



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



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| In the matter of: |) | |
| |) | |
| REDACTED |) | ISCR Case No. 14-00968 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

03/24/2015

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate security concerns arising from his possession and use of a current foreign passport. Clearance is denied.

Statement of the Case

On May 1, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR), alleging that Applicant’s conduct and circumstances raised security concerns under the foreign preference guideline (Guideline C).¹ On May 13, 2014, Applicant answered the SOR, affirmatively waived his right to a hearing, and requested a decision regarding his suitability for a clearance on the written record.

On August 6, 2014, Department Counsel sent Applicant the Government’s file of relevant material (FORM). The FORM contains the Government’s proposed findings of

¹ This action was taken under Executive Order (E.O.) 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 implemented by DOD on September 1, 2006.

fact, argument, and seven exhibits. On February 5, 2015, Applicant filed a response to the FORM (Response). On March 10, 2015, I was assigned Applicant's case.

Evidentiary Ruling

Applicant states that Government Exhibit (Gx.) 4 is false. Specifically, he claims that a summary of an interview conducted by a Defense Security Service (DSS) agent of his facility security officer (FSO) is false. In light of Applicant's *pro se* status, I will consider this an objection to the admission of Gx. 4.

The challenged two-page report is not a personnel background report of investigation, which would be inadmissible in this forum upon objection. See Directive, ¶ E.3.1.20. Instead, Gx. 4 is a DSS agent's security assessment of a secured facility, which the agent was required to file irrespective of its potential future use in a DOHA or other administrative proceeding. Gx. 4 is similar to a business record, which are generally admissible in DOHA proceedings.² Moreover, the relevant information contained in Gx. 4 is consistent with other record evidence, to include a statement from the FSO and a spreadsheet that Applicant submitted with his Response. Accordingly, after considering all potential legal and evidentiary grounds, I overrule Applicant's objection.³ Applicant did not object to the admission of any of the other exhibits offered by the Government and, therefore, Gx. 1 – 7 are admitted.

Findings of Fact

Applicant, 53, is the president and chief executive officer of a U.S. company that he started. His company performs work for DOD. Applicant was born in Australia and immigrated to the United States in 1978. He became a U.S. citizen in 2004, but retains his Australian citizenship and possesses a current Australian passport.

Applicant was first granted a security clearance in 2009 and, in return for being granted access to classified information, purportedly surrendered his Australian passport to his FSO. In 2010 and 2013, Applicant retrieved his Australian passport and used it to travel to Australia. Applicant will not travel to Australia on his U.S. passport because if he does he would immediately lose his Australian passport. (Answer)⁴ Applicant plans to use his Australian passport on future trips to Australia. (Response)⁵

² Fed. R. Evid. 803; Directive, ¶ E.3.1.19 (federal rules of evidence serve as a guide and technical rules of evidence may be relaxed to allow for the development of a full and complete record).

³ ISCR Case No. 11-12461 at 4-5 (App. Bd. Mar. 14, 2013) (evidence compiled or created in the regular course of business, to include Defense Investigative Service facility inspection reports, are properly admissible in DOHA proceedings). See also, *Palmieri v. United States, et. al.*, No. 12-1403, 2014 U.S. Dist. LEXIS 155613, at *24-*33 (D.C. Dist. Ct. Nov. 3, 2014) (admission of a letter from a DOD criminal investigative agency did not violate either the Directive or appellant's due process rights).

⁴ "I have chosen to retain my Australian Passport (although surrendered to the Facility Security Officer) so that when I retire it is possible to spend more time in Australia. I do not plan to retire soon. When I travel to Australia I am required by the Australian Government to use my Australian Passport. If I travel to Australia on my U.S Passport I will lose my Australian Passport immediately." (Answer)

Applicant's use of his Australian passport to travel to Australia came to the attention of DSS in 2012, following a routine security assessment. During the assessment, the FSO informed a DSS agent that Applicant's foreign passport was secured in a locked safe in a file room, and access to the safe was limited to Applicant's administrative assistants and another company official. The FSO further stated that he had not notified the Government regarding Applicant's use of his Australian passport to travel to Australia. (Gx. 4) Subsequently, the FSO notified the Government about Applicant's travels to Australia using his Australian passport. (Response, *Spreadsheet*)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant's eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. An 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." Directive ¶ E3.1.15. An applicant also bears the ultimate burden of persuasion to establish his or her eligibility.

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See also, ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) ("Once a concern arises . . . there is a strong presumption against the grant or maintenance of a security clearance.")

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. 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 an applicant may

⁵ "I do possess an Australian Passport but only intend to use it when traveling to Australia (less than once per year)." (Response)

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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7.⁶ Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9, the concern involving foreign preference arises “[w]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States.” Applicant’s possession and use of his foreign passport raises this concern and also establishes the disqualifying condition at AG ¶ 10(a), “exercise of any right, privilege or obligation of foreign citizenship,” to include “possession of a current foreign passport.”

The foreign influence concern sets forth a number of conditions that could mitigate the concern. The following mitigating conditions are potentially relevant:

AG ¶ 11(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;

AG ¶ 11(d): use of a foreign passport is approved by the cognizant security authority; and

AG ¶ 11(e): the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Generally, the surrender by a clearance holder of their foreign passport to their FSO mitigates security concerns that an individual with access to classified information possess a foreign passport. However, the evidence established that Applicant’s act in handing over his Australian passport to his FSO (or other employee) to place in a company safe was not a true relinquishment or surrender of his foreign passport. Rather, Applicant maintains unfettered access to his Australian passport. In the past few years, Applicant has freely retrieved his Australian passport from his company’s safe and used it for travel to Australia. He plans to do so again on future travel to Australia. Applicant’s action in temporarily handing over his foreign passport to his FSO is insufficient to mitigate the security concerns at issue. His actions neither complied with

⁶ See *also*, ISCR Case No. 11-13626 at 4 (App. Bd. July 25, 2014) (“an adverse decision under the Directive is not a determination that the applicant is disloyal.”).

