance hearing, the FSO again discussed with him the matter of any future drug use. Applicant made it clear to him "that he understood the seriousness of the situation and that he was making a commitment to both the company and most importantly to the U.S. government not to ever do it again." (Tr. 90-91). The FSO did not ask Applicant whether he had used marijuana after he completed his e-QIP in April 2006, and Applicant did not volunteer that he had used marijuana in October 2006 (Tr. 103). The FSO does not have any concerns about Applicant's ability to handle classified information. Applicant has shown himself to be "extremely reliable" and has taken his duty to protect classified information "very seriously" (Tr. 89).

Applicant works long hours, generally 50 to 60 hours per week. He is an inventor or co-inventor on several U.S. patents, and has testified before Congress about his area of expertise. Applicant is aware that his company has a drug policy, but he does not know the specifics of it. He was not involved in formulating the policy (Tr. 50). He is involved in the parent-teacher association in his community, serves as an assistant coach for his son's soccer team, and is involved with some charitable and entrepreneurial organizations (Tr. 34).

Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised 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 common sense 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 access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by 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 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 Executive Order 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).

Analysis

Guideline H, Drug Involvement

The security concern for drug involvement is set out in AG ¶ 24: "Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability

and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations." Applicant, who had a history of marijuana use since college, continued to smoke the drug as he pursued his career in security and explosives detection technologies. He resumed marijuana use after he had told a government investigator that he did not intend to use any illegal drug in the future, and after he was granted a secret clearance. AG ¶ 25(a) ("any drug abuse") and ¶ 25(g) ("any illegal drug use after being granted a security clearance"), apply.

Applicant bears a substantial burden of demonstrating mitigation, given his involvement with marijuana spanned over 20 years.[7] He continued using marijuana in violation of his fiduciary obligations as a cleared employee. Even if Applicant was unaware of a specific drug policy, he knew that marijuana use was illegal (Tr. 64). 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") cannot reasonably be applied. He used marijuana in October 2006, after he had been told by his good friend, a cofounder of the company and its current FSO, that he had to cease his involvement. As recently as summer 2007, Applicant was still associating with those college friends with whom he used marijuana in the past. Although he turned down the drug when it was offered to him on that occasion, he did not leave the premises while his friends smoked the drug. Both incidents raise considerable concerns about his judgment and reliability, and about his commitment to abstain from illegal drug use in the future.

Applicant acknowledges that he did not take his commitment to the Department of Defense seriously enough (Tr. 52) and that he should have left when his friends began smoking in summer 2007 (Tr. 68-69). He asserts that the situation is different now, in that he has too much to lose by using illegal drugs (Tr. 65-66). Given that he continued to smoke marijuana after he started his own company, and after two of his three children were born, one has to question what has changed about his personal situation. Certainly the cofounders and those employees with him from the beginning had every right to count on him to act in the firm's interest, which included not jeopardizing his clearance and potential government contracts by abusing illegal drugs. A credible argument can be made that the importance of setting an example for his children increases as they reach school age and gain in awareness and reason. At the same time, he had the responsibilities of fatherhood when he used marijuana from 2001 to 2006, and any illegal conduct is inconsistent with those responsibilities.

AG ¶ 26(b) ("a demonstrated intent not to abuse any drugs in the future") applies in part. He did not attend the gathering of his college friends this past summer (*see* AG ¶ 26(b)(2) ("changing or avoiding the environment where drugs were used")). However, since he continues to see his college friends on an individual basis, Applicant cannot

[7]The government did not allege Applicant's marijuana abuse that occurred before June 1999. His entire history is relevant to assessing the likelihood of continuation or recurrence and cannot be ignored.

satisfy AG ¶ 26(b)(1) ("disassociation from drug-using associates and contacts"), even though there have been no drugs involved on those occasions.

Applicant has also abstained from marijuana since October 2006. Concerning possible mitigation under AG ¶ 26(b)(3) ("an appropriate period of abstinence"), the DOHA Appeal Board has declined to articulate a "'bright-line rule'" for how long an applicant is required to abstain (*see, e.g.,* ISCR Case No. 07-03596 (App. Bd. Mar. 7, 2008)). The duration and frequency of abuse, the circumstances of the abuse, and the passage of time since last involvement are all relevant considerations in determining a sufficient period of abstinence. The particular circumstances under which Applicant used marijuana since 1999 confirm that marijuana was not a big part of his life. On the other hand, recreational smoking appears to have been an expected activity during the annual to twice annual weekends with his college friends. He declined marijuana when it was offered to him in summer 2007, before the SOR was issued. But he did not remove himself from the situation and his companions smoked marijuana in his presence. It was not until after the SOR was issued that he conformed his behavior to what is expected of persons with a clearance. Under the circumstances, his abstinence since October 2006 is not sufficient to guarantee against recurrence.

A demonstrated intent not to abuse any drugs may also be shown by a "signed statement of intent with automatic revocation of clearance for any violation" (*see* AG ¶ 26(b)(4)). Applicant testified he does not intend to use any illegal drug in the future. Yet, he also signed a statement in August 1995 in which he indicated that he had no intent to use any illegal drug in the future (Ex. 3), and he subsequently resumed use of marijuana. His past failure to abide by his stated intent undermines his case for mitigation under AG ¶ 26(b)(4) now. More is required in reform given his abuse of marijuana on repeated occasions while he held a security clearance. Applicant was granted his initial clearance in 1995 or 1996 after he had made the government aware of his earlier drug use. One would expect that Applicant would have understood the importance of abstaining from illegal drugs at that point, and that he would not have to be reminded by a government interview in April 2007 of the seriousness with which he needed to take this commitment.

Guideline E, Personal Conduct

The security concern related 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 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.

When Applicant applied for a secret-level clearance in February 1995, he deliberately denied any use of illegal drugs and did not report his abuse of marijuana and cocaine in college or his continuing abuse of marijuana after college. AG ¶ 16(a) ("deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities") applies.

However, as alleged in SOR ¶ 2.b, Applicant detailed his involvement with illegal drugs when he was interviewed in August 1995. While Applicant's admissions at that time appear to have been in response to questions from the investigator (Tr. 40), there is no indication that he had to be confronted with the facts. AG ¶ 17(a) applies in mitigation where "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification, before being confronted with the facts." The five-month delay in setting the record straight is viewed as sufficiently prompt in this case, given it occurred at his first opportunity. Applicant was not asked at his hearing whether he knew he could have contacted the government directly to correct the record.

His February 1995 falsification also falls under AG ¶ 17(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"). To be sure, falsification of a security clearance application is a very serious offense. Applicant was placed on notice when he signed his security clearance application that a knowing and willful false statement could be punished by fine or imprisonment or both under Title 18, Section 1001 of the United States Code. However, since the initial falsification 13 years ago, Applicant has been candid with the government about his illegal drug abuse. In addition to the admissions during his August 1995 interview, he listed his marijuana use from June 1999 to then present when he completed his e-QIP in April 2006. He responded "yes" as well to having illegally used a controlled substance while possessing a security clearance. When contacted in April 2007 to discuss his use of marijuana, Applicant revealed his use of marijuana to October 2006, admitting that he had smoked the drug at least once after he had submitted his April 2006 e-QIP. Furthermore, at his hearing, he amended his response to SOR ¶ 2.b to admit that he had lied on his February 1995 clearance application (*see* AG ¶ 17(b) ("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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur").

Concerns were raised at the hearing that Applicant may not have been open with his FSO about his last use of marijuana because the FSO was unaware of any drug use by Applicant after April 2006. The FSO did not ask Applicant whether or not he used any illegal drugs after April 2006. Applicant's failure to inform his FSO about his October 2006 marijuana use does not warrant a denial under Guideline E. There is no evidence

that Applicant lied to the FSO, and he disclosed his October 2006 drug involvement during his April 2007 interview with the government investigator.

As discussed under Guideline H, *supra*, Applicant exercised poor judgment that would fall within the general concerns underlying Guideline E (*see* AG ¶ 15) when he used marijuana while he held a security clearance, including after he had completed his April 2006 security clearance application. This exercise of poor judgment was not alleged as raising personal conduct concerns, and therefore cannot provide an independent basis for denial under Guideline E. However, it is appropriate to consider when evaluating Applicant's suitability for continued access to classified information under the whole-person concept, *infra*.

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 the circumstances in light of 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

Applicant was granted a security clearance after he told a government investigator he had stopped using marijuana in 1994. As his career progressed and he started his own defense contracting company, he continued to smoke marijuana knowing it was illegal and in violation of his fiduciary obligations to the Department of Defense. The doubts about his judgment and reliability are not lessened by the infrequency of his involvement, or that it occurred outside of work in circumstances not likely to come to the attention of law enforcement. His disclosure of his drug use when he updated his security clearance does not mitigate the drug involvement concerns. His use of marijuana in October 2006 is especially troubling, because it occurred after he had assured his FSO that he understood he had to stop using drugs. While he has taken some steps to prevent a recurrence, most notably not putting himself in a situation conducive to drug use, doubts persist whether he can be counted on to fulfill his fiduciary obligations, including that of abiding by the law and DoD policy prohibiting involvement with illegal drugs under any circumstances.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the amended SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	Withdrawn
Subparagraph 2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ELIZABETH M. MATCHINSKI
Administrative Judge