



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



In the matter of: )  
)  
) ISCR Case No. 12-02065  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Pamela Benson, Esq., Department Counsel  
For Applicant: *Pro se*

10/08/2014

**Decision**

HEINY, Claude, Administrative Judge:

Applicant owns a condominium in Thailand. He has extended family members who are citizens and residents of Thailand, some of whom work or have worked for the government of Thailand. Between 2008 and 2011, he purchased sex from foreign nationals in foreign countries. His foreign relatives and past criminal conduct are no longer a security concern. The ownership of a condominium in Thailand, when balanced against his financial interests in the United States, does not pose a security concern. The foreign influence, sexual behavior, and personal conduct security concerns are mitigated. Eligibility for access to classified information is granted.

**Statement of the Case**

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> on January 6, 2014, the DoD issued a Statement of Reasons (SOR) detailing security concerns. DoD adjudicators could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue Applicant’s security clearance

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<sup>1</sup> Executive Order 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) effective within the DoD on September 1, 2006.

due to alleged security concerns under Guideline B (foreign influence), Guideline D (sexual behavior), and Guideline E (personal conduct). (Item 1)

On February 14, 2014, Applicant responded to the SOR allegations and waived his right to a hearing. (Item 3) A complete copy of the file of relevant material (FORM), dated March 31, 2014, was provided to him on April 14, 2014. The FORM contained nine attachments (Items). Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. Department Counsel did not object to Applicant's response of June 10, 2014. The case was assigned to me on June 25, 2014.

### **Procedural Ruling**

Department Counsel requested administrative notice of facts concerning the Kingdom of Thailand (Thailand) and provided supporting documents to show details and context for those facts. Applicant asserted that issues in the administrative notice had no relevance to or impact on his suitability for a security clearance.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from government reports.

### **Findings of Fact<sup>2</sup>**

Applicant's SOR response admitted the allegations in the SOR. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 31 years old, and works as a field technician for a DoD contractor at an overseas location. He is a U.S. citizen born in Germany. His father served 21 years in the U.S. Army retiring as a master sergeant. In January 1992, after retiring from the Army, his father spent five years working for the U.S. government in Thailand until March 1997. Applicant's mother is a naturalized U.S. citizen having been born in Thailand. Applicant has a number of relatives who are citizens and residents of Thailand. From September 2009 through November 2013, Applicant traveled to Thailand three times a year. He worked for three months at various overseas locations and then had three to four weeks of vacation, which he spent in Thailand. While in Thailand he saw his relatives who are citizens and residents there. Many of the meetings involve going out to eat. Applicant does not speak Thai and he was left out of much of the conversations during dinner.

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<sup>2</sup>To protect Applicant and his family's privacy, the facts in this decision do not specifically describe employment, names of witnesses, and names of other groups or locations. The cited sources contain more specific information.

In 1992, Applicant, then nine years old, met his relatives who are citizens and residents of Thailand when his father worked in country. He had contact with them until 1997, when his father left Thailand. Applicant did not see these relatives again until September 2009. His contact with four of his relatives was limited to five minutes to a couple hours a time, three times a year between September 2009 and September 2013. One of these individuals is his 70-year-old maternal aunt. In 2005, she retired from a government-owned airline. This aunt's husband, age 81, is a retired aircraft mechanic, a flight engineer, and pilot. Applicant is not close to those individuals. They have two sons. Applicant has contact with one son between one and two hours at a time when Applicant visited Thailand. His cousin's wife previously worked as an architect. Applicant is not close to his cousin or his cousin's wife.

The other son is a purchasing manager for a private company. Between 2009 and 2013, Applicant would see this cousin 8 to 12 times per visit to Thailand. Their meetings would last several hours.

Another maternal aunt, age 67, is a retired professor at a university in Thailand. Applicant saw her three times a year from 2009 through 2013, spending 5 to 20 minutes with her each time. His final relative who is a citizen and resident of Thailand is another maternal aunt, age 56, who is a research judge in Thailand. Applicant has not seen this aunt since September 2013. Between 2009 and 2013, he had 5 minutes to 20-minute interactions with her three times a year when he visited Thailand.

Applicant served in the U.S. Air Force from February 2002 through February 2008. He had one overseas tour of duty. He was a staff sergeant (E-5) when he honorably separated from the service. While on active duty, he was awarded the Air Force Commendation Medal, the Air Force Achievement Medal, and the Army Achievement Medal. In 2008, after leaving the Air Force, Applicant worked for a DoD contractor in Qatar. Starting in 2009, he worked on a State Department contract supporting various locations in Iraq.

From January 2011 through September July 2013, Applicant traveled to 42 different countries in his DoD contractor position. In November 2013, he obtained his current government contracting job. In his current job he works for six months and then has three weeks of vacation.

In Applicant's previous jobs, he would work three months and then have three to four weeks of vacation. For federal income tax reasons<sup>3</sup> he chose to spend his vacations in overseas locations and not return to the United States. At some point, he decided that owing property overseas made more sense than paying hotel fees when he took vacations. In March 2013, he purchased a condominium in Thailand for

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<sup>3</sup> A U.S. citizen living abroad may exclude up to \$97,600 of foreign earnings. To qualify for the exclusion a person must have a tax home in a foreign country, have foreign earned income, and be a bona fide resident of a foreign country for an uninterrupted period that included an entire tax year or be a U.S. citizen who is physically present in a foreign country for at least 330 days during any period of 12 consecutive months. Applicant now claims to be a bona fide resident of a foreign country.

\$353,000. He maintains a bank account containing less than \$1,000 to pay condo fees and other condo-related expenses.

When Applicant learned that ownership of the condominium could be a security problem, he attempted to sell it. The sale was not completed due to no fault of Applicant. Had the sale been completed, Applicant would have incurred a \$50,000 loss. He was willing to accept the loss in order to address any security concern.

In 2008, Applicant spent two weeks in the United States. In 2010, he spent three weeks in the United States. He also visited the United States in September 2013. Applicant admits that his visits to the United States have been infrequent during the past several years. He has done so because of the federal income tax advantage created when a taxpayer remains overseas for designated periods of time. He routinely spent his three-week vacations every three months at overseas locations. He has weekly telephone or email contact with his father, mother, brother, sister, and sister-in-law in the United States. He has \$145,655 in a trade account, \$13,712 in a Roth IRA account, a \$6,462 account, and a \$10,329 401(k) retirement account, all in the United States.

The record shows no arrests, convictions, evidence of alcohol abuse, or illegal drug usage. However between 2008 and May 2011, Applicant admitted paying for sex in different countries around the world. Prostitution was illegal in some of those countries. An additional concern is that those individuals involved in prostitution may be involved with other individuals who could attempt to coerce or exploit an individual employing a prostitute. Applicant's last involvement with prostitutes occurred in May 2011. His employer, supervisors, and security officer are aware of his conduct.

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “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. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism.

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 (4<sup>th</sup> 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). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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**

### **Foreign Influence**

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

[I]f the individual has divided loyalties or foreign financial interests, [he or she] may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 indicates three conditions that could raise a security concern and may be disqualifying in this case:

- (a) contact 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 sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information; and
- (e) a substantial business, financial, or property interest in a foreign country, or any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

Applicant has relatives that are citizens and residents of Thailand. He has an aunt who is a judge in Thailand, an aunt who is a retired university professor, and an aunt and uncle who worked for a state-owned airline, but are now retired. He also has a cousin living in Thailand. Except for his cousin, he visits with his aunts and uncle three times a year, when he vacations in Thailand. The conversations are short since he does not speak Thai and their English is limited. He spends more time with his cousin when he is in Thailand.

There is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. *See generally* ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at \*8 (App. Bd. Feb. 20, 2002). Influence, pressure, or coercion applied to Applicant's relatives living in Thailand could result in a security concern. Applicant's communications with his relatives in Thailand are infrequent and casual. His ongoing communications over the years with his relatives living in Thailand are insufficient to create "a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." His relationships with his relatives in Thailand do not create a concern about Applicant's "obligation to protect sensitive information or technology."

The nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion or inducement. The United States currently has and for a long period of time has had a close relationship with Thailand. Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Furthermore,

friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at \*\*15-16 (App. Bd. Mar. 29, 2002).

Applicant owns a \$350,000 condominium in Thailand. When he learned that this could be a security concern he attempted to sell the condo, but has been unsuccessful. He purchased the condo so he would not have to pay for hotels when he was on vacation from his overseas job. He maintains a very small bank account to pay for transactions related to the condo.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns including:

- (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 U.S.;
- (b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;
- (c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;
- (d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;
- (e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and
- (f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶¶ 8(a) and 8(c) apply to his relatives in Thailand. Applicant's contact with them is casual and infrequent. There is no showing of strong loyalty or connections to his relatives in Thailand.

AG ¶ 8(b) applies. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S." Applicant has significant connections to the United States. Applicant's parents and siblings are U.S. citizens and residents. He has telephone or email communication with them weekly. His father served for an extended time in the U.S. Army and Applicant has honorably served in the U.S. Air Force.

AG ¶ 8(f) applies to the small bank account he maintains in Thailand in relation to payments of the condo fee and other expenses related to the real estate in Thailand. AG ¶ 8(f) does not apply to the ownership of the condo in Thailand. It is a sizable investment. However, he maintains financial accounts of approximately \$176,000 in the United States, which represents approximately half the value of the condo. He attempted to sell the condo once he was aware of the security concern.

In sum, Applicant's connections to his relatives living in Thailand are not significant. He does not have close or continued communicate with them. Applicant's connections to his relatives in the United States are strong.

## **Sexual Behavior**

AG ¶ 12 expresses the security concern pertaining to sexual behavior, "Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information."

AG ¶ 13 describes two conditions that could raise a security concern and may be disqualifying, ¶ 13(a), "sexual behavior of a criminal nature, whether or not the individual has been prosecuted," and ¶ 13(c), "sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress."



Between 2008 and May 2011, Applicant paid for sex in various foreign countries. His actions were legal in some of the countries and illegal in others. Those individuals involved in such conduct often associate with individuals who could attempt to coerce or exploit someone who engages in such conduct. His last involvement with a prostitute occurred more than three years ago. His employer, supervisors, and security officer are aware of his conduct.

AG ¶ 14 provides two conditions that could potentially mitigate security concerns:

(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 good judgment; and

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

The conduct did not involve arrests, but because there are multiple incidents occurring over a number of years, the conduct cannot be considered "infrequent." However, since it has been more than three years since the last incident, Applicant's conduct does not cast doubt on his current reliability, trustworthiness and good judgment. AG ¶ 14(b) applies. AG ¶ 14(c) also applies because Applicant fully disclosed his conduct, is no longer involved in such conduct, and it could not serve as the basis for coercion, exploitation, or duress.

There is evidence of successful rehabilitation, including the passage of three years since the last involvement with foreign prostitutes. He accepted responsibility for his actions and admitted the conduct to security officials. He has outstanding recommendations as to his duty performance. His post-offense behavior is sufficient to fully mitigate the criminal conduct in this case.

### **Personal Conduct**

The sexual behavior previously discussed was also listed as a personal conduct security concern. For the same reasons previously listed to mitigate the sexual behavior concern, the personal conduct concerns are also mitigated.

### **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. 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. I have incorporated my comments under Guidelines B, D, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

The factors weighing for approval of Applicant's security clearance are more substantial than the factors weighing against its approval due to the ownership of the condo in Thailand. His connections to his relatives in Thailand also do not make him more vulnerable as a target of coercion.

Applicant lives and works overseas in support of the U.S. Government. In the four years between 2008 and September 2013, he spent most of his vacations overseas. Choosing to spend approximately ten vacations overseas instead of returning to the United States is not a determinative factor. Applicant's condo is a significant financial investment. He also has significant financial investments in the United States totaling approximately half the value of the condo. He has been actively attempting to sell the condo once he was informed of its security significance. The fact he chose to vacation overseas and purchase real estate overseas is not of sufficient security concern to deny his clearance.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude Applicant has carried his burden and the foreign influence, sexual behavior, and personal conduct concerns are mitigated. Eligibility for access to classified information is granted.

### **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, Foreign Influence: Subparagraphs 1.a - 1.f:	FOR APPLICANT For Applicant
Paragraph 2, Sexual Behavior: Subparagraph 1.a:	FOR APPLICANT For Applicant
Paragraph 3, Personal Conduct: Subparagraph 1.a:	FOR APPLICANT 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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Claude R. Heiny  
Administrative Judge