



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 13-01178

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: Nicole A. Smith, Esq.

04/16/2014

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated foreign preference and financial considerations security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On December 13, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines C (foreign preference) and F (financial considerations). The action was taken under Executive Order (EO) 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 (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on January 16, 2014, and requested a hearing before an administrative judge. The case was assigned to me on February 28, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 7, 2014, scheduling the hearing for March 25, 2014. The hearing was convened as scheduled.

Procedural and Evidentiary Rulings

Evidence

Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through E, which were admitted without objection. The record was held open for Applicant to submit additional information, and for either side to submit a brief or legal points and authorities. On April 2, 2014, I sent the parties an e-mail with a link to the IRS website asking if they wanted to comment. Department Counsel submitted a brief on April 7, 2014, which is marked Hearing Exhibit (HE) I. Applicant's brief of April 15, 2014, is marked HE II. Correspondence about the additional exhibits is marked HE III.

Administrative Notice

Unlike foreign influence cases under Guideline B where the identity and the nature of the foreign country can and should be considered, Guideline C cases are more country-neutral. That does not mean that the country is irrelevant. I have taken administrative notice of certain facts about Germany, as provided by the U.S. Department of State.¹ The facts are summarized in the Findings of Fact below.

Findings of Fact

Applicant is a 57-year-old employee of a defense contractor. He has worked for his current employer since 2006. He served in the U.S. military from 1975 until he retired in 1997. He seeks to retain a security clearance, which he has held since serving in the military. He is married for the second time. He has an adult child and two adult stepchildren.²

Applicant spent most of his military career overseas. When he retired from the military, he accepted a job working in Germany for a defense contractor. He bought a house in Germany in 2002 for the equivalent of about \$280,000 in U.S. currency. He estimated that the house is worth about the same as he paid for it, and that he still owes the equivalent of about \$165,000 on his mortgage loan. He married his current wife in 2004. She is a German citizen. Applicant's stepchildren are dual U.S.-German citizens.³

In order to live and work in Germany, Applicant became a German resident in 2000. He paid taxes on his income to Germany. He also paid the German equivalent of Social Security. He will be eligible to receive about \$200 per month from the German equivalent of Social Security when he reaches a certain age. He maintains a German

¹ See <http://www.state.gov/r/pa/ei/bgn/3997.htm>.

² Tr. at 20-24, 28-29, 93; GE 1, 2.

³ Tr. at 21-38, 90-97, 103-104; Applicant's response to SOR; GE 1, 2, 4.

bank account that he uses to pay his mortgage loan and other expenses. His main banking is done through a U.S. credit union.⁴

As a non-German and non-European Union citizen, Applicant is not able to vote in German elections. Non-citizens are permitted to vote for foreigners' advisory councils, which are advisory boards for local politics. Applicant thought he voted one time for one of the foreigners' advisory councils, but his wife later told him that she never mailed the ballot.⁵

Applicant worked in Afghanistan in 2005 and 2006. He returned to Germany when the contract ended. Except for leave periods, Applicant has worked in Afghanistan in support of Operation Enduring Freedom since he accepted his current position in 2006. He usually goes to Germany and visits his wife during his leave periods. His German residency status expired in 2011. After his current assignment in Afghanistan is over, he may return to Germany for work. He does not intend to retire in Germany. Applicant credibly testified that he does not have a preference for Germany over the United States and that his loyalties are in and to the United States. He stated that he sought work overseas because the pay is better than he could have received in the United States.⁶

Applicant did not file U.S. federal income tax returns when they were due for tax years 1996 through 2000. He discussed his unfiled tax returns in a statement he provided for his background investigation in December 2001. He stated that he filed his returns for 1996, 1997, and 1998, and that he would file his 1999 and 2000 returns before the end of January 2002.⁷

Applicant did not file U.S. federal income tax returns when they were originally due for tax years 2006, 2007, and 2008. The IRS filed a substitute return for 2006 in August 2009. Applicant filed his 2006 return in May 2010. In June 2010 and August 2010, the IRS imposed penalties for filing his tax return after the due date. All taxes, penalties, and interest have been paid for tax year 2006.⁸

The IRS filed substitute returns for tax years 2007 and 2008 on May 3, 2010. Applicant filed his 2007 and 2008 returns on May 11, 2010. In August 2010, the IRS imposed penalties for filing his tax returns after the due date. All taxes, penalties, and interest have been paid for tax years 2007 and 2008.⁹

⁴ Tr. at 39-54, 107-112; Applicant's response to SOR; GE 1, 2, 4.

⁵ Tr. at 55-58, 113-115, 133-134; Applicant's response to SOR; GE 2.

⁶ Tr. at 25-26, 31, 44-49, 59-62, 98-106, 132-133; GE 1, 2.

⁷ Tr. at 127-129; GE 4.

⁸ Tr. at 64-69, 82; Applicant's response to SOR; GE 1-3.

⁹ Applicant's response to SOR; GE 3.

Applicant did not become aware until a few weeks before the hearing that, because of his service in a combat zone in support of the armed forces, he may have been eligible for an automatic extension to file his income tax returns for tax years 2006, 2007, and 2008. He has timely filed his tax returns from tax years 2009 to 2012. He does not owe the IRS any back taxes. He does not excuse his negligence for failing to file his tax returns, but he promises that he will timely file his returns in the future. His finances are currently sound.¹⁰

Applicant deployed and served overseas while he was on active duty. He submitted several letters praising his work performance, loyalty, honor, dedication, professionalism, work ethic, leadership, and integrity.¹¹

Germany

The United States is committed to preserving peace and security in Europe, and U.S.-German relations have been a focal point of U.S. involvement in Europe since the end of World War II. Germany stands at the center of European affairs and is a key partner in U.S. relations with Europeans in the North Atlantic Treaty Organization (NATO) and the European Union. U.S. policy toward Germany is to preserve and consolidate a close and vital relationship with Germany, not only as friends and trading partners, but also as allies sharing common institutions. The United States recognizes that the security and prosperity of the United States and Germany significantly depend on each other. The bilateral political, economic, and security relationships are based on close consultation and coordination at the most senior levels, and the United States and Germany cooperate actively in international forums.

As allies in NATO, the United States and Germany work side by side to maintain peace and freedom. U.S. and German troops work together effectively in NATO and UN operations worldwide due in part to the joint training and capacity-building performed at U.S. military installations in Germany. The two countries have extended their diplomatic cooperation into military cooperation by maintaining peacekeeping efforts in the Balkans and working together to encourage the evolution of open and democratic states throughout central and eastern Europe. Germany has been an integral part of the UN-mandated International Security Assistance Force in Afghanistan. German and U.S. maritime forces also are deployed to combat piracy off the Horn of Africa. Since the September 11, 2001, terrorist attacks in the United States, Germany has been a reliable U.S. ally in efforts against terrorism.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially

¹⁰ Tr. at 72-73, 84-89, 122-127, 135-136; Applicant's response to SOR; GE 2, 3; AE A-C, E; <http://www.irs.gov/uac/Extension-of-Deadlines-%E2%80%94-Combat-Zone-Service>.

¹¹ Tr. at 120-121; AE D.

disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines 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.

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 classified 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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

The security concern for foreign preference is set out in AG ¶ 9:

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.

The guideline notes the following conditions that could raise security concerns under 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 but is not limited to:

- (1) possession of a current foreign passport;
- (2) military service or a willingness to bear arms for a foreign country;
- (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
- (4) residence in a foreign country to meet citizenship requirements;
- (5) using foreign citizenship to protect financial or business interests in another country;
- (6) seeking or holding political office in a foreign country;
- (7) voting in a foreign election;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;

(c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest; and

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

Applicant acquired residency status in Germany, but he never became a German citizen. No specific foreign preference disqualifying condition has been raised. However, his actions could indicate a preference for Germany over the United States. A general foreign preference security concern under AG ¶ 9 has been raised, even without the applicability of a specific disqualifying condition.

Conditions that could mitigate foreign preference security concerns are provided under AG ¶ 11. The following 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; and

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

Just as there is no specific disqualifying condition applicable, no specific mitigating condition is applicable. While not a mitigating condition, I pay specific attention to the security concern identified under Guideline C 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) Because of Applicant’s military service and his service in Afghanistan in support of the U.S. military, as well as the close relationship between the United States and Germany, I do not find that Applicant’s connections and ties to Germany make him “prone to provide information or make decisions that are harmful to the interests of the United States.”

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. One is potentially applicable in this case:

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant did not file federal income tax returns when they were originally due for tax years 2006, 2007, and 2008. He was unaware that he may have been eligible for an automatic extension, and he thought he was required to file the returns.¹² His failure to

¹² Based upon the information available to the IRS at the time, the IRS imposed penalties against Applicant for filing his tax returns after the due date. Applicant may have rated an automatic extension of the deadlines to file his returns because he was “serving in a combat zone or a contingency operation in support of the Armed Forces.” See AE A-C, and <http://www.irs.gov/uac/Extension-of-Deadlines->

follow what he thought was his legal obligation shows a lack of judgment and an unwillingness to abide by rules and regulations. The disqualifying conditions listed under AG ¶ 19 are illustrative only, not exhaustive and exclusive.¹³ The above disqualifying condition, or a derivation thereof, is applicable.

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control.

Applicant has a history of not filing his tax returns when they were due. He was aware that was a concern to the DOD because he discussed his unfilled tax returns in a statement he provided for his background investigation in December 2001. Despite that knowledge, he was negligent in complying with what he thought was his legal obligation to file his tax returns for tax years 2006, 2007, and 2008. Applicant filed those returns in May 2010. All subsequent years have been filled in a timely manner; and all taxes, penalties, and interest have been paid. Applicant does not excuse his behavior, but he credibly testified that he will timely file his returns in the future. His finances are currently sound.

I find that Applicant's financial issues have been resolved and are under control. They occurred under circumstances that are unlikely to recur and do not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a) and 20(c) are applicable.

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 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

[%E2%80%94Combat-Zone-Service](#). It is unnecessary for the purpose of this decision to determine whether Applicant actually rated that extension because Applicant was unaware of the extension.

¹³ See ISCR Case 08-08831 at 5 (App. Bd. Jan. 4, 2011).

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. I have incorporated my comments under Guidelines C and F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's favorable character evidence, and his honorable military service. He has worked overseas in support of the U.S. national defense. The Appeal Board has held that "an applicant's proven record of action in defense of the United States is very important and can lead to a favorable result for an applicant in a Guideline B [foreign influence] case."¹⁴ This is not a foreign influence case, but it is also not a classic foreign preference case. It is almost a hybrid of the two foreign guidelines. I am satisfied that Applicant does not have a preference for Germany over the United States. I am also convinced that he will comply with all tax-filing requirements in the future.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the foreign preference and financial considerations security concerns.¹⁵

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:	For Applicant
Subparagraphs 1.a-1.e:	For Applicant
Paragraph 2, Guideline F:	For Applicant
Subparagraph 2.a:	For Applicant

¹⁴ ISCR Case 04-02511 at 4 (App. Bd. Mar. 20, 2007).

¹⁵ I find Applicant mitigated his failure to file his tax returns whether he was required to file his income tax returns while working overseas or only thought he was required to do so.

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge