



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



In the matter of:

ADP Case No. 12-07347

Applicant for Public Trust Position

Appearances

For Government: Gregg Cervi, Esq., Department Counsel

For Applicant: *Pro se*

11/03/2015

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the foreign preference trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On January 7, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline C, foreign preference. The action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

On February 5, 2015, Applicant submitted an answer to the SOR, and she elected to have his case decided on the written record. On August 6, 2015, Department Counsel submitted the Government's file of relevant material (FORM). The FORM was mailed to Applicant and it was received on August 17, 2015. Applicant was afforded an

opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant had no objections to the Government documents that were marked as Items 3 and 4, and are admitted into evidence. There was no objection to Applicant's response to the FORM, and it is marked as Item 5, and admitted into evidence. The case was assigned to me on October 14, 2015.

Findings of Fact

Applicant admitted both allegations in the SOR. Her admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact.

Applicant is 37 years old. She was born in Bulgaria. She married a Bulgarian citizen in 2001, and they came to the United States later the same year. They have a six-year-old child born in the United States. Applicant became a U.S. citizen in February 2011. She has been employed with the same government contractor since 2001, but has held different positions within the company.¹

In September 2010, prior to becoming a U.S. citizen, Applicant renewed her Bulgarian passport. She used her Bulgarian passport in December 2011 to travel to Mexico. In April 2012, Applicant was interviewed by a government investigator as part of her background investigation. She indicated to the investigator that she was in possession of a Bulgarian passport that was obtained prior to her becoming a U.S. citizen. She indicated she would not use the Bulgarian passport for foreign travel and would surrender it if it was necessary.² As a U.S. citizen, she used her Bulgarian passport to travel to Bulgaria in June through August 2012 and June through August 2014, a direct contradiction of her statement. In addition, during her interview she indicated that she was not willing to renounce her Bulgarian citizenship at the time because her family still lived there and she wanted to ensure she would be permitted to visit them. She indicated she would be willing to renounce her Bulgarian citizenship in the future.³

In response to interrogatories from August 2014, Applicant disclosed that her Bulgarian passport would expire on September 23, 2015, and also provided the dates she used her Bulgarian passport to travel after becoming a U.S. citizen. She explained she intended to retain the Bulgarian passport until her Bulgarian citizenship is no longer personally advantageous. She noted that she was willing to surrender the passport, but not immediately. She intended to do so before its expiration date. She indicated she was retaining the passport at that time because she was still a Bulgarian citizen, all of her family still lived in Bulgaria, and it was advantageous. In the interrogatories, she also indicated she did not intend on renewing her Bulgarian passport. As part of her interrogatories, she was asked to make any changes to the summary of her personal

¹ Item 3.

² Item 4.

³ Item 3.

subject interview from April 2012. She wrote: “At the time of my interview, my intention was to invalidate my Bulgarian passport. However, due to the nature of the border operations in Bulgaria, it became obvious that the use of my Bulgarian passport in conjunction with my U.S. passport was personally advantageous to me.”⁴ She further stated that she had lived and worked in the United States for over 12 years. She stated that she was trustworthy, a valued asset to the company, and that her foreign ties have not and will not compromise her loyalty and dedication to her employer, clients, and the U.S. Government.⁵

In Applicant’s response to the FORM, she stated that her Bulgarian passport expired on September 23, 2015. She did not renew it and sent it to Bulgaria 90 days before it expired so as not to be charged fees. She stated she did not intend to apply for a new or reissued Bulgarian passport. She agreed to notify her facility security officer prior to any overseas travel and upon return from any overseas travel. She agreed to allow the U.S. Government to search her non-domestic travel documents.⁶

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) “The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person’s loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security.” (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. 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.

⁴ Item 4.

⁵ Item 4.

⁶ Item 5.

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 [sensitive] information will be resolved in favor of national security.”

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 to obtain a favorable trustworthiness decision.

A person who seeks access to sensitive 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9 the trustworthiness concern involving foreign preference is as follows:

When 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 ¶ 10 describes conditions that could raise a trustworthiness concern and may be disqualifying. The following is potentially applicable:

(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 but is not limited to: (1) possession of a current foreign passport

Applicant held a Bulgarian passport after becoming a U.S. citizen and used it to travel to Bulgaria and Mexico. I find her actions of possessing a current foreign passport falls within the above disqualifying condition.

I have considered all of the mitigating conditions under AG ¶ 11 and the following is potentially applicable:

(b) the individual has expressed a willingness to renounce dual citizenship; and

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Applicant's Bulgarian passport has expired. She stated she returned it to Bulgaria. She stated that she does not intend to renew or reapply for a Bulgarian passport and that she will advise her facility security officer of any foreign travel. I was unable to make a credibility determination. Applicant previously told a government investigator that she would not use her Bulgarian passport to travel and then used it on two separate occasions because it was advantageous. She stated that she still considers herself a citizen of Bulgaria. Applicant stated she was not willing to renounce her Bulgarian citizenship at the time, but would be willing in the future. AG ¶ 11(e) applies because the passport has expired. AG ¶ 11(b) applies because she expressed a willingness to renounce her dual citizenship in the future. Although these mitigating conditions apply, based on Applicant's statements that she is a Bulgarian citizen; retention and use of her Bulgarian passport subsequent to advising a Government investigator that she would not use it; using it on two occasions, the most recent in August 2014; and using it because it was advantageous, I find there is insufficient evidence to overcome the foreign preference concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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 public trust position 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. I have incorporated my comments under Guideline C in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 37 years old and has lived in the United States since 2001. She used her Bulgarian passport after becoming a U.S. citizen, and after advising a Government investigator that she would not use it. She indicated she is still a Bulgarian citizen. She clearly indicated she was using her Bulgarian passport after becoming a U.S. citizen because it was advantageous to her, indicating a potential preference for Bulgaria over the United States. She used her Bulgarian passport as recent as August 2014. Despite her recent promises regarding any future foreign travel, Applicant's past conduct shows she maintained a footprint in Bulgaria that she was unwilling to relinquish. Applicant stated that she has returned her expired passport to Bulgaria and does not intend to renew or reapply for it in the future. Based on her past statements and conduct, I cannot conclude she has mitigated the foreign preference concerns. Overall, Applicant has not resolved questions and doubts about her eligibility and suitability for a public trust position. Applicant failed to mitigate the trustworthiness concerns under Guideline C, foreign preference.

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
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Subparagraphs 1.a-1.b:	Against Applicant
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Conclusion

In light of all of the circumstances it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Carol G. Ricciardello
Administrative Judge