DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-09063
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Candace Garcia, Esq., Department Counsel
For Applicant: *Pro se*

March 16, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct) and G (Alcohol Consumption). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on May 12, 2008. On July 17, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines J and G. 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on September 23, 2009; answered it on September 29, 2009; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on November 3, 2009, and the case was assigned to me on December 16, 2009. DOHA issued a notice of hearing on December 18, 2009, scheduling the hearing for January 6, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through O, which were admitted without objection. DOHA received the transcript (Tr.) on January 8, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 30-year-old engineer employed by a defense contractor. He has worked for his current employer since September 2004. He has never held a security clearance.

Applicant graduated from college in June 2002 with a bachelor's degree in engineering graphics and design. He received a master's degree in biomedical engineering in December 2006.

In September 1998, Applicant and several friends were stopped for speeding. Applicant was not the driver. All were administered breathalyzer tests, and all were cited for underage possession of alcohol. Applicant was released to his mother's custody. He paid a $100 fine (GX 2 at 7).

In July 2000, Applicant held a party at his parents' home while they were away. A neighbor called the police because of the noise. A local county sheriff observed alcohol in the home and charged Applicant with underage possession of alcohol. He paid a $100 fine (GX 2 at 6-7; GX 6).

In December 2000, shortly after his 21st birthday, Applicant was driving home after consuming alcohol at a Christmas party. A police officer stopped him for speeding and noticed a bottle of vodka in the back seat. Applicant failed several field sobriety tests as well as a breathalyzer test. He was charged with operating a motor vehicle while visibly impaired by liquor. He pleaded guilty to operating a motor vehicle under the influence of liquor, and he paid a fine and costs totaling $835 (GX 2 at 6; GX 5). He was required to attend a victims' impact panel and attend a one-day class on the effects of alcohol. He testified he was advised to attend Alcoholics Anonymous (AA) meetings and he did so, but his testimony was vague on the extent of his AA participation (Tr. 70).

After his arrest in December 2000, Applicant continued to drink and drive "maybe a few times a year." He testified he was heavily involved in working full-time and attending school, and he was more cautious about drinking and driving (Tr. 61-62).

In July 2001, Applicant was out drinking with college friends, and he decided to steal an advertising banner hanging outside a bar and put it in his house (Tr. 63-65). The record does not reflect the extent of his alcohol consumption. He was arrested, convicted of larceny, and fined $100. After one year with no further criminal charges, the larceny charges were dismissed (GX 4). He wrote a letter of apology to the bar owner (GX 2 at 7).

In August 2007, Applicant was driving home from a party at which he had been consuming alcohol steadily for about eight hours (Tr. 44). He was driving at a speed well in excess of the speed limit when he swerved to avoid a car that was stopped (Tr. 63). He struck another car that was making a left turn, seriously injuring two passengers in the car he struck. The police administered a blood-alcohol test that registered .26%. A second test at the scene registered .24% (GX 3 at 2-3). A third test at the police station registered .20% (GX 3 at 4). Applicant was charged with driving while intoxicated and causing serious injury, a felony. Pursuant to a plea agreement, he pleaded no contest. In June 2008, he was placed on supervised probation for four years, sentenced to 30 days in jail (deferred, conditioned on successfully completing probation), ordered to perform 60 hours of community service, required to pay $6,680 in court costs, and required to pay restitution of about $13,700 (GX 3 at 8). His insurance company paid the restitution (GX 2 at 6).

As of the date of the hearing, Applicant had complied with all the terms and conditions of his probation (AX D). Although his four years on probation will not be completed until June 2012, he testified he expects to be released from probation in June 2010, based on his conversations with his probation officer (Tr. 51-52).

As a result of the August 2007 accident, Applicant sought treatment for his excessive alcohol consumption. He received counseling three times a week in August and September 2007 and monthly counseling from September 2007 to April 2008 (GX 2 at 7). Upon discharge from the program, he was diagnosed by a medical doctor and a licensed clinical social worker as alcohol dependent in remission. According to the discharge summary, he met all the goals of the program, maintained his sobriety, and made appropriate lifestyle changes. His relapse potential was evaluated as low (GX 2 at R-2). He attended Alcoholics Anonymous meetings once or twice a week until April 2008 (Tr. 57). No aftercare was prescribed.

Applicant married in October 2009 (Tr. 39). He has fully disclosed his previous alcohol involvement to his wife, his parents, and his sister (Tr. 80, 82).

Applicant has not consumed alcohol since August 2007. He moved to another state after his last conviction to accept a new position with the same employer. He has not attended AA meetings or received additional counseling after April 2008. He has a new circle of friends, and they are focused on work and family rather than partying. He testified his “support mechanism” is his work and church involvement, his wife, his friends, and his colleagues (Tr. 76). He is active in his church. He performed his community service with a church-based charitable organization, and he continued to

donate his time to that organization after his community service obligation was completed (AX E; Tr. 77. 83-84). He and his wife have become involved in physical fitness, and he is training to run a marathon (Tr. 87).

A former supervisor described Applicant as dependable, reliable, and trustworthy (AX A). A friend who has known him since 1985 considers him dedicated and loyal (AX B). A coworker for three years considers him reliable, dedicated, and responsible (AX C). Numerous supervisors have recognized him as a technically proficient and creative designer and a dedicated, hardworking employee (AX F, I, J, M, N, L, and O). He has twice received monetary awards for his achievements (AX G and H).

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

The SOR alleges four alcohol-related convictions (SOR ¶¶ 1.a, 1.c, 1.d, and 1.e) and a larceny conviction (SOR ¶ 1.b). Applicant has admitted all the allegations under this guideline. The concern raised by criminal conduct is set out in AG ¶ 30 as follows: "Criminal conduct creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

Conditions that could raise a security concern and may be disqualifying include "a single serious crime or multiple lesser offenses" and "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted." AG ¶¶ 31(a) and (c). Applicant's record of arrests and convictions are sufficient to raise these two disqualifying conditions, shifting the burden to him to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated by evidence that "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." AG ¶ 32(a). Applicant's criminal conduct did not occur under unusual circumstances making it unlikely to recur. Thus, the key element in determining whether this mitigating condition applies is the first the first prong of AG ¶ 32(a) ("so much time has elapsed"). This prong focuses on

whether the criminal conduct was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant's last criminal conduct was in August 2007, more than two years before the hearing. He stopped consuming alcohol in August 2007, successfully completed an alcohol treatment program in April 2008, moved to another state, made a new circle of friends, married in October 2009, and has shifted his focus from heavy social drinking to physical fitness and exercise. He has abstained from alcohol and further misconduct for "a significant period of time." On the other hand, his two-plus years of responsible conduct are less significant in the context of his serious misconduct in August 2007 after about six years of responsible behavior following his larceny conviction. He is still on probation and knows he is under scrutiny. Although he is alcohol dependent, he relies on his own self-designed support system rather than an external system such as AA or a counselor. I conclude it is too soon to conclude that he is rehabilitated, because he has not had sufficient time to convincingly demonstrate that he can maintain sobriety and responsible behavior without the inhibiting influence of a probation officer and a formal support structure such as AA or periodic counseling. I conclude AG ¶ 32(a) is not established.

Security concerns arising from criminal behavior also may be mitigated if "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement." AG ¶ 32(d). For the reasons set out above in the discussion of AG ¶ 32(a), I am not satisfied that he has demonstrated successful rehabilitation.

Guideline G, Alcohol Consumption

The SOR alleges Applicant consumed alcohol, at times to excess and to the point of intoxication, from 1998 to 2007 (SOR ¶ 2.a). It also cross-alleges the alcohol-related criminal conduct alleged in SOR ¶ 1.a, 1.c, 1.d, and 1.e (SOR ¶ 2.b). Finally, it alleges Applicant received treatment for alcohol dependency from August 2007 to April 2008 (SOR ¶ 2.c). Applicant has admitted these allegations.

The concern under this guideline is set out in AG ¶ 21 as follows: "Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness." The following disqualifying conditions are raised by the evidence:

> AG ¶ 22(a): alcohol-related incidents away from work, such as driving while under the influence. . . , regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;
>
> AG ¶ 22(c): habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and
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> AG ¶ 22(e): evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

Security concerns under this guideline may be mitigated if "so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." AG ¶ 23(a). For the reasons set out above in my discussion of AG ¶ 32(a), I conclude this mitigating condition is not established.

Security concerns also may be mitigated if "the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser)." AG ¶ 23(b). This mitigating condition is established, although, as noted above, I am not satisfied that the circumstances of his abstinence are sufficient to warrant a finding of rehabilitation.

Finally, security concerns under this guideline may be mitigated under AG ¶ 23(d) if —

> [T]he individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

There is no evidence that Applicant's treatment program had any "required aftercare," but he has designed his own informal aftercare program. He has satisfied all the other requirements of this mitigating condition. Because he successfully completed his alcohol treatment program, I have resolved SOR ¶ 2.c, alleging the treatment program, in his favor.

Notwithstanding Appellant's significant period of abstinence and successful completion of his alcohol treatment program, he is still under the scrutiny of a probation

officer. The persuasive value of his two-plus years of sobriety is diminished by the fact that he relapsed in August 2007 after almost seven years of responsible alcohol consumption. He has chosen to control his alcohol dependence without a formal support structure such as AA or routine, periodic counseling. Under these circumstances, he needs more time to mitigate the security concerns arising from his alcohol consumption.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the relevant circumstances. An 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. I have incorporated my comments under Guidelines J and G in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature, well-educated adult. He is a talented, creative engineer, and he has earned the respect of his supervisors, colleagues, and friends. He has made major lifestyle changes since his alcohol-related conviction in August 2007. He has married, moved to a new state and a new job, made new friends, abstained from alcohol, become involved in his church and his community, and shifted his off-duty focus from social drinking to physical fitness. He was candid, sincere, and remorseful at the hearing.

Most of the conduct raising security concerns occurred while Applicant was either underage or in a college environment. The serious car accident in August 2007 was his first alcohol-related misconduct after leaving the college environment, and it apparently was a wake-up call. He voluntarily sought and completed treatment, stopped consuming alcohol, and made major lifestyle changes.

On the other hand, all his lifestyle changes have occurred while he has been on probation. Although he was optimistic that his probation will be terminated early, the

record reflects that he will be on probation until June 2012. He has completed less than half of his term of probation. Given his diagnosis of alcohol dependence and his history of alcohol-related misconduct, I am concerned about his lack of a formal support system such as AA or a continuing relationship with a counselor.

Applicant has not had sufficient time to demonstrate that he will continue to abstain from alcohol when he is no longer under the scrutiny of a probation officer. Although he needs more time to demonstrate his rehabilitation, an administrative judge does not have the authority to grant a conditional clearance. ISCR Case No. 99-0901, 2000 WL 288429 (App. Bd. Mar. 1, 2000).

After weighing the disqualifying and mitigating conditions under Guidelines J and G, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve close cases in favor of national security, I conclude Applicant has not mitigated the security concerns based on his criminal conduct and alcohol consumption. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information. If he successfully completes his probation, continues to abstain from alcohol, and is sponsored by his employer for a clearance, he may be worthy of reconsideration in the future. *See* Directive ¶¶ E3.1.37-E3.1.40 (reconsideration authorized after one year).

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Paragraph 2, Guideline G (Alcohol Consumption):	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant
Subparagraph 2.c:	For Applicant

Conclusion

In light of all of the circumstances, 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.

LeRoy F. Foreman
Administrative Judge