



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



In the matter of:	)	
	)	
[Name Redacted]	)	ISCR Case No. 14-05913
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Eric Borgstrom, Esquire, Department Counsel  
For Applicant: *Pro se*

12/03/2015

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**Decision**

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HOGAN, Erin C., Administrative Judge:

Applicant submitted an application for a security clearance (e-QIP) on March 5, 2014. On April 30, 2015, 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 Guideline B, Foreign Influence. 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) implemented within the Department of Defense on September 1, 2006.

On June 9, 2015, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on July 1, 2015. I was assigned the case on July 28, 2015. On September 11, 2015, a Notice of Hearing was issued, scheduling the hearing for October 8, 2015. The hearing was held as scheduled. During the hearing, the Government offered two exhibits which were admitted without objection as Government (Gov) Exhibits 1 and 2. Government Exhibit 2 is the summary of Applicant's interview conducted by an investigator conducting his background investigation. Applicant clarified some facts in the summary. These clarifications were written on Gov 2. After the changes were made, Applicant stated it was an accurate accounting of what transpired during the interview and Gov 2 was

admitted. Applicant offered seven exhibits which were admitted as Applicant Exhibits (AE) A – G, without objection. The Government also requested administrative notice be taken of certain facts regarding the People’s Republic of China (PRC or China). The administrative notice document was marked as HE I. Applicant did not object to the administrative notice document. The transcript was received on October 16, 2015. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

### **Findings of Fact**

In his answer to the SOR, Applicant admits to all of the allegations in the SOR. (Item 3)

Applicant is a 42-year-old partner of a private equity investment firm. One of the firm’s investments includes a federal contractor that works on classified projects. Applicant is on the board of the federal contractor and requires a security clearance. This is his first time applying for a security clearance. He received his bachelor’s degree in May 1995. He is single, but is in a committed relationship. He and his partner are expecting their first child in December 2015. (Tr. 12-13, 24; Gov 1) (Note: The facts in this decision do not specifically describe employment, names of witnesses, or locations in order to protect Applicant and his family’s privacy. The cited sources contain more specific information.)

### **Guideline H – Drug Involvement**

Applicant admits to using marijuana from June 1991 to January 2014 with varying frequency, but no more than once or twice a year. There were some years when he did not use marijuana at all. His marijuana use consisted of using it when it was passed around at parties. He never purchased marijuana. He disclosed his marijuana use on his security clearance application, dated March 5, 2014, and discussed it during his background investigation interview. He listed his illegal drug abuse in response to section 23 on his security clearance application, which he certified on June 5, 2013. (Tr. 23-24, 37-38; Gov 1, section 23)

Applicant’s last use of marijuana occurred while on vacation in Jamaica in January 2014. He is not dependent on marijuana and does not intend to use marijuana in the future. For the past year and a half, he has not been in a social setting where marijuana was passed around. He recently moved in with his girlfriend and they are starting a family. His girlfriend does not use marijuana. Applicant’s focus is on his career and supporting his family. (Tr. 24, 38-40)

Applicant provided the report of a drug screen test he took on June 3, 2015. The result was negative. (AE B)

### **Guideline B – Foreign Influence**

The sole allegation under the Foreign Influence concern is that Applicant owned an apartment in China valued at \$600,000. Before discussing this allegation, some

background information is relevant. Applicant has one sibling. He and his brother were born and raised in the United States. Aside from a three-year period when his grandmother cared for him as an infant in Taiwan, Applicant has lived in the United States his entire life. Applicant was educated in the United States.(Tr. 12)

Applicant's parents were born in mainland China in the mid to late 1930s. His parents' families moved to Taiwan when the Communist party rose to power on mainland China. His parents immigrated to the United States in the 1960s. His parents are U.S. citizens. They built successful careers in accounting and nursing. Applicant testified that he owes all of his success to his family and the opportunities provided in the United States. All of his close friends and family are located in the United States. He has one paternal uncle who is a citizen and resident of Taiwan. He does not keep in close contact with him. He also has a second cousin, who is a U.S. citizen who lives in Taiwan and owns an apartment in Shanghai. He does not keep in regular contact with his second cousin. The last time he spoke with him was in 2007, which was the last time Applicant travelled to Shanghai, PRC. (Tr. 11-12; 25, 29)

In 2004, Applicant's brother worked for a U.S. accounting firm at their office located in Shanghai, PRC. Applicant's brother could not afford to purchase an apartment on his own, so Applicant and his brother purchased the apartment together. The cost of the apartment was \$344,000. The borrowed 70% of the purchase price and each invested \$51,500 towards the purchase. (Tr. 26; AE C)

In October 2005, Applicant's brother moved back to the United States. Applicant and his brother decided to keep the apartment in Shanghai as a rental investment property. Applicant's brother assumed responsibility for managing the property and uses local agents. Applicant has minimal involvement in managing the property. The apartment in Shanghai has appreciated in value. It is worth approximately \$1,032,000. There is \$160,000 remaining on the mortgage. Applicant's share in the property is \$436,000. (Tr. 26-27; AE C)

Applicant's investment portfolio is over \$5.2 million. He testified the current market value is \$6.2 million. His investments are diversified. His brother mentioned that he helped Applicant invest approximately \$768,064 in five residential properties and one commercial property in the United States. The loss of his investment in the Shanghai property would not have an overall significant impact on his overall financial well-being and he could not be subject to undue influence in order to protect his investment in the Shanghai property. He is willing to divest his interest in the Shanghai property. (Tr. 28-29, 44; AE C – AE G)

The co-managing partner of the private equity investment firm where Applicant works wrote a statement on Applicant's behalf. He has known and worked with Applicant since July 1995. Applicant has a long and distinguished career with the firm. The firm only retains and promotes the best performing and most promising team members. Applicant was promoted to partner in 2011. He has the utmost faith in Applicant and believes he would be a worthy recipient of a security clearance. Applicant has been an outstanding member of the firm for over 20 years. He has acted with integrity throughout his career. Applicant works with confidential information from public

and private companies on a daily basis. He treats confidential information with care and would handle classified information in the same manner. (AE A)

### **Administrative Notice – People’s Republic of China**

China has an authoritarian government, dominated by the Chinese Communist Party whose members hold almost all top government, police, and military positions. China has a poor human rights record, suppresses political dissent, and practices arbitrary arrest and detention, forced confessions, torture, and other prisoner mistreatment. China also monitors communications devices, such as telephones, telefaxes, and internet servers. (HE I)

China is the most aggressive country conducting espionage against the United States, focusing on obtaining information and technologies beneficial to China’s military modernization and economic development. The Chinese government encourages and rewards the action of private individuals who obtain technology on its behalf. China’s intelligence services as well as private companies and other entities frequently seek to exploit Chinese citizens or persons with family ties to China who can use their insider access to corporate networks to steal secrets. They also have offered financial inducements to U.S. government officials to encourage them to compromise classified information. Chinese attempts to collect U.S. technological and economic information represent a growing and persistent threat to U.S. economic security. (HE I)

### **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the 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 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 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 that 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).

### **Guideline H, Drug Involvement**

The security concern relating to the guideline 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.

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), and (2) inhalants and other similar substances;

Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The guideline notes several disqualifying conditions that could raise security concerns. I find the following drug involvement disqualifying conditions apply to Applicant’s case.

AG ¶ 25(a) any drug abuse; and

AG ¶ 25(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used marijuana with varying frequency from 1991 to January 2014. His use occurred in social settings, no more than once or twice per year. There were years when he did not use marijuana. He was not a habitual user of marijuana. However, AG ¶ 25(a) applies because he did use marijuana which falls under the Directive's definition of drug abuse. AG ¶ 25(c) also applies because Applicant possessed marijuana when he used it.

The Government's substantial evidence and Applicant's own admissions raise security concerns under Guideline H, Drug Involvement. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (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. September 22, 2005))

Guideline H also includes examples of conditions that could mitigate security concerns arising from drug involvement. The following mitigating conditions potentially apply to the Applicant's case:

AG ¶ 26(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 26(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.

AG ¶ 26(a) applies because more than 22 months have passed since Applicant's last illegal use of marijuana. He indicated that he stopped using marijuana in January 2014 because he wanted to focus on his future. Most of Applicant's illegal drug use occurred in social settings at parties where marijuana was being passed around. This occurred only once or twice a year. His use of marijuana occurred before he applied for a security clearance. He was forthcoming when disclosing his illegal drug use on his security clearance application and apologizes for his behavior. Applicant understands the security concern involving illegal drug use. It is unlikely that he will jeopardize his future by returning to illegal drug use.

AG ¶ 26(b) applies because Applicant has not used illegal drugs for close to two years. His use of marijuana did not occur on a habitual basis. His life circumstances have changed now that he and his girlfriend are starting a family. While he did not provide a signed statement of intent with automatic revocation of clearance for any violation, he did express his intent to never use marijuana again in response to questions in Section 23 of his security clearance application, in his response to the SOR and during the hearing. Applicant met his burden to mitigate the security concerns raised under Guideline H, Drug Involvement.

## Guideline B, 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.

The guideline indicates one condition that could raise a security concern and may be disqualifying under AG ¶ 7 in this case:

(e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

Applicant owns a fifty percent interest in an apartment in Shanghai, PRC. There is a potential for heightened risk because of the amount of the investment and the nature of the PRC government. Applicant’s ownership interest creates a risk of foreign pressure or attempted exploitation because there is always the possibility that Chinese agents or individuals operating in China may exploit the opportunity to obtain sensitive or classified information about the United States.

The Government produced substantial evidence raising a potentially disqualifying condition, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the Government. AG ¶¶ 7(e) applies and further inquiry is necessary about potential application of any mitigating conditions.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns. Of these conditions, two apply to Applicant’s case:

(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; 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.

Applicant was born, raised, and educated in the United States. Aside from three years living in Taiwan while an infant, Applicant has always lived in the United States. Applicant has a strong affection and sense of obligation to the United States. He is grateful for the opportunities the United States has provided him. All of his close family members are citizens of and reside in the United States.

Notwithstanding, the risk of coercion, persuasion, or duress are significantly greater because China has an authoritarian form of government and Applicant has a significant property interest in the Shanghai apartment. Although not insignificant, Applicant's investment in the Shanghai property is not his only major investment. His U.S. investment portfolio is worth several times more than the value of his ownership interest in the apartment located in the PRC. Applicant testified that the loss of this investment would not have a large impact on his overall financial wealth and has provided proof of his substantial U.S. holdings. His property interest in the Shanghai apartment is unlikely to result in a conflict and could not be used to influence, manipulate, or pressure him.

Security concerns raised under Foreign Influence are 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 relevant 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. In addition to Applicant's illegal drug use, I considered he fully disclosed his illegal drug use on his security clearance application. Close to two years have passed since his last use of marijuana. Applicant's marijuana use occurred before he applied for a security clearance. The level of marijuana use was not habitual, only one to two times per year. Applicant has no intent to use marijuana in the future and understands the consequences that additional illegal drug use may have on his ability to hold a security clearance. Applicant met his burden to overcome the security concerns raised under Drug Involvement.

Applicant's investment in an apartment located in Shanghai, PRC, raised a security concern under Foreign Influence. However, those concerns are mitigated because Applicant's investments in the United States are far greater than his interest in the Shanghai apartment. He initially purchased his interest in the apartment to help out his brother. When his brother moved back to the United States, they held onto to the property as an investment rental property. While the property has appreciated, Applicant states that he could not be unduly influenced in order to keep the property. I find his explanations credible.

### **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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraph 2.a:	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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ERIN C. HOGAN  
Administrative Judge