

DATE: January 31, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-08983

ECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is a dual citizen of the United Kingdom (U.K.) and the United States (U.S.). She renewed her U.K. passport after becoming a U.S. citizen, used it twice, and intends to renew it again. She is not willing to surrender it. The security concern based on her possession and use of a foreign passport is not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On July 24, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleged security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of the Directive.

Applicant answered the SOR in writing on August 14, 2006, admitted the allegations under Guideline C, admitted one of two allegations under Guideline B, offered explanations, and elected to have a hearing before an administrative judge. The case was assigned to me on November 14, 2006. On January 5, 2007, I granted Department Counsel's motion to withdraw the allegations under Guideline B. The case was heard on January 17, 2007, as scheduled. DOHA received the hearing transcript (Tr.) on January 23, 2007.

FINDINGS OF FACT

Applicant's admissions in her answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 55-year-old supply chain manager for a federal contractor. She was born in the United Kingdom (U.K.), married a U.S. citizen in August 1975, and became a naturalized U.S. citizen. She holds dual U.S.-U.K. citizenship. She

first received a security clearance in 1993 (Tr. 40). Her clearance was continued in March 2003 (GX 1 at 7).

Applicant renewed her U.K. passport in April 1997, after becoming a U.S. citizen. She continues to hold her U.K. passport, which expires in April 2007, and she used it twice, in April 1997 and April 1998, to visit her parents in the U.K. (GX 5; Answer to SOR). On each occasion, a parent was on the verge of death, and Applicant used her U.K. passport because it enabled her to exit the airport more quickly and rush to the hospital (Tr. 39). She also has a U.S. passport, which she has used for all other foreign travel (Tr. 44).

Applicant is not willing to surrender her U.K. passport. In an interview with a security investigator in November 1993, she stated she was unwilling to give up her U.K. passport. She explained, "It is part of me, who I am and it is something I don't want to give up." She professes allegiance to the U.S., and she also takes pride in her U.K. citizenship. She keeps her U.K. citizenship because it is part of her heritage (GX 3 at 1; GX 4 at 6). She adhered to her position at the hearing (Tr. 40, 47). She intends to renew her U.K. passport when it expires (Tr. 45). When asked if she would keep her U.K. passport even if it meant losing her clearance, she responded that she probably would give up her clearance (Tr. 50).

POLICIES

"[N]o 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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants 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 and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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 Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *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). "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

When an applicant acts in such a way as to indicate a preference for a foreign country over the U.S., he or she may be prone to provide information or make decisions that are harmful to the interests of the U.S. Directive ¶ E2.A3.1.1. A disqualifying condition under Guideline C may arise if an individual exercises dual citizenship (DC 1), or possesses or uses a foreign passport (DC 2). Directive ¶¶ E2.A3.1.2.1., E2.A3.1.2.2. Use of a foreign passport is an exercise of dual citizenship. Applicant's exercise of her dual U.K-U.S. citizenship by possessing and using her U.K. passport establishes DC 1 and DC 2.

Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision. ISCR Case No. 99-0454 at 5 (App. Bd. Oct. 17, 2000). Under Guideline C, "the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions." ISCR Case No. 98-0252 at 5 (App. Bd. Sep 15, 1999).

When possession or use of a foreign passport is involved, the clarifying guidance issued by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (the "Money Memorandum") dated August 16, 2000, requires denial of a clearance unless the applicant surrenders the foreign passport or obtains official approval for its use from the U.S. Government. Applicant is aware of the "Money Memorandum" and understands its implications. She stated at the hearing that she "probably" would keep her U.K. passport even if it prevents her from keeping her clearance.

A mitigating condition (MC 1) applies if dual citizenship is based solely on parents' citizenship or birth in a foreign country. Directive ¶ E2.A3.1.3.1. This mitigating condition is established because Applicant did not affirmatively seek foreign citizenship, but acquired it by virtue of her birth in the U.K to parents holding U.K. citizenship.

MC 2 applies if indicators of possible foreign preference occurred before the individual obtained U.S. citizenship. Directive ¶ E2.A3.1.3.2. This mitigating condition does not apply to Applicant, because she has continued to possess and use her U.K. passport after becoming a U.S. citizen.

In addition to considering the specific disqualifying and mitigating conditions under Guideline C, I have also considered: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

Applicant is a mature adult who has held a clearance for many years. She is understandably proud of her heritage, and she does not believe her attachment to the U.K. affects her allegiance to the U.S. She was candid, honest, and sincere at the hearing. Her motive for using her U.K. passport while rushing to her parents' deathbeds was understandable, but it does not outweigh her continued and more recent refusal to surrender her passport after being advised of the "Money Memorandum." The guidance in the "Money Memorandum" precludes her from continuing to hold a clearance.

After weighing the disqualifying and mitigating conditions under Guideline C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concern based on based on her possession and use of a foreign passport. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the interests of national interest to continue her security clearance.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline C (Foreign Preference): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

DECISION

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

LeRoy F. Foreman

Administrative Judge