DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 14-06969
	)	
Applicant for Security Clearance	)	

Appearances

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

02/17/2016

Decision

HARVEY, Mark, Administrative Judge:

Applicant surrendered her currently valid Irish passport, which does not expire until December 2023, "to the cognizant security authority" under Adjudicative Guideline (AG) ¶ 11(e). Security concerns pertaining to foreign preference are mitigated. Eligibility for a security clearance is granted.

Statement of the Case

On July 15, 2014, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF-86) (Government Exhibit (GE) 1) On May 30, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a statement of reasons (SOR) pursuant to Executive Order (Exec. Or.) 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 AGs, which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF made a preliminary decision to deny or revoke Applicant's eligibility for access to classified information. Specifically, the SOR set forth security concerns arising under the foreign preference guideline.

On August 7, 2015, Applicant responded to the SOR and requested a hearing. (Hearing Exhibit (HE) 3) On October 16, 2015, Department Counsel was ready to proceed. On October 27, 2015, the case was assigned to me. On December 9, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for January 12, 2016. (HE 1) The hearing was held as scheduled. The government offered one exhibit, which was admitted into evidence without objection. (Tr. 16; GE 1) Applicant did not offer any documents at her hearing. On January 19, 2016, I received a copy of the transcript (Tr.) of the hearing. On February 8, 2016, I received one exhibit from Applicant, which was admitted without objection. (Applicant's Exhibit (AE) A) On February 8, 2016, the record was closed.

Findings of Fact[1]

In Applicant's SOR response, she admitted she held a currently valid Irish passport. (SOR ¶ 1.a) She also provided some extenuating and mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 49-year-old division director, who has been employed for 14 years in a well-known agency affiliated with the U.S. Government. (Tr. 8-9; GE 1; AE A) She was born in the United States and educated in U.S. schools through the graduate school level. In 1984, she graduated from high school, and in 1988, she received a bachelor's degree in public administration. (Tr. 6) In 2006, she was awarded a master's degree in emergency services administration. (Tr. 6-7)

In 1984, Applicant enlisted in the U.S. Army Reserve. (Tr. 7) She completed 23 years of active and reserve Army service. (Tr. 7) She honorably retired as a major in the Medical Service Corps in 2006. (Tr. 7) She did not deploy to any combat zones. (Tr. 7) Her highest award was the Army Commendation Medal. (Tr. 8) She has held a security clearance since 1988. (Tr. 9)

In 2008, Applicant married. (Tr. 9) She does not have any children. (GE 1)

In 2003, Applicant received dual citizenship with Ireland, which was available because her grandparent was from Ireland. (Tr. 19) In 2004, she received an Irish passport. At the time of her hearing, she possessed an Irish passport she renewed in 2013, which would continue to be valid until 2023. (Tr. 19-20)

Applicant believed that her Irish passport might facilitate her work for her agency because some areas of the world where she may deploy might be more hostile to a person holding a U.S. passport. (Tr. 21-25; GE 1) She did not utilize her Irish passport. Once security rules about possession of a foreign passport being incompatible with being eligible for access to classified information were clarified for her, Applicant elected to provide her Irish passport to her "cognizant security authority." (AE A) On February 1,

[1]Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

2016, Applicant's facility security officer (FSO) wrote that she received Applicant's Irish passport and would retain it as part of her official duties. (AE A)

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 revised 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. Thus, nothing in this decision should be construed to suggest that it is based, 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 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 was born in the United States. She obtained an Irish passport after becoming a U.S. citizen, and she possessed it until January 31, 2016, establishing AG ¶ 10(a). Consideration of the applicability of mitigating conditions is required.

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).

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.

AG ¶ 11(e) fully applies. On February 1, 2016, Applicant surrendered her Irish passport to her cognizant security authority. Foreign preference security concerns are mitigated.

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 Guideline C, but some warrant additional comment.

Applicant is a 49-year-old division director, who has been employed for 14 years in a well-known agency affiliated with the U.S. Government. She was born in the United States and educated in U.S. schools through the graduate school level. She completed 23 years of active and reserve Army service, and she honorably retired as a major. She has held a security clearance since 1988, and there is no evidence of security

violations, violations of her employer's rules, abuse of alcohol, arrests, convictions, or use of illegal drugs.

The only rationale for denying or revoking Applicant's clearance was her continued retention of a currently valid Irish passport. After being advised that she could mitigate security concerns by ensuring her "passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated" under AG ¶ 11(e), she surrendered her Irish passport to her cognizant security official.

I have carefully applied the law, as set forth in *Egan,* Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person, and I conclude that it is clearly consistent with the national interest to grant continued Applicant security clearance eligibility. Foreign preference security concerns are 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Conclusion

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

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MARK HARVEY
Administrative Judge