



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 14-05691
)	
Applicant for Security Clearance)	

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

02/16/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated security concerns raised by her past consumption of marijuana-infused brownies while on vacation overseas. She has not been involved with any illegal drugs in over two years and established her past drug experimentation is unlikely to be repeated. However, Applicant did not mitigate the heightened security concerns raised by her deep and strong connections to her relatives living in China. Clearance is denied.

History of the Case

On May 29, 2015, the Department of Defense (DOD) sent Applicant a Statement of Reasons (SOR), alleging that her past conduct and current circumstances raised security concerns under the drug involvement and foreign influence guidelines.¹ Applicant answered the SOR, admitting all the SOR allegations and requesting a hearing to establish her eligibility for access to classified information.

¹ This action was taken under Executive Order (E.O.) 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 implemented by DOD on September 1, 2006.

On September 11, 2015, Department Counsel notified the hearing office that the Government was ready to proceed. The hearing was scheduled, with the agreement of the parties, for November 12, 2015.²

At hearing, Department Counsel offered Applicant's security clearance application (SCA) and the summaries of her security clearance background interviews. These documents were marked and admitted into the record without objection as Exhibits 1 and 2, respectively. Applicant testified and offered Exhibit A. She timely submitted Exhibit B post-hearing. Both exhibits were admitted into the record without objection. The transcript (Tr.) was received on November 23, 2015, and the record closed on February 4, 2016.³

Administrative Notice: People's Republic of China (PRC or China)

Defense Office of Hearings and Appeals (DOHA) administrative judges may accept for administrative notice uncontroverted, easily verifiable facts regarding a foreign country from official U.S. Government reports. Additionally, the official position of relevant federal agencies or the pertinent statements of key U.S. Government officials regarding a foreign country may be appropriate for administrative notice. The party requesting administrative notice of a particular matter must provide the source document, either the pertinent parts or the full document, to allow the judge and, if necessary, the Appeal Board to assess the reliability, accuracy, and relevancy of any administratively noticed fact. *See generally*, ISCR Case No. 08-09480 (App. Bd. Mar. 17, 2010); ISCR Case No. 05-11292 (App. Bd. Apr. 12, 2007).

Department Counsel requested that I take administrative notice of certain matters regarding China. Department Counsel's request and the documents submitted in support of the request were collectively marked and included in the record as Exhibit 3. After reviewing the exhibit and conducting an independent review of the source documents cited in Department Counsel's request for administrative notice, I find that the following are the pertinent facts regarding China:

1. The PRC is an authoritarian state in which the Chinese Communist Party is the paramount authority;
2. China is actively engaged in intelligence gathering efforts against the United States; and
3. China has a poor human rights record, where the repression and coercion of individuals and groups is routine.

² Hearing Exhibit I is the case management order and scheduling correspondence.

³ See Hearing Exhibit V (remediating Department Counsel's late production of the request for administrative notice and supporting documentation by providing Applicant extensive time post-hearing to review and respond to the matters requested for administrative notice).

Findings of Fact

Applicant was born in China. Her parents and grandparents were intellectuals who were persecuted by the PRC government. Her parents met in a PRC labor camp. When Applicant was about two years old, her father was given permission to leave China to further his education in the United States on condition he return to China after completing his studies. Upon completing his studies, Applicant's father did not return to China. In retaliation, the PRC government would not allow Applicant or her mother to leave China. When Applicant was in grade school, her mother was able to leave China. Applicant was raised by her aunt and uncle until she was twelve. She was then allowed to leave China and joined her parents in the United States. Applicant credibly testified that because of this childhood experience she has "no love for the Chinese government." (Tr. at 48-52)

Applicant is a naturalized U.S. citizen. She attended and graduated from high school in the United States. She earned her undergraduate degree in the United States. She is married to a U.S. citizen and they have two young children, who were born in the United States. She started working for her current employer in 2013. Within a few short months, she was promoted into a management position. She supervises about 10 employees and contractors. She earns approximately \$114,000 annually. She is seeking a security clearance for the first time to contribute to the efforts of her employer in support of the U.S. Government. (Tr. at 46, 55-62; Ex. 1 – 2)

Applicant's manager writes that he personally selected Applicant over others for her current position because she is "focused, determined, and committed to her team's efforts." He further states that he has received "high praise" regarding Applicant's work from their customers. He fully supports her request for a security clearance. (Ex. B)

Applicant's aunt and uncle who raised her until age 12 and the cousin she grew up with are residents and citizens of China. Applicant described her current contact with them as limited and infrequent due to her busy schedule. Notwithstanding her inability to speak more frequently with them, Applicant acknowledged the deep love she has for them, especially her aunt and cousin. Applicant's uncle is retired and suffers from a debilitating illness. Her aunt is also retired and spends her time caring for her ill husband. Applicant's aunt worked for a PRC-owned entity and receives a pension from the PRC government. Applicant's cousin works for a private foreign company doing business in China. Applicant last visited China in 2001. She traveled to China to visit her aunt, uncle, and cousin. (Tr. at 48-55, 64-66, 88-91; Ex. 2)

Applicant's father-in-law, who is in seventies, was originally from the Ukraine and worked for the government before "the fall of communism." He is a U.S. citizen. He recently married a woman, who is about 40 years younger and is also originally from Ukraine. She recently received U.S. residency status. Applicant limits her social

interaction with her father-in-law and his new wife.⁴ In the past, Applicant's father-in-law traveled overseas and met with foreign nationals, to include government officials from Kyrgyzstan and South Korea, to further his far flung business ideas. Applicant is unaware whether these meetings resulted in any ongoing business relationships or contacts, but it appears highly unlikely. Applicant disclosed the information regarding her father-in-law and his foreign contacts on her SCA. Her father-in-law is currently retired and in bad health. He lives off social security and the financial support he receives from Applicant and her husband. Applicant's father-in-law and his new wife live in the United States. (Tr. at 62-67; Ex. 1; Ex. A)

Applicant, before starting her current job, traveled overseas on vacation with her husband. While on vacation, Applicant bought and consumed marijuana-infused brownies. Applicant believed that her purchase and use of marijuana while on vacation was either legal or tacitly approved by the local authorities. She would not have bought and used the marijuana if she knew it was illegal for U.S. citizens to engage in such conduct overseas. She has not used any other illegal drugs and last used marijuana over two years ago. She disclosed her past drug use on her SCA and fully discussed it during her security clearance background interviews. When Applicant started her current job, she was required to take a pre-employment drug test. Her current employer has a drug-free workplace policy. She credibly testified that she will not use illegal drugs in the future. (Tr. at 45-48, 86-88; Ex. 1 at 50-51; Ex. 2 at 4)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865, § 2.

When evaluating an applicant's eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

⁴ In her SCA, Applicant explained her relationship with her father-in-law's wife: "My father-in-law surprised us with his new wife on New Year's eve 2013. I have no choice but to let her in my house whenever she comes over. She doesn't speak much English so we don't really communicate." (Ex. 1 at 28)

Administrative Judges are responsible for ensuring that due process proceedings are conducted “in a fair, timely and orderly manner.” Directive ¶ E3.1.10. Judges make certain that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has held that “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline H, Drug Involvement

Illegal drug involvement is potentially a security concern because:

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. (AG ¶ 24)

Applicant’s past experimentation with marijuana raises the illegal drug involvement concern. It also raises the disqualifying conditions listed at AG ¶¶ 25(a) and 25(c). The guideline also sets forth a number of conditions that could mitigate the illegal drug involvement concern. I have considered all the mitigating conditions and only the following warrant further discussion:

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; and

AG ¶ 26(b): a demonstrated intent not to abuse any drugs in the future, such as . . . an appropriate period of abstinence.

Applicant only used marijuana while on vacation overseas in locations where she believed its use was either legal or sanctioned by the local authorities. She was not a federal contractor, federal employee, or a security clearance holder at the time. Her last involvement with marijuana was over two years ago. Since then, Applicant has been hired by an employer with a drug-free workplace policy who required her to take and pass a pre-employment drug screen. She is dedicated to her job and family, and would not put either at risk by being involved with marijuana or other illegal drugs. She voluntarily disclosed and freely discussed her past drug involvement during the course of the security clearance process. She credibly testified that she would not engage in similar behavior in the future. Based upon a complete and thorough review of the record evidence and after having the opportunity to observe Applicant's demeanor while testifying, I find that her past marijuana experimentation is unlikely to be repeated. Applicant's past drug involvement no longer raises a concern about her current reliability, trustworthiness, or good judgment. AG ¶¶ 26(a) and 26(b) apply. Applicant mitigated the security concerns raised by her past illegal drug involvement.

Guideline B, Foreign Influence

The SOR alleges that Applicant's connections to her aunt, uncle, and cousin in China raise the foreign influence security concern, which is explained at AG ¶ 6:⁵

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, 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.⁶

⁵ The SOR also alleges that Applicant's connection to her father-in-law and his new wife raises a Guideline B concern. In light of Applicant's admission, I have presumed that such familial connections raise a security concern but, as further explained below, find that said concern was mitigated.

⁶ ISCR Case No. 09-07565 at 3 (App. Bd. July 12, 2012) ("As the Supreme Court stated in *Egan*, a clearance adjudication may be based not only upon conduct but also upon circumstances unrelated to conduct, *such as the foreign residence of an applicant's close relatives.*") (emphasis added) (internal citation omitted).

An individual is not automatically disqualified from holding a security clearance because they have familial or other connections in a foreign country. Instead, in assessing an individual's vulnerability to foreign influence, an administrative judge must take into account the foreign government involved; its intelligence-gathering history; the country's human rights record; and other pertinent factors, not the least of which is the nature and strength of an applicant's connections in a foreign country.⁷

Applicant's connections to her relatives in China are significant and raise serious concerns about her susceptibility to adverse foreign influence. Applicant was raised by her aunt and uncle and grew up with her cousin. Her connection to these relatives is deep and strong. Notwithstanding Applicant's (understandable) contempt for the PRC government, those working on behalf of the PRC could attempt to leverage her relatives in China to influence her to disclose sensitive information. Of note, the PRC is known to aggressively target the United States for sensitive information and, as it is clear from Applicant's own testimony, the PRC government has no qualms in abusing its own people, to include young children, in pursuit of its aims. Thus, Applicant's connections to her family in China raise the foreign influence security concern and establish the following disqualifying conditions:

AG ¶ 7(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; and

AG ¶ 7(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.

The foreign influence guideline also sets forth a number of mitigating conditions. I have considered all the mitigating conditions, to include:

AG ¶ 8(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.;

AG ¶ 8(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

⁷ ISCR Case No. 14-03112 (App. Bd. Nov. 3, 2015); ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (setting forth factors an administrative judge must consider in foreign influence cases).

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;

AG ¶ 8(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; and

AG ¶ 8(e): the individual has promptly complied with existing agency requirements regarding the reporting of contacts . . . from a foreign country.⁸

Applicant did not mitigate the security concerns raised by her connections to and contact with her relatives in China. Applicant's limited opportunities now-a-days to speak more frequently with her relatives do not minimize the deep love and affection she has for them or the foreign influence risk posed by such familial ties to China. AG ¶¶ 8(a) and 8(c) do not apply.

I have considered Applicant's deep ties to the United States and her voluntary disclosure of her foreign connections during the course of the security clearance process. However, this favorable evidence is insufficient to mitigate the serious security concerns raised by her deep and strong connections to her relatives in China, as previously explained. Accordingly, I find that AG ¶¶ 8(b) and 8(e) partially apply, but are insufficient to mitigate the foreign influence security concern.⁹

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 an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).¹⁰ I hereby incorporate my Guideline B and H analysis.

⁸ Applicant mitigated the foreign influence concerns presumably raised by her connections to her father-in-law and his new wife. She rebutted the legal presumption that she is close to these individuals. Her father-in-law's foreign contacts resulted in no long-lasting business or other relationships raising a security concern. Applicant promptly reported the information regarding her father-in-law and his foreign contacts, and fully discussed them during her background investigation. AG ¶¶ 8(a) – 8(c), and 8(e) apply in full or in part, and mitigate the concerns raised by SOR 2.b – 2.d.

⁹ At the same time, I note that this finding is "not a comment on Applicant's patriotism but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved-one, such as a family member." ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).

¹⁰ The non-exhaustive list of factors are: (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.

Applicant presented a strong case in mitigation, to include her honesty and full cooperation throughout the security clearance process. However, as the Appeal Board recently stated:

[A] “clearance [decision] does not equate with passing judgment upon an individual’s character. Instead, it is only an attempt to predict [her] possible future behavior and to assess whether, under the compulsion of circumstances or for other reasons, [she] might compromise sensitive information.” Even a person of the highest character can experience circumstances under which [she] could be tempted to place the well-being of foreign relatives over the interests of the United States.¹¹

In light of the administratively noticed facts regarding the PRC, Applicant’s close connections to and contact with her relatives in China continue to raise a security concern. Consequently, I must resolve those concerns in favor of U.S. national security and deny her request for a security clearance.

Formal Findings

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

Paragraph 1, Guideline H (Drug Involvement)	FOR APPLICANT
Subparagraphs 1.a – 1.d:	For Applicant
Paragraph 2, Guideline B (Foreign Influence):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b – 2.d:	For Applicant

Conclusion

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

Francisco Mendez
Administrative Judge

¹¹ ISCR Case No. 14-03112 at 4 (App. Bd. Nov. 3, 2015), *quoting and citing, Hill v. Dept. of the Air Force*, 844 F. 2d 1407 at 1409 (10th Cir. 1988).