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**United States Department of Energy  
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing )  
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Filing Date: April 29, 2021 ) Case No.: PSH-21-0046  
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Issued: July 13, 2021

**Administrative Judge Decision**

Kimberly Jenkins-Chapman, Administrative Judge:

This Decision concerns the eligibility of XXXX XXXX (hereinafter referred to as “the Individual”) to hold an access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled “General Procedures for Determining Eligibility for Access to Classified Matter of Special Nuclear Material.”<sup>1</sup> As discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (Adjudicative Guidelines), I conclude that the Individual’s access authorization should not be granted.

**I. Background**

A DOE Contractor employs the Individual in a position that requires him to hold access authorization. The Individual signed and submitted a Questionnaire for National Security Positions (QNSP) on August 20, 2019, in which he answered questions pertaining to his foreign contacts, illicit drug use, and prior employment. Ex. 6. On September 13, 2019, the Individual underwent an Enhanced Subject Interview (ESI) with an Office of Personnel Management (OPM) investigator. Ex. 7. The Local Security Office (LSO), having unresolved questions, asked the Individual to complete a Letter of Interrogatory (LOI), which the Individual completed and submitted on April 29, 2020. Ex. 5. After receiving the Individual’s responses to the LOI, the LSO began the present administrative review proceeding by issuing a Notification Letter to the Individual, informing him that he was entitled to a hearing before an Administrative Judge in order

<sup>1</sup> Access to authorization is defined as “an administrative determination that an individual is eligible for access to classified mater or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access to authorization or security clearance

to resolve the substantial doubt regarding his eligibility to hold a security clearance. *See* 10 C.F.R. § 710.21.

The Individual requested a hearing, and the LSO forwarded the Individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Administrative Judge in this matter. At the hearing I convened pursuant to 10 C.F.R. § 710.25(d), (e), and (g), the Individual testified on his own behalf, presented the testimony of two other witnesses, and submitted four exhibits marked Exhibits A through D (hereinafter cited as "Ex."). *See* Transcript of Hearing, Case No. PSH-21-0046 (hereinafter cited as "Tr."). The DOE Counsel did not present the testimony of any witnesses and submitted seven exhibits, marked as Exhibits one through seven.

## **II. The Notification Letter and the Associated Security Concerns**

As indicated above, the Notification Letter informed the Individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for a security clearance. That information pertains to Guidelines B (Foreign Influence), E (Personal Conduct), and H (Drug Involvement and Substance Misuse).

Under Guideline B, "[f]oreign contacts and interests . . . are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest." Adjudicative Guidelines at ¶ 6. With respect to Guideline B, the LSO alleged that in the April 29, 2020 LOI, the Individual indicated that his fiancée, a citizen of another country and the Individual's cohabitant since 2015, has been unlawfully residing in the United States since 2009. Ex. 1 at 1. The Individual has also provided for her financially since June 2018. Ex 1 at 1.<sup>2</sup>

Under Guideline E, "[c]onduct involving questionable judgement, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information." Adjudicative Guidelines at ¶ 15. With respect to Guideline E, the LSO alleged that (1) in an April 29, 2020, LOI, the Individual admitted that his undocumented fiancée has been in the United States since 2009 and that she has resided with him since 2015; (2) the Individual admitted in his April 29, 2020, LOI that he used marijuana in May or June 2018, despite denying the use of illegal or controlled substances in the last seven years in his QNSP and during the ESI; and (3) In his August 29, 2019, QNSP, the Individual certified that he was neither terminated from nor left his 2018 employment by mutual agreement. However, the investigation revealed that the Individual had been terminated following a failed drug test and a later false urine sample. Ex. 1 at 1-2.

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<sup>2</sup> By the time of the hearing, the Individual had married his fiancée. Accordingly, the "Hearing" and "Analysis" sections of the decision refer to her as the Individual's wife.

The LSO cited Guideline H (Drug Involvement and Substance Misuse) of the Adjudicative Guidelines as another basis for revoking the Individual's security clearance. Ex. 1. Not only do illegal substances cause mental or physical impairment, but they also raise "questions about a person's ability or willingness to comply with laws, rules, and regulations." Adjudicative Guidelines ¶ 24. Under Guideline H, the LSO alleged that the Individual used marijuana in either May or June 2018, resulting in a failed random drug test administered by his employer. Ex. 1 at 2.

### **III. Regulatory Standards**

A DOE administrative review proceeding under Part 710 requires me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all of the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). The entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." Adjudicative Guidelines ¶ 2(a). The protection of the national security is the paramount consideration. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

The Individual must come forward at the hearing with evidence to convince the DOE that granting or restoring access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The Individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

### **IV. Findings of Fact**

To begin the security clearance process, the Individual signed and submitted a QNSP on August 20, 2019. Ex. 6. In his QNSP, the Individual indicated that he departed from prior employment in 2018 because the "insurance [was too] expensive [and] not enough work hours." Ex. 6 at 18. He also denied that he had either been terminated or left the position by mutual agreement. Ex. 6 at 18. In addition, the Individual noted in his QNSP that he began cohabitating with a foreign-born individual in April 2015 and provided her country of citizenship. Ex. 6 at 34. Further, the Individual denied any use of any illicit substances within the past seven years. Ex. 6 at 44.

In connection with the security clearance process, the Individual underwent an ESI with an OPM investigator on September 13, 2019. Ex. 7 at 72. On that occasion, the Individual did not disclose any information pertaining to past drug use. In a second meeting with an OPM investigator that took place on September 27, 2019, the Individual disclosed information that he had previously failed to discuss; namely, that in his previous employment, he had been placed on a “second chance program after failing a random drug test.” Ex. 7 at 76. He informed the OPM investigator that he had difficulty sleeping over the duration of his fiancée’s complicated pregnancy, and that he believed the marijuana would help him sleep. Ex. 7 at 76. As a result of testing positive for marijuana, the Individual was placed on a “second chance program” by his employer, wherein he would provide weekly urine samples to be tested. Tr. at 76. When one of the Individual’s urine samples was returned with an unacceptably low temperature, the Individual was notified that he had failed the “second chance program,” at which point the Individual also realized that it was no longer financially feasible for him to continue working his reduced hours. Ex. 7 at 76. Accordingly, he informed the OPM investigator that he separated from his employment under mutual agreement. Ex. 7 at 76.

The Individual also completed and signed an LOI on April 29, 2020. Ex. 5. The LOI states that the DOE was in possession of information indicating that the Individual had been terminated from a prior position after first testing positive for marijuana, then providing a false urine sample after being offered a “second chance” by his employer a week later. Ex. 5 at 1. To explain the situation, the Individual responded by stating that he was informed that his urine sample was “under temperature, which was an automatic fail[.]” Ex. 5 at 1. He denied ever providing false urine samples, using any other controlled substance or misusing prescription medications, and explained that he had used marijuana to help him sleep during his then-girlfriend’s difficult pregnancy in either May or June 2018. Ex. 5 at 1. When asked why he omitted his prior marijuana use from his QNSP, he denied omitting this information deliberately and stated that his work hours were the “main reason for leaving[.]” and, further, that he provided this information to the OPM investigator “right away” after remembering the incident, as it had “slipped [his] mind[.]” Ex. 5 at 4. Endeavoring to provide further information regarding his termination from prior employment, the Individual indicated that it was his understanding he left that position by mutual agreement and that he now understands he should have listed this event in his QNSP. Ex. 5 at 5. He denied deliberately omitting, concealing, or falsifying this information on the QNSP. Ex. 5 at 5.

In his LOI, the Individual also stated that he had met his fiancée in April 2015, that they began cohabitating the same month, and that he became aware of her immigration status “[a]fter a month of [them] being together.” Ex. 5 at 8. A citizen of another country, his fiancée had been living in the United States since 2009, and he denied having ever taken any action to conceal her detection by authorities or providing “false statements or documentation regarding [her] immigration status.” Ex. 5 at 8-9. The Individual also acknowledged that he had been financially supporting his fiancée since June 2018. Ex. 5 at 9. He stated that he was “[i]n the process of getting married” so that his fiancée can “obtain legal status” and that this plan was previously unfeasible due to the Individual’s other financial obligations. Ex. 5 at 9-10.

## **Individual's Exhibits**

As part of the exhibits submitted, the Individual provided his request for an administrative hearing, which included written responses to the concerns provided in the Notification Letter. Ex. A. In his responses, he clarified that he married his fiancée on November 19, 2020, and confirmed that they had been residing together since April 2015, that he had been providing for her financially since 2018, and that she had been continuously living in the United States since 2009. Ex. A at 1. In his responses, the Individual also admitted that he should have disclosed his past drug use on the QNSP and to the OPM Investigator, but stated that he had panicked, as he “[did not] want anything bad to be on [his] QNSP or with [his] interview[.]” Ex. A at 1. He did acknowledge this mistake and stated that he “should have been honest from the beginning.” Ex. A at 1. The Individual also admitted that he should have listed his prior termination with a previous employer. He provided the same explanation for failing to provide this information on his QNSP, stating that he “panicked and [did not] want anything bad to show up on [his] QNSP[.]”. Ex. A at 2.

A letter from an immigration attorney confirms that the Individual and his wife have begun the immigration process, and that “their immigration visa application is under review.” Ex. B at 1.

Two character witnesses, the Individual's current and former colleague, submitted written statements of support. Ex. C; Ex. D. The statements indicate that the Individual “has proven himself to be [] trustworthy[,]” and further, that the Individual expressed remorse over the actions he took during the clearance process. Ex. C; Ex. D. The Individual was also described as “genuine,” “dependable,” and someone “with strong morals and values.” Ex. C.

## **The Hearing**

The Individual's wife testified that she first met the Individual in 2015, and the Individual only became aware of her immigration status after they began cohabitating, which was within a week of their meeting. Tr. at 12-13, 16-17. The couple sought to engage the services of an immigration attorney after their marriage in November 2020. Tr. at 14, 17-18. Their search for an immigration attorney was delayed, as the Individual was still in the process of divorcing his first wife. Tr. at 18. In the context of the security clearance process, the Individual had been honest with her about his duty to disclose her immigration status, and he had disclosed everything she had shared with him at that time. Tr. at 19.

The Individual's wife testified that she remains in contact with her brother and sister in her home country and that neither her brother nor her sister work for the government or defense industry. Tr. at 13. Regarding her employment status, the Individual's wife confirmed that she has not worked in several years after enduring a difficult pregnancy with the couple's child but stated that she had paid her taxes while she was employed. Tr. 14-15.

The Individual's wife described the Individual as her “better half” and hardworking. Tr. 15. She testified that “when that incident happen[ed] with the drug use, it was . . . a setback for us[.]” Tr. at 15. Regarding their circumstances after the Individual's termination, she described the Individual as being “scared for our future,” but described the Individual's personal growth since then, and confirmed that it was the only time he had smoked marijuana. Tr. at 15, 20-21. The

Individual's wife stated that, while she was pregnant with their child, she suffered circumstances that resulted in early labor and a hospital visit. Tr. at 19-20. She also testified that the difficulties she suffered during the pregnancy greatly upset the couple, resulting in the Individual's marijuana use. Tr. at 20.

The Individual's coworker, who has known the Individual for approximately a year-and-a-half and interacts with him daily, testified to the Individual's trustworthiness, describing him as "a good kid." Tr. at 32-33. She also testified to the Individual's personal growth, indicating that he has taken on increasing responsibilities, is helpful to his coworkers, and "does beautiful work." Tr. at 33-36.

The Individual confirmed his wife's testimony, stating that they met in April 2015 and moved in with each other shortly thereafter, at which time, she informed him of her immigration status. Tr. at 41-42. With regard to her status, he stated that "[he] fell in love with her, and [he] loved her, and that part of it didn't matter to [him]." Tr. at 42. He did not, at that time, encourage her to pursue the naturalization process because their relationship had just begun. Tr. at 42. Additionally, because he grew up close to the border of her home country, interacting with individuals without "legal status" was "normal." Tr. at 42-43.

The Individual's divorce from his first wife was finalized in approximately October 2020, and he confirmed that the Notification Letter was the impetus to finalizing his divorce and marrying his current wife. Tr. at 44-45. He also "[did not] want to wait any longer" to marry. Tr. at 46. The couple sought to engage the services of an immigration attorney soon after their marriage, as the possibility of deportation was also a concern. Tr. at 46-47.

The Individual confirmed that he understood his obligation to provide honest and truthful answers on his QNSP and to the OPM investigator, but admitted that he did not answer some questions truthfully because he "[did not] want to mess up [his] situation or the opportunities" before him with his current employer. Tr. at 48-49. As he felt that his current employment was a redemption of sorts after the marijuana incident and his subsequent termination, he was concerned that disclosing some facts would result in him losing a good opportunity. Tr. at 49-52. When asked about his LOI response with regard to his stated reason for leaving his prior employer, the Individual admitted that he was terminated from that position as a result of testing positive for marijuana and that he did not leave by mutual agreement. Tr. at 52. However, he did qualify this response by testifying that he was struggling to provide for his family at that time. Tr. at 53. He stated that at the time he underwent his first meeting with the OPM investigator, he did not completely understand the clearance process, and it was only after he began his employment with the contractor that he understood his obligation to provide complete and truthful answers. Tr. at 55. Accordingly, he made subsequent disclosures pertaining to the marijuana incident upon his second meeting with the OPM investigator. Tr. at 55-56. The Individual stated that he understands that "[b]eing 100 percent truthful is very important" and that he would never withhold negative information again." Tr. at 56.

The Individual also denied any further use of marijuana and stated that, although he has faced stressful situations since his wife's difficult pregnancy, he has coped with them by sharing his

feelings rather than engaging in marijuana use. Tr. at 59-60. At the time of his marijuana use, he was under the impression that it would help him sleep but admitted that he “[did not] like it.” Tr. at 61.

## V. Analysis

### Guideline B

The Adjudicative Guidelines provide that an individual may mitigate security concerns under Guideline B if:

- (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 United States;
- (b) There is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest[.]

Adjudicative Guidelines at ¶ 8(a)-(b).<sup>3</sup>

OHA has previously examined and evaluated the security concerns associated with an Individual's contact with an undocumented immigrant spouse under Guideline B. The primary concern that is articulated in these decisions pertains to the possibility of blackmail; specifically, whether the Individual can be blackmailed into disclosing classified information in order to prevent the blackmailer from alerting the authorities to the presence of an Individual's undocumented spouse.<sup>4</sup>

It is clear the Individual loves his wife and is committed to his family. Based on the record before me, I am convinced that the Individual's bonds of affection to his wife and his wife's immigration status do not leave him open to the threat of blackmail. As an initial matter, the Individual did not attempt to hide his wife's immigration status, providing as much information as he had in a forthright manner, knowing that this information would be reviewed and assessed by appropriate investigators. I believe this is a strong indication the Individual has generally accepted the possibility that his wife can be deported, and the acknowledgement of this fact makes him less susceptible to being blackmailed with the potential deportation of his wife.

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<sup>3</sup> The remainder of the mitigating factors under Guideline B are not applicable to this matter. *See* Guideline B at ¶ 8(c)-(f).

<sup>4</sup> *See Personnel Security Hearing*, PSH-18-0070 (2019), citing *Personnel Security Hearing*, PSH-16-0055 at 3 (2016) and *Personnel Security Hearing*, PSH-17-0073 at 5 (2018). Both cited cases discuss the Administrative Judge's consideration of whether the undocumented status of the Individual's spouse would make the Individual susceptible to blackmail or coercion.

Further, the couple has retained an immigration attorney, who at the time of the hearing, was preparing the necessary paperwork and forms to submit to the appropriate authorities. Upon the submission of the visa application, the government will be notified of the Individual's wife's status, significantly reducing any chance the Individual can be blackmailed with the threat of his wife's deportation.<sup>5</sup>

For the foregoing reasons, I find that it is unlikely that the Individual will be susceptible to blackmail or coercion due to his spouse's undocumented immigration status. Accordingly, the Individual has sufficiently resolved the Guideline B concerns.

### **Guideline E**

An Individual may mitigate security concerns under Guideline E if he "made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts[.]" Guideline E at ¶ 17(a). The Individual submitted a QNSP devoid of any mention of his past drug use and 2018 termination. Approximately one month later, he underwent an ESI with an OPM investigator while under oath, but he continued to fail to disclose the aforementioned information. Although he was notified of his duty to provide truthful responses both in his QNSP and at the start of the ESI, he only opted to disclose the information he had omitted from his QNSP upon his second meeting with the OPM investigator. Further, the Individual only admitted he had been terminated from his prior employment in 2018 after he requested a hearing. While the Individual eventually came forth with the information, I cannot conclude his efforts to disclose the omissions were either prompt or in good faith.

An Individual may also mitigate Guideline E concerns if he can show that "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment[.]" Guideline E at ¶ 17(a). In the statement he attached to his request for a hearing, the Individual acknowledged that he should have disclosed the information he omitted in his QNSP, but explained that he "did panic and [did not] want anything bad to be on [his] QNSP or with [his] interview, as this was [his] first opportunity for a job with the DOE [and] the best opportunity of [his] life." Ex. A at 1. The knowing omissions on the Individual's QNSP and his continued failure to come forth and disclose the omissions during the ESI not only evidences poor judgement, but also confirms that the omissions were not infrequent. Further, the duty to disclose does not begin or end at the QNSP or the ESI, but rather, continues so long as an Individual holds a clearance. Other than the Individual's eventual acknowledgement that he was under a duty to provide truthful information, I have no assurance that the Individual will do so at a future time. Accordingly, based on the foregoing and the Individual's reasoning behind his omissions, I cannot find that his omissions occurred under unique circumstances or that they are unlikely to recur. Accordingly, the Individual has not resolved Guideline E concerns.

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<sup>5</sup> See *Personnel Security Hearing*, PSH-17-0073 at 5, in which the Administrative Judge states in his analysis that "[a]s soon as the [naturalization] process is initiated, she will have formally made DHS aware of her presence in the United States, which should reduce any security concerns that the individual could be blackmailed. If his wife is successful in obtaining legal status, the security concerns under Guideline B will be further mitigated."



## **Guideline H**

The Adjudicative Guidelines provide that an individual may mitigate security concerns under Guideline H if the Individual can show that 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. Guideline H at ¶ 26(a).<sup>6</sup> I am persuaded by the Individual's testimony that he had not used or consumed any illicit substances since approximately May or June 2018 prior to his termination from previous employment. The record is bereft of any subsequent positive drug tests or any witness evidence suggesting the Individual either used or stated he used illicit substances since 2018. Further, the circumstances under which the Individual consumed marijuana were unique in that it occurred at a time the Individual's wife was facing serious complications in her pregnancy, causing the couple great emotional distress. As the evidence indicates the Individual's marijuana use was infrequent, occurred approximately three years ago, and happened under such circumstances to suggest it is unlikely to recur, I am convinced that the Individual has resolved the Guideline H concerns.

## **VI. Conclusion**

Upon consideration of the entire record in this case, I find that there was evidence that raised concerns regarding the Individual's eligibility for a security clearance under Guidelines B, E, and H of the Adjudicative Guidelines. I further find that the Individual has not succeeded in fully resolving all of those concerns. Therefore, I cannot conclude that granting DOE access authorization to the Individual "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the DOE should not grant access authorization to the Individual at this time.

Kimberly Jenkins-Chapman  
Administrative Judge  
Office of Hearings and Appeals

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<sup>6</sup> The remainder of the mitigating factors under Guideline H are not applicable to this matter. *See* Guideline H at ¶ (b)-(d).