



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-03221

Appearances

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

04/23/2015

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant did not mitigate security concerns regarding his foreign preference. Eligibility for access to classified information is denied.

History of the Case

On October 17, 2014, the Department of Defense (DOD) Consolidated Adjudicative Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order 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 (AGs) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on October 22, 2014, and elected to have his case decided on the basis of the written record. Applicant received the Government's File of Relevant Material (FORM) on February 24, 2015, and did not respond to the FORM. The case was assigned to me on April 13, 2015.

Summary of Pleadings

Under Guideline C, Applicant, a U.S. citizen by birth, allegedly (a) applied for and obtained Australian citizenship in August 1996; (b) applied for, obtained, and used an Australian passport in August 1996, which expired in August 2006; (c) applied for, obtained, and used an Australian passport, which was issued in about August 2006, and which will expire in August 2016; (d) lived and worked in New Zealand from 1999 to about 2004; and (e) exercised Australian citizenship by voting in an Australian election in 1998.

In his response to the SOR (Item 2), Applicant admitted the allegations covered by the foreign preference guideline. He provided no explanations.

Findings of Fact

Applicant is a 51-year-old aircraft maintenance technician of a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant is single and has never been married. He has no children. (Item 3) Applicant claims no post-high school academic credits. He enlisted in the Marine Corps in December 1982 and served four years of inactive active duty in the Marine Corps Reserve. (Item 3)

Applicant is a U.S. citizen by birth. (Item 3) In August 1996, he sought Australian citizenship based on his mother's Australian citizenship. (Items 3 and 4) He has maintained Australian citizenship since August 1996. Also, in August 1996, he sought and obtained an Australian passport, which he renewed in August 2006. (item 3)

Currently, Applicant possesses a valid Australian passport, which will not expire until August 2016. (Item 3) He provided no explanations of how he intends to use his Australian citizenship and passport in the future.

Applicant has used his Australian passport to travel to Australia and New Zealand on several occasions between 2010 and 2013. (Item 3) He lived in Australia from about December 1997 to February 1999, and lived and worked in New Zealand from about March 1999 to May 2004. (Item 3) While living in Australia, he voted in the country's 1998 national election.

In March 2014, Applicant was interviewed by an agent of the Office of Personnel Management. (OPM). (Item 4) In this interview, he explained to the agent that he obtained his first Australian passport in August 1996 because he wanted to live and work in Australia permanently. (Item 4) He used his first Australian passport to travel to Australia in November 1997, to New Zealand in February 1999, and for several trips between Australia and New Zealand until his return to the United States in June 2004. (Item 4)

After renewing his Australian passport in August 2006, Applicant used his renewed passport to travel to New Zealand (March 2009, August 2009, June-July 2010, and March 2012), and to Australia (July 2010, November 2012, and June-July 2013). (Item 4) An incident history report in August 2014 noted that Applicant chose not to destroy his Australian passport. (Item 5) No reasons were assigned.

Endorsements

Applicant provided no endorsements or performance evaluations on his behalf. Nor did he provide any proof of community and civic contributions.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns."

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Foreign Preference

The Concern: When an individual acts in such a way as to indicate 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. See AG ¶ 9.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant is an aircraft maintenance technician who acquired Australian citizenship and an Australian passport in August 1996, which he has continued to hold and possess as a dual citizen with U.S. citizenship he acquired at birth. He has continued to use his Australian passport when traveling to Australia and New Zealand. Security concerns relate to foreign preference.

Dual citizenship concerns necessarily entail allegiance assessments and invite critical considerations of acts indicating a preference for the interests of the foreign country over the interests of the United States. The issues, as such, raise concerns over Applicant's preference for a foreign country over the United States. By obtaining and using an Australian passport and voting in an Australian election, Applicant (a U.S. citizen by birth) revealed a split preference for the United States and Australia.

Since becoming a naturalized Australian citizen, Applicant has taken several actions and exercised Australian privileges that reflect active indicia of dual citizenship. Specifically, he has voted in an Australian election in 1998. And he has obtained and used his Australian passport to meet country exit and entry requirements imposed by the Australian government, and retained his Australian citizenship and passport.

In assessing split-preference cases, the Appeal Board has looked to indicia of active exercise of dual citizenship. In cases where there is record evidence of a dual-citizen applicant exercising privileges in the foreign country (such as voting in a foreign election or having substantial real property interests in a country that are not available to non-residents or citizens on the same terms), the Appeal Board has considered such interests to represent special benefits or privileges that reveal a preference to that particular country. See ISCR Case No. 08-02864 at 4 (App. Bd. Dec. 29, 2009); See ISCR Case No. 16098 at 2 (App. Bd. May 29, 2003).

Preference questions require predictive judgments about how an applicant can be trusted in the future to honor his fiduciary responsibilities to the Government. While his choices of voting in a foreign election and acquiring and using a foreign passport for travel convenience are understandable, they also reflect a current and ongoing split preference for the United States and Australia.

Because Applicant elected to acquire and retain his Australian citizenship, passport, and other privileges of Australian citizenship (e.g., use of his Australian passport for travel convenience purposes and voting in an Australian election) while he still held dual U.S. citizenship, the Government may apply certain provisions of disqualifying condition (DC) ¶ 10(a) of AG ¶ 9, "exercise of any right, privilege or obligations of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member." This DC 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; and

(7) voting in a foreign election.

Specifically, DC ¶ 10(a)(1) and (7) apply to the established facts and circumstances herein. By acquiring and retaining his Australian citizenship and passport, and by using his Australian passport for travel outside the United States, Applicant was able to utilize special travel privileges of Australia that are not currently available to non-Australian citizens. And by voting in an Australian election as a dual citizen of the United States and Australia, he exercised privileges not available to non-citizens of Australia.

While living and working in New Zealand (a neighboring country) for several years by itself does not reflect a preference for Australia, his living and working in the country can be considered an additional indicia of preference for Australia (such as using his Australian passport to travel to and from New Zealand) when assessed in conjunction with other factors having a bearing on Applicant's country preference. In Applicant's case, his use of his Australian passport to travel to and from New Zealand, where he lived and worked for several years, reflects an additional indicia of a split preference for his birth country (the United States) and his adopted country (Australia).

Were Applicant to renounce his Australian citizenship and relinquish his Australian passport, he risks a potential loss of travel privileges. This creates a dilemma for Applicant who has historically declined to renounce his Australian citizenship or relinquish his Australian passport. His election to retain the Australian citizenship he acquired in 1996 and preserve his travel privileges makes good practical sense and reflects entirely rational and understandable choices on his part. His election also reflects split preferences for his newly adopted country of Australia.

Because Applicant's dual citizenship status is not based solely on his parent's citizenship or birth in Australia, he may not claim the benefits of MC ¶ 11(a), "dual citizenship is based solely on parents' citizenship or birth in a foreign country." Nor are any of the other potential mitigating conditions available to Applicant based on the developed record.

Whole-person precepts are not particularly helpful to Applicant in surmounting the Government's preference concerns herein. Afforded an opportunity to respond to the FORM with evidence of support from his employer and his community, he did not do so. Overall, Applicant is not able to persuade that his current preference is with the

United States. Because he made considerable use of Australian privileges associated with his obtaining his Australian citizenship and passport in 1996, he manifested a preference for Australia under the criteria as established by the Appeal Board.

Applicant fails to absolve himself of foreign preference concerns associated with the presented issue of whether he retains a preference or split preference for his adopted country (Australia), or his country of birth (the United States). Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.e of Guideline C.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE C (FOREIGN PREFERENCE): AGAINST APPLICANT

Subparagraphs 1.a-1.e

Against Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

