

KEYWORD: Foreign Influence; Foreign Preference; Personal Conduct; Criminal Conduct

DIGEST: Applicant, a dual citizen of Panama and the United States, used a Panamanian passport on his several visits to Panama which he has now surrendered. While his mother, brothers, and other relatives are citizens and residents of Panama, none of those relationships creates an unacceptable security concern. Although the security clearance application Applicant submitted in November 2001 contains several inaccurate or incomplete answers, he did not deliberately provide false information or conceal accurate information in the application. Applicant has mitigated the security concerns that existed in this case. Clearance is granted.

CASENO: 03-23491.h1

DATE: 01/23/2006

DATE: January 23, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23491

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a dual citizen of Panama and the United States, used a Panamanian passport on his several visits to Panama which he has now surrendered. While his mother, brothers, and other relatives are citizens and residents of Panama, none of those relationships creates an unacceptable security concern. Although the security clearance application Applicant submitted in November 2001 contains several inaccurate or incomplete answers, he did not deliberately provide false information or conceal accurate information in the application. Applicant has mitigated the security concerns that existed in this case. Clearance is granted.

STATEMENT OF THE CASE

On December 16, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E (personal conduct), Guideline B (foreign influence), Guideline C (foreign preference), and Guideline J (criminal conduct). Applicant submitted a response to the SOR that was received by DOHA on March 21, 2005, requested a hearing, and admitted all Guideline B and C allegations, denied all Guideline E allegations, and denied the allegation under Guideline J, subparagraph a, and admitted the allegation under Guideline J, subparagraph b.

The case was assigned to me on July 7, 2005. A notice of hearing was issued on July 27, 2005, scheduling the hearing for August 17, 2005. The hearing was conducted as scheduled. The government submitted seven documentary exhibits that were marked as Government Exhibits (GE) 1-7, and admitted into the record without objection. Applicant testified and submitted 22 documentary exhibits that were marked as Applicant's Exhibit (AE) 1-22, and admitted into the record without objection.

The record was held open to allow the Government time to submit additional document(s) that were requested by me without objection. One additional document was received, marked as Appellate Exhibit (App. Ex.) I, and administrative notice was taken of the contents thereof without objection. The transcript was received by DOHA on August 25, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, testimony, and exhibits, I make the following findings of fact:

Applicant is a 38-year-old married man who has been employed by a defense contractor as a heavy equipment operator since April 2001. He was previously employed by the U.S. Air Force at the same facility as a heavy equipment operator from August 1999 until March 2001. Before that he served on active duty with the U.S. Army from June 1993 until August 1999, followed by two year's of service in the Army National Guard. He attained the rank of Sergeant (paygrade E-5), and was awarded an Honorable Discharge on September 20, 2001.

Applicant was born in Panama in April 1967. His father, now deceased, was a U.S. citizen on active duty in the U.S. Army stationed in Panama, and his mother was a Panamanian citizen when they married and conceived Applicant. As a result of his parents nationalities, Applicant is a dual citizen of the U.S. and Panama. He was raised by his parents in Panama, graduated from high school there in 1985, and attended about four years of college in that country, although he did not receive a degree. Applicant was employed as a warehouse supervisor by the U.S. Army in Panama from April 1990 until June 1993. He enlisted in the U.S. Army while still residing in Panama, and first came to reside in the U.S. when he attended basic training.

Applicant married his wife, a Panamanian citizen, in Panama in June 1993. Shortly after they were married, she immigrated to the U.S. and obtained permanent resident status. She delayed applying for U.S. citizenship until fairly recently because she and Applicant mistakenly believed she had to be a resident of this country for ten years before she could become a citizen. At the time of the hearing, Applicant's wife had completed almost all requirements to become a U.S. citizen, and, assuming everything was in order, Applicant estimated she would obtain U.S. citizenship within a few months. Applicant and his wife have a seven-year-old son who was born in the U.S. and is a U.S. citizen.

Applicant's mother is 69 years old and retired. She has resident alien status in the U.S., and was residing with Applicant in the U.S. until his 45-year-old brother, who lives in Panama and who is a dual U.S. and Panamanian citizen, became seriously ill with pancreatic cancer. She now divides her time between living with Applicant in the U.S. and this son in Panama. Applicant contacts this brother by telephone on a weekly basis to check on his well-being. Applicant has a second brother who is 43 years old, a dual citizen of the U.S. and Panama, and a resident of Panama. Applicant speaks with this brother by telephone somewhere between bi-weekly and monthly. The older brother works in a museum, and the younger brother is self-employed as a contractor, in a catering business with his wife, and producing television commercials. Neither work for the Panamanian government.

In addition to his brothers, Applicant has two half-brothers who are substantially older than him. Primarily because of their age differences, Applicant has very little contact with his half-brothers. Applicant's parents-in-law are citizens and residents of Panama. His mother-in-law is retired, and his father-in-law works for a company in a duty-free area in Panama. He does not know if his in-laws have ever been employed by the Panamanian government.

Applicant also has two boyhood friends in Panama with whom he maintains contact. One is an attorney and the other has a small business of unknown enterprise that he operates in a duty-free area. Applicant's contact with these individuals consists of sporadic telephone conversations and visits when he travels to Panama.

Applicant visited Panama in 1994, 1999, 2000, 2001, 2002, and 2004. He used his Panamanian passport for most if not all travel to Panama before the 2004 trip because he found it easier to enter and exit that country with his Panamanian passport. He initially obtained a Panamanian passport in October 1992 that expired in October 2002.

Sometime in 2002, Applicant traveled to Panama on short-notice due to his older brother becoming gravely ill. His Panamanian passport apparently expired either before the trip or while he was in Panama, ⁽²⁾ and, believing it was necessary for him to have a valid Panamanian passport to exit the country, his mother prepared an application and obtained a Panamanian passport for him. On August 2, 2004, Applicant tore his active Panamanian passport in half, and surrendered that passport and his expired Panamanian passport to the Panamanian consulate on or about that date. Applicant has repeatedly expressed his willingness to renounce his Panamanian citizenship.

Applicant signed and submitted a security clearance application (SF 86) on November 2, 2001. The process by which the SF 86 was prepared consisted of Applicant filling out an SF 86 worksheet (AE 2) and giving it to his supervisor for the information to be inputted into the computer EPSQ system (AE 1). The supervisor who inputted the information had limited experience and believes she provided Applicant with misleading instructions (AE 1). The final electronic version failed to disclose that Applicant was a dual citizen, that his wife was a citizen of Panama, and that his brothers are Panamanian citizen and that they reside in Panama.

The SF 86 questionnaire submitted by Applicant to his employer clearly states Applicant has dual citizenship with Panama (AE 2, Module 3) and his wife is a citizen of Panama (AE 2, Module 8). However, the SF 86s themselves indicate he is only a U.S. citizen. The electronic version of the security clearance (GE 2), indicates Applicant's wife is only a citizen of the U.S. The SF 86 that was actually signed by Applicant (GE 1) indicates that Applicant's wife is a citizen of Panama and the United States.

The SF 86 questionnaire does not contain any information about Applicant's brothers. Instead, the only persons listed in the questionnaire in response to the question seeking information about his relatives (AE 2, Module 9) are Applicant's parents. While he circled the number next to the word *child* in the *Entry List Options* section of that module, he did not provide any information about his son. He explains the omissions are because he and his supervisor interpreted the phrase *Mandatory Entry* next to the lines seeking information about his parents to mean that those were the only persons he was required to list. While both brothers are listed in each of the SF 86s, they are only described as U.S. citizens. That information apparently came from a conversation with the supervisor who inputted the other information incorrectly. Applicant on a prior occasion did list his brothers and their residence in Panama on at least one form he submitted while on active duty in the Army (AE 4).

The SOR also alleges that Applicant failed to disclose he had a current Panamanian passport when he was interviewed by a Special Agent (SA) from the Defense Security Service (DSS) in June 2003. As explained above, the passport was obtained while he was in Panama on an emergency visit to see his hospitalized brother, primarily through the action of Applicant's mother. Applicant's testimony can be interpreted as he either forgot the passport had been renewed or was unaware that it had been renewed because of the circumstances under which the trip and the renewal occurred. (3) Under the circumstances, his explanation that he was unaware that he had a current Panamanian passport when he was interviewed by the SA is credible.

Applicant was charged with Driving Under the Influence (DUI), Drove Vehicle when Blood Alcohol .10+, and Failure to Drive Within Marked Lanes on September 6, 1997. He pled guilty to a lesser charge of Driving While Ability Impaired, (DWAI) on May 12, 1998, and the other charges were dismissed. Applicant was sentenced to 12 months probation, and ordered to complete Level I Alcohol Education, perform 24 hours of public service, and pay a fine and court costs totaling \$349.00. He had never been arrested before this offense, and has not been arrested since.

Applicant has held a secret level security clearance since September 1993. No prior action has been taken to revoke or downgrade that clearance, and no allegations have been made that Applicant has ever mishandled classified information. The various documents that Applicant submitted establish that he performed successfully while in the Army, and has continued to be a successful performer in each job he has held since being released from active duty.

Applicant's many letters of recommendation establish he is considered to be a dedicated and invaluable employee, an exceptional worker, and an honest person whose integrity is beyond question. Applicant works in a facility that is critical to the national defense of the United States. His project manager wrote:

During September 11, 2001 (Applicant) was Mission Essential to (omitted) due to his expertise in several critical areas. His efforts during the REAL-WORLD critical button-up were accomplished flawlessly to allow the closure of Blast doors for the first time in a real world condition. This ensured the safety and security of all (omitted) personnel and allowed (omitted) personnel to continue their mission of national security (AE 15).

Applicant's duties on September 11, 2001, required him to lock himself into one of the most secure locations in this country, thereby cutting himself off from his family and the events that were transpiring outside. In so doing, Applicant convincingly established his willingness to place the security of the nation above his personal needs and those of his family.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering

the evidence as a whole, Guideline B, foreign influence, Guideline C, foreign preference, Guideline E, personal conduct, and Guideline J, criminal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁶⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

No one has a right to a security clearance⁽¹¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹²⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹³⁾

CONCLUSIONS

A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Based upon the SOR allegations, Disqualifying Conditions 1: *An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country*; and DC 2: *Sharing living quarters with a person or persons, regardless of the citizenship status, if the potential for adverse foreign influence or duress exists* must be evaluated in determining whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

DC 1 applies based on Applicant's mother, brothers, and in-laws being citizens and residents of Panama, and his wife being a citizen of Panama. Applicant's close ties of affection to his wife need not be elaborated on. His close ties of affection to his immediate relatives are demonstrated by his relatively frequent telephone contact with them, his regular visits to Panama, the concern he has for his older brother's well-being, and the fact that

his mother resided with him full-time in the U.S. before his brother became gravely ill, and resides part-time with him at present. DC 2 applies not only based upon Applicant's wife's citizenship, but also because of her immediate family members' residency in Panama.

Once the government meets its burden of proving controverted facts⁽¹⁴⁾ the burden shifts to an applicant to present evidence demonstrating extenuation, mitigation, or changed circumstances.⁽¹⁵⁾ Further, the government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating conditions, and an administrative judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition.⁽¹⁶⁾

Applicant has continuously demonstrated his allegiance to the United States since he first came to this country after joining the U.S. Army while still residing in Panama. He served honorably in the Army and the National Guard, and has performed exceptionally well while working at one of the most secure facilities in the U.S. dedicated to the national defense. Most significantly, when Applicant was called upon to demonstrate his willingness to place the national security above the interests of himself and his family on September 11, 2001, he unhesitatingly secured the blast doors on his work place and locked himself inside, away from his wife and son. Accordingly, under a whole-person analysis, Applicant has clearly demonstrated his eligibility for the granting of a security clearance.

Concerning Mitigating Condition (MC) 1: *A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitants, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States*, none of Applicant's relatives are agents of a foreign power. Further, considering their respective positions and circumstances, none of Applicant's relatives are in a position where the government of Panama is ever likely to attempt to exploit their relationship with Applicant. However, considering DOHA Appeal Board precedent that seemingly indicates even the remotest possibility of exploitation, no matter how unlikely, prohibits application of MC 1, I am unable to find that MC 1 applies in this case.

The analysis does not end though with the mere inability to find the existence of a mitigating condition, because the objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

In this case, Applicant has unquestionably and unhesitatingly demonstrated his devotion and loyalty to the United States. He has served honorably in the U.S. armed forces, and performed superbly for many years while working at one of the nation's most secure facilities. Most importantly, it is unnecessary in this case to speculate what Applicant would do if confronted with the dilemma of the national security and the well-being of his relatives in Panama, because he demonstrated during a real-world crisis that to him the national security of the United States comes before all else, including his family. Guideline B is decided for Applicant.

Under Guideline C, 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. Disqualifying Condition (DC) 1: *The exercise of dual citizenship* and DC 2: *Possession and/or use of a foreign passport* are acts that demonstrate a foreign preference. Applicant is a dual citizen of the U.S. and Panama, based upon his birth in Panama to a U.S. soldier and a Panamanian woman. He obviously exercised his Panamanian citizenship while growing up in Panama and attending school in that country. He also exercised it after relocating to the U.S. by obtaining and using a Panamanian passport to enter Panama.

Applicant's use of his Panamanian passport was strictly for convenience purposes and without any recognition of the concern it would create about his eligibility to hold a security clearance. When he became aware that the exercise of dual citizenship was an impediment to his retaining a security clearance, he destroyed and surrendered his Panamanian passports and expressed a willingness to renounce his Panamanian citizenship. Mitigating Conditions (MC) 1: *Dual citizenship is based solely on parents' citizenship or birth in a foreign country* and MC 4: *Individual has expressed a willingness to renounce dual citizenship* apply. Additionally, Applicant's service in the U.S. Army, his overall work performance at a facility critical to the national defense, and his performance during the real-world crisis of September 11, 2001, demonstrate he is a trustworthy and loyal U.S. citizen. Guideline C is decided for Applicant.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information.

Although there were several incorrect answers in the SF 86s submitted, Applicant did not deliberately provide false information. The SF 86 questionnaire he hand-wrote and submitted to his employer evidences his intent to provide full and complete answers about his citizenship and that of his wife. While his brother's Panamanian citizenship and residency was not reported on the SF 86 questionnaire, the EPSQ version, or the SF 86 that he actually signed, his credible testimony, the letter from his supervisor (AE 1), and his disclosure of their citizenship and residency in U.S. Army records establish the omissions were inadvertent and that he was not trying to conceal the information from the Government.

Applicant failed to disclose he had a current Panamanian passport when he was interviewed by a SA from the DSS in June 2003, and instead asserted his Panamanian passport was expired. Having observed his appearance, demeanor, and manner of testifying, along with the substance of his testimony, I find his explanation for the misstatement to be credible. Applicant neither deliberately provided false or misleading information in the security clearance applications that were submitted, nor during his interview with the SA from DSS. No disqualifying condition applies in this case. Guideline E is decided for Applicant.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information. Applicant's only arrest and conviction was for an alcohol related driving offense that occurred in September 1997. As noted above, he did not deliberately provide false or misleading answers in the SF 86s that were submitted or when he was questioned by the SA so there is no violation of 18 U.S.C. § 1001 that could create additional criminal conduct concerns. Although he was only convicted of DWAI, the evidence is sufficient to find he actually committed the DUI. A DUI offense is serious criminal offense and warrants applying DC 2: *A single serious crime or multiple lesser offenses*.

In mitigation, Applicant had never been arrested before the 1997 DUI arrest, and has not been arrested since. He performed successfully in the U.S. Army and National Guard following his conviction for DWAI, has maintained an outstanding work record since that time, and has earned a reputation as an honest individual of unquestionable integrity. MC 1: *The criminal behavior was not recent*; MC 2: *The crime was an isolated incident*; MC 4: *. . . the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* all apply. Guideline J is decided for Applicant.

In all adjudications the protection of our national security is the paramount concern. I am persuaded by the totality of the evidence available in this case that Applicant is trustworthy, reliable, and does not pose a risk to national security.

FORMAL FINDINGS

SOR ¶ 1-Guideline E: For Applicant

Subparagraphs a-d: For Applicant

SOR ¶ 2-Guideline C: For Applicant

Subparagraph a-d: For Applicant

SOR ¶ 3-Guideline B: For Applicant

Subparagraphs a-g: For Applicant

SOR ¶ 4-Guideline J: For Applicant

Subparagraph a-b: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. The copies of the passports contained in GE 6 and GE 7 do not contain any entry stamps for 2002, but do have at least one illegible stamp in them. Accordingly, it is impossible to determine from the documentary evidence if this passport was used for entry into the Panama in 2002.
3. English is Applicant's second language and it was not always possible to clearly interpret what he was attempting to express by the words and phrases he used.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
11. *Egan*, 484 U.S. at 528, 531.
12. *Id* at 531.
13. *Egan*, Executive Order 10865, and the Directive.
14. Directive, Additional Procedural Guidance, Item E3.1.14
15. Directive, Additional Procedural Guidance, Item E3.1.15
16. ISCR Case No. 99-0597 (December 13, 2000)