DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 07-00434
SSN:	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: Elizabeth L. Newman, Esquire

March 24, 2008

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate the foreign preference security concerns arising from her exercise of dual citizenship with Belgium. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted her Security Clearance Application (SF 86) on May 4, 2005. On September 24, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government's security concerns under Guideline C (Foreign Preference) and B (Foreign Influence).[1]

[1] 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on October 12, 2007, and requested a hearing before an Administrative Judge. The case was assigned to me on December 6, 2007. Department Counsel contacted Applicant in Belgium to propose hearing dates. Applicant requested her hearing be conducted via video teleconference (VTC), and a hearing date of February 11, 2008 (Tr. 9-10). DOHA issued a notice of hearing on January 16, 2008.

The hearing was convened as scheduled on February 11, 2008. Applicant and her witness appeared through VTC from a facility in Brussels, Belgium. Department Counsel, Applicant's counsel, and I were located in Arlington, Virginia. The government offered exhibits (GE) 1 through 6, which were admitted without objection, except for the third page of GE 6, which was not admitted (Tr. 14). Applicant testified on her own behalf, and presented the testimony of one witness and one exhibit, marked AE 1, which was received without objection. DOHA received the transcript of the hearing (Tr.) on February 20, 2008.

Procedural Ruling

By motion dated November 28, 2007, the Government indicated it would not pursue the Guideline B concerns alleged in the SOR, and that it would not oppose findings for the Applicant. Based on the motion, Applicant mitigated the Guideline B concerns with her answers to the SOR and other information provided. My decision will address only the Guideline C concerns.

Findings of Fact

In her Answers to the SOR, Applicant admitted SOR ¶¶ 1.a through 1.c with explanations. Her admissions are incorporated herein as findings of fact. After a thorough review of all evidence of record, I make the following additional findings of fact.

Applicant is 40 years old. She has worked for the North Atlantic Treaty Organization (NATO) at the professional/managerial level since March 2006 (GE 3, Tr. 37). She has had interim access to NATO classified information for approximately two years (Tr. 28-29, 55). There is no evidence that Applicant has ever compromised classified information or that she has failed to comply with rules and regulations concerning the protection of classified information.

Applicant's parents are Jewish holocaust survivors (GE 3). After World War II, her father was sent from Germany to England where he grew up. He came to the United States in 1953 to attend college, and became a U.S. naturalized citizen in 1975. Her mother immigrated from Lithuania to Canada where she grew up and became a Canadian citizen. She moved to the United States in 1959, and became a U.S. naturalized citizen in 1975. Her parents married that same year. Applicant was born in the United States in 1968. In 1986, when Applicant was eight years old, her father took a job in Canada, and the whole family immigrated to Canada. Applicant became a Canadian citizen, and attended high school and her first year of college in Canada (Tr.

23). Her parents are dual citizens of the United States and Canada and currently reside in Canada.

In 1987, Applicant married a Belgian citizen and moved to Belgium with her husband. She automatically acquired her Belgian citizenship as a result of her marriage. Except for a period of around seven months from 1999 to 2001, when Applicant was working for a U.S. company in the United States, Applicant has been a Belgium resident since 1987 (Tr. 23-24). As a Belgium citizen, Applicant is required by law to vote in Belgian elections. She has voted in five Belgian elections (GE 2). She felt compelled to vote in light of Belgian law which makes voting mandatory.

Applicant and her husband have five Belgian born children; ages 17, 14, 10, 5, and a three-month-old baby (Tr. 25). Her four older children received their U.S. citizenship in July 2007 (Tr. 42-46). Applicant was not able to transfer her U.S. citizenship to her children because she did not live in the United States for a period of two years after age 14. Her children acquired their U.S. citizenship through their grandparents. She is in the process of acquiring U.S. citizenship for her new baby.

Applicant completed the last three years of her bachelor's degree in mathematics in Belgium (Tr. 27-28). Additionally, she received a master's degree in computer science in 1995, a doctorate degree (Ph.D.) in mathematics and theoretical computer science in 2000, and a master's in business administration in 2006. Applicant attended Belgian universities as a Belgian national and received student grants (Tr. 48-51).

Since 1987, Applicant has worked sporadically for private companies, a foreign company, and as a university research assistant (GE 1). As a Belgian citizen, she is entitled to and has received social welfare benefits such as healthcare, unemployment benefits, child allowances, and educational grants. She is also entitled to a small government pension (Tr. 48). Applicant and her husband own no property either in the United States or Belgium (Tr. 47). She claimed they never intended to live permanently in Belgium and never purchased a home (Tr. 57). In 1999, Applicant took a job in the United States with the idea of moving permanently to the United States, however, her husband did not get a job and they had to return to Belgium. Thereafter, the opportunity never presented itself again (Tr. 58-59). Applicant owns bank accounts both in Belgium and in the United States. She also voted in U.S. elections in 1996 and 2006, and is registered to vote in the 2008 U.S. Presidential election.

In 2005, when Applicant applied for her NATO job, she was informed about the security clearance concerns raised by having Canadian and Belgium passports and was asked to surrender them. She surrendered both passports in November 2005 (GEs 5, 6). Applicant claimed she was not informed that her dual citizenship, voting in Belgium, or otherwise receiving social welfare benefits from Belgium (exercising her dual citizenship) could raise security concerns. Applicant became aware of these security concerns for the first time when she received the pending SOR in September 2007 (Tr. 35-36, 40). Notwithstanding, Applicant was interviewed in September 2006 by a government investigator concerning possible foreign preference and foreign influence

security concerns. The investigator noted in his summary of Applicant's interview that "she [was] not ready to renounce her Canadian or Belgian citizenship[s]" (GE 3).

At her hearing, Applicant expressed several times her willingness to renounce her Belgian citizenship to eliminate security concerns raised by her dual citizenship (Tr. 41). She presented no evidence of efforts taken to renounce her Belgian citizenship.

Applicant considers herself a loyal American. She stated: "My loyalty to the United States is undivided. My family relationships in the United States are deep and longstanding. There is no conflict of interest. If ever a conflict of interest appears I will, without hesitation, resolve the conflict in favor of the United States interest" (GE 2). As evidence of her ties to the United States she noted that her children are U.S. citizens, she assures their connection to the United States by sending them to the United States for summer camps and to visit their friends and relatives living in the United States. Applicant and her spouse speak English at home, and their children are fluent in English (Tr. 26).

Applicant has four siblings. Her 29-year-old brother was born in Canada. He is a citizen and resident of Canada. Her 26-year-old sister was born in Canada. She married a U.S. citizen, became a naturalized U.S. citizen in 2000, and resides in the United States. Both her half-brother and half-sister were born in the United States and are residents of the United States.

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.[2]

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised 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 controlling adjudicative goal is a fair, impartial and common sense 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.

[2] *See Department of the Navy v. Egan,* 484 U.S. 518, 531 (1988).

The protection of 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."[3] In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 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).

Analysis

Guideline C, Foreign Preference

Under Guideline C the government's concern is that "[w]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States." AG ¶ 9.

Applicant was born and lived in the United States for the first eight years of her life. At age eight, she moved to Canada with her parents, and became a Canadian citizen. She attended Canadian schools and enjoyed the privileges of her Canadian citizenship, including a Canadian passport. In 1987, at age 19, she married a Belgian national and automatically acquired her Belgian citizenship. She moved to Belgium in 1987, and she has lived in Belgium ever since.

[3] *Egan, supra,* at 528, 531.

Applicant considers herself a tri-citizen of the United States, Canada, and Belgium. Her home is in Belgium where she has lived with her Belgian husband since age 19. She completed college, and two higher education degrees with the assistance of Belgium educational grants. Except for a bank account in the United States, all of Applicant's and her spouse's financial/economic interests are in Belgium. Applicant's children were born and educated in Belgium. Applicant has received or is entitled to -- on her own right or through her spouse's or children's citizenship, -- privileges and benefits reserved for Belgian citizens such as a Belgian identification card, a Belgian passport, educational grants, unemployment and healthcare benefits, child allowances, and a pension. She also voted in five Belgian elections.

Her actions constitute an exercise of dual citizenship and raises security concerns under Guideline C. Foreign preference disqualifying condition AG 10(a), "exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes . . . (3): accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country, and (7) voting in a foreign election," apply.

The Government produced substantial evidence of the disqualification condition in AG ¶ 10(a)(3) and (7), 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.[4]

AG ¶ 11 provides for six foreign influence mitigating conditions that are potentially applicable:

> (a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;
>
> (b) the individual has expressed a willingness to renounce dual citizenship;
>
> (c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;
>
> (d) use of a foreign passport is approved by the cognizant security authority.
>
> (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated;

[4] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

(f) the vote in a foreign election was encouraged by the United States Government.

Applicant surrendered her Belgian passport in 2005. At her hearing she expressed her willingness to renounce dual citizenship. Mitigating conditions AG ¶¶ 11(b) and (e) apply. The remainder of AG ¶ 11 mitigating conditions are either not applicable or were not fairly raised by the evidence of record.

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 the 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. Applicant strongly averred her loyalty to the United States, that she feels like an American, her desire to raise her children as Americans, and to live in the United States. Applicant has had access to interim NATO classified information for the last two years and there is no evidence that he she failed to comply with rules and regulations concerning the protection of classified information.

Although Applicant surrendered her passport and expressed willingness to renounce her dual citizenship, considering the record evidence as a whole, her favorable evidence is not sufficient to mitigate the foreign preference security concerns. Applicant has stronger ties and connection with Belgium than with the United States. She was born in the United States, but only lived the first eight years of her life in the United States. Except for a period of less than one year around 1999-2001, during which she worked and resided in the United States, she has lived 31 years of her life in foreign countries. She has lived in Belgium as a Belgian citizen for the last 21 years of her life enjoying all the privileges and benefits reserved for Belgian citizens.

Applicant's social, emotional, and financial ties are connected to her husband, and their children all of whom are Belgian citizens. This is partially confirmed by her 2006 statement to a government investigator to the effect that she was not ready to surrender her dual citizenship. On balance, I am not convinced that Applicant's favorable evidence is sufficient to outweigh the potential conflicting loyalties for Belgium and the United States.

"Because of the extreme sensitivity of security matters, there is a strong presumption against granting a security clearance. Whenever any doubt is raised . . . it is deemed best to err on the side of the government's compelling interest in security by denying or revoking [a] clearance." *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990). After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude she has not mitigated the security concerns pertaining to foreign preference. The evidence leaves me with doubts as to Applicant's security eligibility and suitability.

For all these reasons, I conclude Applicant has failed to mitigate the concerns arising from her foreign preference security concerns.

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 C:	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	Against Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 1.a-1.e:	For Applicant

Conclusion

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

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JUAN J. RIVERA
Administrative Judge