



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



In the matter of: )  
)  
) ISCR Case No. 12-02857  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Robert J. Kilmartin, Esquire, Department Counsel  
For Applicant: *Pro se*

03/11/2014

**Decision**

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant abused marijuana with varying frequency from 1975 to 1982, from about 1988 to January 2002, and again from June 2008 to November 2011. He continued to smoke and purchase marijuana after being granted Department of Defense (DOD) security clearance eligibility. Applicant regrets his illicit drug use, and he intends no future involvement, but I cannot yet conclude that his drug abuse is safely behind him. Clearance denied.

**Statement of the Case**

On August 8, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline H, Drug Involvement, and explaining why it was unable to find that it is clearly consistent with the national interest to continue his security clearance. The DOD CAF took the action under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (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.

Applicant submitted an undated response to the SOR allegations. He requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge if his response was insufficient to continue his security clearance eligibility. On January 14, 2014, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On January 17, 2014, I scheduled a hearing for February 12, 2014.

At the hearing, six Government exhibits (GEs 1-6) and three Applicant exhibits (AEs A-C) were admitted without objection. Applicant also testified, as reflected in a transcript (Tr.) received on February 20, 2014.

### **Findings of Fact**

The SOR alleged under Guideline H that Applicant used marijuana with varying frequency from approximately 1975 to at least 2011 (SOR 1.a), including after he was granted a DOD security clearance around 1990 (SOR 1.e) and in about 2003 (SOR 1.b). Applicant also allegedly purchased marijuana with varying frequency from about 1975 to at least 2011 (SOR 1.c), including after he was granted a DOD security clearance around 1990 (SOR 1.f) and in about 2003 (SOR 1.d).<sup>1</sup> In a detailed response, Applicant admitted the allegations, and he expressed his intent “to never do drugs again.” After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 53-year-old high school graduate, who completed a technical training program in early 1982. (GE 1; Tr. 39.) He has held his current position as a project technician with a defense contractor employer since March 2000. He previously worked for the company from October 1987 to March 1993 and from September 1995 to July 1998.<sup>2</sup> (GEs 1, 3, 6.) He holds a DOD Secret clearance. (GE 1.)

Applicant began using marijuana in junior high school in 1975. From about age 15 until age 20, he smoked marijuana, as frequently as three to four times a week, while socializing with his peers. Occasionally, he contributed money to purchase marijuana.<sup>3</sup> (GE 4.) Around mid-November 1978, Applicant was charged with possession of marijuana after the police found a small bag containing the drug on the front seat of his car. He had

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<sup>1</sup> To the extent that the use of marijuana while holding a DOD clearance (SOR 1.b and 1.e) is covered under SOR 1.a, and the purchase of marijuana while holding a DOD clearance (SOR 1.d and 1.f) is covered under SOR 1.c, the allegations are duplicative. The Formal Findings reflect that drug involvement while holding a security clearance is an aggravating factor, but it does not represent additional drug activity.

<sup>2</sup> Applicant provided estimated dates for his previous tenures with the defense contractor on his latest security clearance application (GE 1).

<sup>3</sup> Applicant's present recollection is that he smoked marijuana infrequently in high school, between two and four times a month. (Tr. 37.) In his January 2002 sworn statement, he indicated that he smoked marijuana three to four times a week. (GE 4.)

accepted a small quantity of the drug from a friend and intended to pass it on to someone else. The charge was dropped when the officer did not appear in court. (GE 5.)

After getting married in September 1982 (GEs 1, 6), Applicant stopped using marijuana. (Tr. 36.) Around 1988, he resumed smoking the drug with varying frequency. (GE 4.) He enjoyed the relaxing effects of marijuana. (Tr. 37.)

In October 1987, Applicant began working for his current employer. On October 20, 1989, Applicant completed and certified to the accuracy of a DOD Personnel Security Questionnaire (PSQ) on which he responded negatively to whether he had ever used “any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP), or cannabis (to include marijuana or hashish), except as prescribed by a licensed physician.” He also answered “No” to whether he had “ever been arrested, charged, cited, or held by Federal, State, or other law enforcement or juvenile authorities, regardless of whether the citation was dropped or dismissed or [he was] found not guilty.” (GE 6.)

On February 21, 1990, Applicant was interviewed by a special agent of the Defense Investigative Service (DIS) about his undisclosed drug arrest and marijuana use. Applicant executed a Statement of Subject in which he detailed the circumstances of his 1978 arrest for possession of marijuana, his use of marijuana, and his failure to disclose this drug involvement on his PSQ. Applicant admitted that he should have responded “yes” to the drug question on the PSQ because “[he] did smoke marijuana at a guess between 15 and 20 times over a span of about four years (9-76 through 1-80).” About the arrest question, Applicant did not believe that it pertained to him because he was a minor at the time of his arrest. (GE 5.) Applicant was granted a Secret clearance sometime in 1990.

Applicant continued to smoke marijuana, monthly on average, although some months he used marijuana up to three or four times. Around March 1993, Applicant either lost or left his job with the defense contractor. He was unemployed for around six months before going to work as a car salesman for a dealership. He continued to purchase and smoke marijuana, even after the birth of his first daughter in February 1994. (GEs 3, 4.)

In September 1995, Applicant returned to work for his current employer. In September 1996, his DOD Secret clearance was renewed. Applicant was unemployed from July 1998 to January 1999. Over the next year, he had several technician jobs before returning to work for his current employer in March 2000. In December 2000, he and his spouse had another daughter. Applicant continued to smoke marijuana, monthly on average. (GE 3.)

On August 7, 2001, Applicant completed and executed a security clearance application (SF 86). He listed his arrest for possession of marijuana, which he indicated was in October 1977 [sic]. Applicant also answered “Yes” to whether he had used any illegal drugs in the last seven years, and to whether he had ever illegally used a controlled substance while possessing a security clearance. He disclosed that he used marijuana

monthly from 1994 to August 2001, and that he had used marijuana monthly from 1990 to 1994 while holding a security clearance.<sup>4</sup> (GE 3.)

On January 29, 2002, Applicant was interviewed by a DIS special agent about his listed marijuana use. Applicant executed a sworn statement in which he detailed his marijuana use as three to four times a week from ages 15 to 20, and then from three to four times a month, with some months of no involvement, from age 24 or 25 to present. He explained that he found marijuana relaxing, but that he did not crave it. He smoked marijuana when he got together with a couple of neighbors. He previously saw nothing wrong with his marijuana use because it was “very infrequent” in his life. About any other drug abuse, Applicant volunteered that he had used cocaine once at age 17, but that he had otherwise no involvement. Applicant cited the interview with the DIS agent for giving him an appreciation of the seriousness of marijuana use as it related to working with classified information. He expressed his intent to cease using marijuana because it is illegal and he could lose his eligibility to work with classified material. (GEs 2, 4.)

Applicant did not use any marijuana after his interview until approximately June 2008. Despite his spouse’s expressed disapproval (Tr. 55), Applicant resumed smoking the drug to relax, about six to ten times a year, when fishing, on vacation, or while doing yard work. (GE 2; Tr. 38-39.) He smoked marijuana on fishing trips with his spouse’s cousin’s husband and a couple of this relative’s friends. (Tr. 40.) Applicant bought his marijuana from a neighbor, about ten joints at a time, once a year or less frequently. Applicant last smoked marijuana around November 2011. He bought a small bag of marijuana for \$50 from his neighbor. (Tr. 46, 48.) He decided to stop using marijuana because he had been told that he would have to apply for renewal of his security clearance. (Tr. 51.) Applicant knew when he smoked marijuana that it was illegal to do so. (Tr. 41, 58.) He has never had any treatment for drug abuse. (GE 2; Tr. 39.)

On January 4, 2012, Applicant executed and certified to the accuracy of an Electronic Questionnaire for Investigations Processing (e-QIP). Applicant disclosed his arrest for possession of marijuana around August 1976 [sic]. Concerning any illegal use of drugs or controlled substances in the last seven years, Applicant disclosed that he used marijuana between June 1975 and November 2011, “on occasion from 1976 thru 2000, but not at all from 2000 thru 2008, then on occasion from 2009 thru 2011.” Applicant admitted that he had used marijuana while possessing a security clearance, but he denied any intent to use marijuana or controlled substance in the future. He expounded, as follows:

I absolutely intend NOT to use this substance ever again. I do not need it; do not depend on it in any way at all. Please understand that this was only on occasion and after eight years of not using somehow seemed to have forgot [sic] the importance of the situation. Even after 2008 still only used it on occasion, being on a fishing trip with friends or occasionally doing yard work.

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<sup>4</sup> Applicant also reported on the SF 86 that he was granted a Secret clearance in September 1996. Assuming that date is correct, and that he had smoked marijuana on a monthly basis since 1990, he would presumably also have smoked marijuana while holding a clearance and working for his employer from September 1996 to July 1998.

I think I needed a wakeup call and surely got one.<sup>5</sup> I am a very honest person who is well known from friends and family that does not lie and always speaks the truth. It's taught by me to my children and wife that any type of lying is not permitted in our house and my children are better from that. Believe me when I tell you that I will never use marijuana ever again and I beg of you not to let this affect me or my family in any way. I love my country and I love the job I do for my country.

On February 2, 2012, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM) about his marijuana use. Applicant indicated that he used marijuana from six to ten times a year on average from 1975 to 2000 or 2001 and from June 2008 to November 2011, at times while possessing a DOD security clearance. He reported smoking only two puffs of a marijuana cigarette on each occasion when he was alone to relax. Applicant admitted that he bought 10 joints at a time from a neighbor. Applicant denied any association with known drug users or any intent to use marijuana in the future. He cited his disclosure of his marijuana use on his e-QIP as evidence of his honesty, and he denied any susceptibility to blackmail or coercion even though "no one" knew about his marijuana use. (GE 2.)

When he answered the SOR allegations, Applicant acknowledged that his marijuana use, "even to the infrequent extent that [he] used it is wrong, against the law and unbecoming of a person with a security clearance." He speculated that he "must have become desensitized over the years with the Bill Clinton, I didn't inhale, and the decriminalization of marijuana."<sup>6</sup> He added that he had removed himself from "certain friends who were a bad influence" and had not used marijuana since 2011. Applicant reiterated that he had no intent of using marijuana in the future. Applicant expressed a willingness to submit to drug testing at his cost and to drug treatment at the DOD's request, to prove his abstention since 2011. (Answer.)

At his hearing, Applicant explained his marijuana use "as just a pleasure type of thing on extreme occasion." As for his use of marijuana while holding a security clearance, Applicant testified on direct examination:

Later on in the ten years between being interviewed for my clearance I will forget the importance of it and that's mostly what I'm guilty of is not remembering the importance of [his security clearance], but I will never forget it now, I can tell you that, and I will never, ever use marijuana again, I can

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<sup>5</sup> Applicant testified that the wakeup call was his interview by a government official. (Tr. 50.) After it was pointed out to him that his interview occurred after he completed his e-QIP, Applicant clarified that he believed the reason he stopped using marijuana was that he had been told that he would have to apply for renewal of his security clearance. (Tr. 51.)

<sup>6</sup> Under § 94C:32L of the state's Controlled Substances Act, effective January 2, 2009, the state decriminalized possession of one ounce or less of marijuana, making possession of one ounce or less a civil offense subject to a \$100 fine and forfeiture of the drug. While possession of one ounce or less is no longer a criminal offense under state law, it is still a violation of state law. Moreover, it remains a crime under federal law.

guarantee you that, and I truly, truly mean that. That's all I have to say at this time. (Tr. 30-31, 41.)

Applicant does not have a close friendship with the neighbor from whom he bought his marijuana. They have lived about five houses apart since 1996. This neighbor has not smoked marijuana in Applicant's presence for the past "two years anyway, two or three years." Applicant made it clear to the neighbor over two years ago that he no longer uses marijuana. (Tr. 48-49.)

Applicant takes pride in his work as a mechanical technician on defense projects. He never used marijuana before reporting to work or at work. (Tr. 46.) Applicant has demonstrated dedication to his work and his family. (AEs A-C.) Applicant supports the detailed electrical and mechanical assembly of deliverable products on three programs, and he is the custodian of two laboratories where classified work is performed. He maintains clean work environments while keeping his productivity high and the quality of his work excellent. (AE C.)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall 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 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. 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 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 that the applicant may deliberately or inadvertently fail to 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.

Under AG ¶ 24(a), drugs are defined as “mood and behavior altering substances,” and include:

- (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens),<sup>7</sup> and
- (2) inhalants and other similar substances.

Under AG ¶ 24(b), drug abuse is defined as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” Disqualifying condition AG ¶ 25(a), “any drug abuse,” applies because Applicant abused marijuana from 1975 to 1982, 1988 to about January 2002, and from June 2008 to November 2011. The evidence also shows that he tried cocaine once, as a teenager, although that drug abuse was not alleged in the SOR, so it cannot provide a separate basis for disqualification. AG ¶ 25(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia,” is established in that Applicant contributed funds toward the purchase of marijuana during his teenage years and early

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<sup>7</sup>Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act, are contained in 21 U.S.C. § 812(c).

20s. Between June 2008 and November 2011, he bought marijuana from a neighbor, about ten joints of the drug at a time.

AG ¶ 25(g), “any illegal drug use after being granted a security clearance,” is also implicated. Applicant continued to smoke marijuana, on average monthly, but at times up to three or four times a month, while working for his employer and possessing a DOD Secret security clearance from 1990 to March 1993, and from 1995 or 1996 to July 1998. He would not have had an active security clearance from March 1993 to September 1995 or from July 1998 to March 2000, when he was unemployed or otherwise working outside of the defense industry. After he resumed his defense contractor employment in March 2000, he continued abusing marijuana until early 2002, although it is unclear whether he held a security clearance at that time. The evidence does not show a date of reinstatement for his security clearance eligibility. The SOR alleges 2003, although when Applicant was interviewed in January 2002, he expressed his intent to cease using marijuana because he realized that he could lose his ability to work with classified information. There is no evidence of any illegal drug involvement by Applicant for the next six years. For reasons that Applicant could not explain other than desensitization to the importance of his security clearance, Applicant resumed smoking marijuana in June 2008, and he continued to abuse the drug until November 2011, while in possession of a DOD Secret security clearance.

Mitigating condition 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 apply to a history of recurrent marijuana abuse, which was at times frequent and last occurred little more than two years ago. He abused marijuana from 1975 to 1982, from 1988 to early 2002, and from June 2008 to November 2011, knowing that it was illegal, that his spouse disapproved, and that it was inconsistent with his security clearance obligations.

On his January 2012 e-QIP, during his February 2012 interview with the OPM investigator, in his Answer to the SOR, and at his hearing in February 2014, Applicant asserted that he absolutely does not intend to use any illegal drug, including marijuana in the future. Under mitigating condition AG ¶ 26(b), “a demonstrated intent not to abuse any drugs in the future” may be shown by the following:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used;
- (3) an appropriate period of abstinence; or
- (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant’s uncontroverted testimony is that around two years ago, he stopped associating with the neighbor, from whom he purchased most of the marijuana that he



used between June 2008 and November 2011. Applicant also smoked marijuana on fishing trips with his spouse's cousin's husband. It is unclear whether Applicant has any ongoing contacts with this cousin. Even if Applicant satisfies AG ¶ 26(b)(1), his avoidance of known drug users does not necessarily guarantee against future abuse. In recent years, Applicant smoked marijuana at home alone, and while doing yard work. AG ¶ 26(b)(2) is applicable only to the extent that he avoids activities with the neighbor, and perhaps also the cousin, which led to him using marijuana on some occasions in the past.

Applicant has provided varying accounts about the extent of his drug abuse over the years. He was granted a DOD security clearance around 1990, having denied any illegal drug involvement on his October 1989 PSQ and underreported the extent of his marijuana use (i.e., reported only 15-20 times total between July 1976 and January 1980) to a DIS agent in February 1990. Since then, Applicant has been the sole source for the information about his illegal drug involvement. The discrepancies in his accounts since 2001 are likely attributable to lack of recall and do not lead me to doubt the sincerity of his intent to abstain from using marijuana in the future.

Nonetheless, it is difficult to fully mitigate the drug involvement concerns under AG ¶ 26(b)(3) or ¶ 26(b)(4). Applicant indicated in his sworn statement of January 2002 that his interview with the DIS special agent led him to appreciate the seriousness of his marijuana use as it related to him working with classified information, and consequently, he did not intend to use any marijuana or other illegal drug in the future. By resuming marijuana use in June 2008, while he held a DOD security clearance, Applicant raised considerable doubts about whether he can be counted on to comply with his fiduciary obligations. Applicant's uncorroborated claims of abstention since November 2011 are accepted, but there is an unacceptable risk of relapse, given he resumed smoking marijuana in June 2008 after not using the drug for six years and having promised to quit in 2002. His latest cessation of marijuana use was motivated by the renewal of his security clearance eligibility and not because he no longer enjoyed the drug's effects. Applicant is willing to submit to drug testing and drug treatment to prove his abstention. Perhaps at some future date, he may be able to demonstrate that his marijuana use is safely behind him. At this juncture, the drug involvement security concerns are not fully 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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).<sup>8</sup> In making the overall commonsense determination required under AG ¶ 2(c), I have

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<sup>8</sup>The factors under AG ¶ 2(a) are as follows:

- (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

to consider Applicant's poor judgment in abusing marijuana while he held a security clearance. Applicant's abuse of marijuana from June 2008 to November 2011 may have been occasional, but it occurred after he promised to quit, and at an age where his drug use could no longer be explained by youth or immaturity.

Applicant submits that he has been honest about his marijuana use and purchase, and that the Government should therefore be able to trust his promise to abstain completely from any future illegal drug activity. Applicant is credited for disclosing his involvement with marijuana on his January 2012 e-QIP and during his February 2012 interview. Security clearance decisions are not intended as punishment for past wrongdoing. At the same time, once a security concern arises, there is a strong presumption against the grant or continuation of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). For the reasons discussed under Guideline H, *supra*, I am unable to conclude that it is clearly consistent with the national interest to grant or continue Applicant's security clearance eligibility at this time.

### Formal Findings

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

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant <sup>9</sup>
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant

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pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

<sup>9</sup> Formal findings are returned as to SOR 1.b and 1.d because the use of marijuana while he held a DOD security clearance is covered in SOR 1.a. There is no evidence that he used marijuana beyond the time frame alleged in SOR 1.a. Similarly, SOR 1.d and 1.f are found in Applicant's favor because his purchase of marijuana while he held a DOD security clearance is covered in SOR 1.c.

## **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 or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Elizabeth M. Matchinski  
Administrative Judge