DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 14-01966
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

02/10/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges and the record establishes that Applicant is a dual citizen of the United States and Germany. She possesses a German passport that was issued in 2008 and is valid until 2018. She declined to relinquish or destroy her German passport. Foreign preference concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On January 1, 2014, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86). (Item 5) On June 27, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the revised adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline C (foreign preference). (Item 1) The SOR detailed reasons why DOD could not make the affirmative finding under the Directive that it is clearly consistent with the national security to grant or continue a

security clearance for Applicant and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (Item 1)

On August 1, 2014, Applicant responded to the SOR allegations and waived her right to a hearing. (Item 4) A complete copy of the file of relevant material (FORM), dated September 29, 2014, was provided to her on December 5, 2014.[1] Applicant did not respond to the FORM. The case was assigned to me on February 2, 2015.

Findings of Fact[2]

In Applicant's SOR response, she admitted the SOR allegations.[3] (Item 4) Applicant also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 43-year-old scientist with highly-specialized knowledge and training, who contributes to the national defense.[4] Her mother is a German citizen who resides in Germany. Her father has passed away.

Applicant was born in Germany, and she moved to the United States in 1990, when she was 17 years old. She was naturalized as a U.S. citizen in 2006. She earned her bachelor, master, and Ph.D. degrees in the United States. Her husband and daughter were born in the United States and reside in the United States. She has previously been entrusted with sensitive U.S. Government information. A U.S. Navy captain described her valuable contributions to the United States. There is no evidence of security violations, alcohol or drug abuse, or criminal conduct.

Applicant is a dual citizen of the United States and Germany. She possesses a German passport that was issued in 2008 and remains valid until 2018. Although she has not used her German passport for travel, she said she wanted to retain it for possible travel. (Item 4) The FORM notes, "Applicant has refused to surrender or destroy her foreign passport; therefore, the Government's concerns as to her suitability to hold a clearance have not been mitigated." (FORM at 4) She has not relinquished or destroyed her German passport.

[1]The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated September 29, 2014, and Applicant's receipt is dated December 5, 2014. The DOHA transmittal letter informed Applicant that she had 30 days after her receipt to submit information.

[2]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

[3]The source for the facts in this paragraph is Applicant's August 1, 2014 response to the SOR. (Item 4)

[4]The sources for the facts in this paragraph are Applicant's August 1, 2014 response to the SOR and January 1, 2014 SF 86. (Items 4, 5)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the

facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Foreign Preference

Under AG ¶ 9 the security 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, 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(a)(1) describes one condition that could raise a security concern and may be disqualifying in Applicant's case, "(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 renewed her German passport after becoming a U.S. citizen. She continues to possess a German passport that will be valid until 2018, establishing AG ¶ 10(a)(1).

AG ¶ 11 provides conditions that could mitigate security concerns:

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

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

> Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan*, *supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions apply. Applicant did not invalidate, destroy, or relinquish her German passport to her security officer. The FORM advised her that she could mitigate Foreign Preference concerns through AG ¶¶ 11(d) and 11(e), however, she did not take action to effectuate these provisions.

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 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.

There is some evidence supporting approval of Applicant's clearance. Applicant is a 43-year-old scientist with highly-specialized knowledge and training, who contributes to the national defense. She was born in Germany, and she moved to the United States in 1990, when she was 17 years old. She was naturalized as a U.S. citizen in 2006. Her college education was in the United States through the Ph.D. level. Her husband and daughter were born in the United States and reside in the United States. She has strong connections to the United States. She has previously been

entrusted with sensitive U.S. Government information. A U.S. Navy captain described her valuable contributions to the United States. There is no evidence of security violations, alcohol or drug abuse, or criminal conduct.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant has acknowledged that she is a dual United States and German citizen. She renewed her German passport in 2008, and it will not expire until 2018. She was advised that she needed to relinquish or destroy her German passport to mitigate the Government's security concerns. She decided not to relinquish, invalidate, or destroy her German passport.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont*, 913 F. 2d at 1401. Unmitigated foreign preference concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not provide evidence that will justify the award of a security clearance in the future. At some future time, she may decide to relinquish her German passport to her security officer or destroy it in her security officer's presence, which will demonstrate persuasive evidence of her security clearance worthiness. *See* AG ¶¶ 11(d) and 11(e). Based on the facts before me and the adjudicative guidelines that I am required to apply, I conclude that it is not clearly consistent with national security to grant or reinstate Applicant's security clearance eligibility at this time.

I carefully applied the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Foreign preference concerns are not mitigated.

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
Subparagraph 1.a:	Against Applicant

Conclusion

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

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Mark Harvey
Administrative Judge