

SECURITY CLEARANCE DENIED: THE MOST COMMON PITFALLS FOR SECURITY CLEARANCE APPLICATIONS

By: Ziran Zhang

"There is a strong presumption against granting a security clearance."
Dorfmont v. Brown, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S.
905 (1991).

A security clearance refers to a formal determination by an executive branch agency that a person is permitted to access classified information. Because security clearance law deals with sensitive issues of national security, the executive branch has broad discretion in deciding who can have a security clearance. The quote above is an accurate reflection of the law: any doubt about a person's eligibility for security clearance is resolved in favor of national security.

I. Who Needs a Security Clearance?

Anyone who works in a position that requires access to classified information will need a security clearance. For a sense of what kinds of information may be classified, one can look to Executive Order 13526. Broadly speaking, there are three categories of protected information: (1) military and intelligence information; (2) scientific, technological, or economic matters relating to national security; and (3) information about foreign relations and foreign governments.

In general, almost all military personnel and defense contractors will need a security clearance. Lawyers may also need a security clearance if they plan to work for: the DOJ, any U.S. Attorney's Office, the Department of Defense, the Department of Homeland Security, the Nuclear Regulatory Commission, the Federal Reserve, and so on. A 2011 report from the Office of the Director of National Intelligence estimates that there are approximately 4.2 million individuals with security clearances in the United States. While the majority of the security clearances are held by government employees, more than 1 million clearances are held by private contractors. Thus, even someone who has no intention of working for the federal government may still require a security clearance as a prerequisite for his or her job.

II. What Kinds of Security Clearances are Out There?

Most classified information fall into three security levels. From most restrictive to least restrictive, they are: top secret, secret, and confidential. Having access at one level also grants access to all information below that level. For example, someone with a secret clearance can access secret and confidential information, but not top secret information. There are also access controls that go beyond the usual top secret/secret/confidential trichotomy, known as SCIs and SAPs, although they will not be discussed here.

The application process and the legal standard is the same regardless of the security clearance sought. Thus, an applicant for a confidential level access must still demonstrate the same level of trustworthiness and reliability as an applicant for top secret level access. If an applicant is found ineligible for a top secret clearance, then he is also ineligible for a secret or confidential clearance. The principal difference between the different clearance levels is in the thoroughness of the background investigation, and the period of time before reinvestigation.

For secret and confidential security clearances, the standard investigation consists of running the applicant's name and fingerprint record through the FBI database, a review of all applicable government records, a credit check, and written inquiries to schools, employers, and local law enforcement. For top secret clearance, the investigation will also include face-to-face interviews with the applicant, current and former neighbors, spouse(s), teachers, employers, and other individuals. The purpose of these interviews is to develop derogatory information that may justify denying a security clearance. Some agencies, such as the CIA and NSA, also require a polygraph examination and psychological evaluation.

Finally, the government conducts periodic reinvestigations for anyone seeking to maintain a security clearance. For a confidential clearance, the reinvestigation period is every 15 years; for secret, it is 10 years; and for top secret, every 5 years. The reinvestigation generally will only cover the period of time since the last investigation, but is otherwise the same as the initial investigation.

III. How Does Someone Get a Security Clearance?

A person cannot apply for a security clearance until he or she is actually employed in a position requiring access to classified information. The employer must sponsor the application. The process for obtaining a security clearances begins with filling out a 127-page questionnaire (the SF-86). That questionnaire, along with a fingerprint card and release forms, are turned over to the employer, who then forwards the package to a Central Adjudication Facility for processing.

The CAF conducts the investigation and makes an initial determination of whether to grant the security clearance. Typically, the CAF will grant the security clearance only if there is no, or minimal, derogatory information in the applicant's file. If there is derogatory information (e.g., a recent criminal conviction) precluding an immediate clearance, the CAF will issue a Statement of Reasons to the applicant explaining why he or she is being denied a security clearance. The applicant then has 20 days to file a response and request a hearing before an Administrative Judge.

Once the applicant's case is docketed for a hearing, the applicant can begin conducting discovery. Depending on whether the case involves a private contractor or a government employee, the government may or may not be represented by a Department Counsel. At the hearing before the Administrative Judge, the applicant can present witnesses and documentary evidence, make opening and closing arguments, and be represented by counsel. Once the hearing is complete, the AJ will render a written decision called either an initial determination (in a private contractor case) or a recommended decision (in a government employee case).

In private contractor cases, either the government or the contractor can appeal an adverse decision to the DOHA Appeals Board. In government employee cases, because the AJ's decision is merely a recommendation, there is no right of appeal. Instead, a separate Appeals Board reviews the AJ's recommendation and then makes a final decision in the matter.

Decisions by the Appeal Board are not appealable any further. No other agency or court has jurisdiction to review the merits of a security clearance decision. In addition, once the applicant has been denied a security clearance, there is a one year cool-down period before he or she can apply again for a security clearance.

IV. Who Makes the Law?

Security clearance law is a unique field. The courts and the legislature is mostly silent in this field. Instead, almost all of the law come from Executive Orders, DOD Directives, and DOD Regulations. Decisions by the DOHA Appeals Board serves the functional equivalent of case law, creating precedents by interpreting and applying the Directives and Regulations.

The procedural aspects of security clearance law are governed by DOD Directives 5200.2 and 5220.6. The first directive applies to both federal employees and private contractors, while the second directive applies only to private contractors. The DOD has also promulgated regulations to implement both Directives, known respectively as DOD

Regulation 5200.2-R and 5220.6-R. Together, these directives and regulations form the procedural back bone of security clearance decisions.

The substantive law comes from the Adjudicative Guidelines. These Guidelines set forth the reasons for which a person can be denied a security clearance (called disqualifying conditions), as well as the reasons for overcoming specific disqualifications (called mitigating factors).

V. Who is Eligible for a Security Clearance?

Anyone who is a United States citizen and employed in a position requiring access to confidential information is eligible to receive a security clearance, so long as he or she is not disqualified under any of the Adjudicative Guidelines.

In security clearance cases, the administrative judge is required to decide whether granting a security clearance to the individual seeking access is "clearly consistent with the national security interest." To arrive at this conclusion, the administrative judge uses the "whole-person" concept. This means that disqualifying conditions and mitigating factors are evaluated cumulatively, rather than piece-meal. Although the government bears the burden of production to show that specific disqualifying conditions apply, any doubt about eligibility is resolved *against* the applicant (i.e., applicant bears burden of persuasion).

The Adjudicative Guidelines provide the substantive rules for decision. Each Guideline lists a specific "concern" and then enumerates examples of "disqualifying conditions" as well as "mitigating factors." If there is an applicable disqualifying condition under any of the individual Guidelines, then the person will not be granted a security clearance unless there is evidence of mitigation.

There are a total of 13 different Adjudicative Guidelines, labeled A through M as follows:

- A. Allegiance to the United States
- B. Foreign Influence
- C. Foreign Preference
- D. Sexual Behavior
- E. Personal Conduct
- F. Financial Considerations
- G. Alcohol Consumption
- H. Drug Involvement
- I. Psychological Conditions
- J. Criminal Conduct

- K. Handling Protected Information
- L. Outside Activities
- M. Use of Information Technology Systems

Although the guidelines appear diverse (and the list will only grow as time goes on), they all relate to three broad areas of concern: loyalty, reliability, and vulnerability. In thinking about how specific factors impact the security clearance application, and what mitigating conditions may apply, it is helpful to think of the issues in terms of these three questions

Loyalty

The loyalty question concerns itself with whether an individual has undivided loyalty to the United States. A person who is not loyal to the United States, or who has divided loyalties between two countries, cannot be trusted to protect classified information. Guidelines A, B, C, and L all implicate issues relating to an individual's loyalty.

Under Guideline A, a person can be disqualified for any conduct that calls his or her allegiance into question. Disqualifying conditions include exhibiting sympathy for an enemy organization (e.g., Al Qaeda), participating in certain organizations (e.g., the communist party), or advocating for the overthrow of the U.S. government.

Under Guideline B, a person can be disqualified for having regular contact with foreign family members, sharing living quarters with foreign citizens, or owning substantial assets in a foreign country. Under Guideline C, a person can be disqualified for acquiring foreign citizenship, serving in a foreign military, or owning a foreign passport.

Finally, Guideline L, although not directly a loyalty question, implicates loyalty because it disqualifies anyone whose outside employment or service creates a conflict of interest.

Because these Guidelines deal with loyalty, mitigating conditions requires the individual to demonstrate that despite the adverse facts, he or she remains loyal to the United States. For example, if the disqualifying condition is foreign relatives, a mitigating condition would be if the person has minimal to no contact with the foreign relatives, or has deep and long-standing ties with relatives or friends in the United States.

Reliability

Reliability refers to an individual's trustworthiness and consistency of conduct. Individuals who demonstrate a lack of honesty, poor judgment, or inability to comply with rules and regulations cannot reliability handle classified information, even if they are otherwise loyal and not vulnerable to coercion.

In many ways, the reliability question is the most important question in security clearance law. Guidelines E, F, G, H, I, J, K, and M directly implicate reliability. Guidelines D and F at least touch upon reliability as a secondary concern.

Guideline E is a unique Guideline. Typically, Guideline E cases arise when a person omits something on his or her security questionnaire (the 127 page Form SF-86), and subsequent investigation reveals the omission. Where the disqualifying condition is the result of an omission or a misrepresentation on the security questionnaire, the individual must demonstrate that the misrepresentation or omission was inadvertent or at least not culpable (for example, that the individual relied on the erroneous advice of counsel). Furthermore, the individual must promptly correct the omission or misrepresentation once he becomes aware of the issue. Guideline E also serves as a "catch-all" provision, by allowing the AJ to disqualify any individual for factors that do not necessary require disqualification under any of the other Guidelines.

Guidelines G, H, I, and J deal with problems relating to alcohol, drugs, psychological illness, and criminal conduct. With the exception of Guideline I, these guidelines frequently overlap. For example, a DUI conviction can be considered a disqualifying factor under either Guideline G or Guideline J, and a marijuana conviction can be disqualifying under Guideline H or Guideline J. It is important to keep in mind that the Guidelines are concerned with the underlying conduct, not the formal outcome of the criminal charge. Thus, the Guidelines may apply even if there was no criminal prosecution.

Guideline K cases typically involve negligent or deliberate disclosure of protected information. The protected information does not have to be classified. Guideline K cases can arise in the context of a company employee who discloses the company's trade secrets, or a lawyer who breaches a client's confidence. Guideline M cases deal specifically with information technology systems. An employee who misused company computer, such as by accessing porn at work or downloading copyrighted content, may be disqualified under Guideline M.

Finally, while Guidelines D and F are primarily concerned with an individual's vulnerability to coercion or pressure, they also relate to an individual's reliability to the extent sexual misconduct or financial irresponsibility demonstrates an inability to comply with laws and regulations.

Where the disqualifying conditions call into question an individual's reliability, the mitigating factor generally requires the applicant to demonstrate that he or she has sufficiently "reformed." Thus, an AJ will look to whether the conduct was recent (1-3 years is usually considered recent), whether the problems are recurrent, and whether the individual has undergone therapy, counseling, or treatment for the problem.

Vulnerability

An individual who is loyal and reliable may nevertheless live under certain circumstances such that he or she is more easily susceptible to manipulation or coercion than the average person. In such cases, the government will deny a security clearance based on the fear that the individual may be blackmailed into disclosing classified information.

Guideline B, which was discussed earlier in the section on loyalty, is also concerned with vulnerability. From the government's perspective, one of the problems with maintaining a close relationship with foreign relatives, or owning assets in a foreign country (besides a risk of divided loyalties) is the danger that the foreign contacts may subject the person to coercion. This concern overshadows the issue of loyalty when the foreign country is hostile to the United States, has a poor human rights record, or is known to engage in espionage against the United States.

Guidelines D and F, discussed earlier in the section on reliability, can also be considered in the context of vulnerability.

Where Guideline D overlaps with Guideline J (e.g., where the sexual conduct constitutes a crime), the reliability concerns are paramount. But where there is no overlap, the vulnerability concern is usually the most prominent. For example, under Guideline D, the government can deny a security clearance to a gay person if he has not revealed this fact to his family members and close associates. Similarly, while adultery is no longer a crime, the government can deny a security clearance on the basis of adultery if the person has not disclosed this fact to his spouse, family members, or close associates. In these cases, the person is thought to be more easily subject to exploitation by others who know about the person's secrets. To mitigate the vulnerability concern, the individual must publicly disclose the underlying facts, such that the sexual conduct is no longer a basis for coercion.

Guideline F cases arise when the applicant has a very high debt to income ratio, or has a history of not paying debts. The concern with irresponsible spending habits is that someone who is eventually financially overextended may risk selling classified information to generate funds. Mitigating factors under Guideline F usually require the person to be on a debt repayment plan, and demonstrate a period of consistent and successful efforts at repaying the debts.

VI. Conclusion: Begin Preparations Early

Although you cannot apply for a security clearance until you are actually employed in a position requiring such a clearance, there are good reasons to plan ahead. For example,

many of the mitigating factors, such as participation in an alcohol treatment program, payment of debts, or restitution to victims, take time and effort to complete. Moreover, having an awareness of the types of issues that have security clearance implications can help you plan ahead when deciding on how to live your life.

As a general rule, if none of the Guidelines apply to you at the time of your application, then you will probably be able to obtain a security clearance simply by completing the security questionnaire accurately. Indeed, the majority of security clearances are granted this way. If one or more of the Guidelines do apply, however, it is a good idea to begin on developing the mitigating conditions that would cure the cause for disqualification. Finally, it is always a good idea to seek a hearing before an administrative judge when faced with a security clearance denial or revocation.

VII. About The Authors

This publication is created by Burnham & Gorokhov, PLLC. Burnham & Gorokhov is a law firm in Washington, DC that focuses on criminal defense, civil litigation, and appeals. Because criminal convictions carry negative implications for a person's security clearance, our practice also includes security clearance adjudications.

Burnham & Gorokhov, PLLC
1724 20th Street NW, Suite 304
Washington, D.C. 20009
Tel: (202) 386-6920
Fax: (267) 390-7587
www.burnhamgorokhov.com