



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



In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ADP Case No. 07-08108
SSN: XXX-XX-XXXX	)	
	)	
Applicant for Public Trust Position	)	

**Appearances**

For Government: Stephanie Hess, Esq., Department Counsel  
For Applicant: *Pro se*

June 29, 2009

**Decision**

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TUIDER, Robert J., Administrative Judge:

Applicant successfully mitigated Guideline C (Foreign Preference) security concerns. Eligibility for access to sensitive information is granted.

**Statement of the Case**

Applicant submitted her Public Trust Position Application (SF-85P), on July 12, 2006. On March 2, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline C (Foreign Preference) for Applicant.

The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

She answered the SOR in writing on March 16, 2009, and requested a hearing before an Administrative Judge. DOHA received the request on March 26, 2009. Department Counsel was prepared to proceed on May 18, 2009, and I received the case assignment on May 21, 2009.

DOHA issued a notice of hearing on May 29, 2009, scheduling the case for June 9, 2009. The hearing was held as scheduled. The Government offered Government Exhibits (GE) 1 through 3, which were received without objection. Applicant testified on her own behalf, and offered Applicant Exhibits (AE) A and B, which were received without objection.

I held the record open until June 23, 2009, to afford the Applicant an opportunity to submit additional material. Applicant timely submitted AE C and D, which were received without objection. DOHA received the hearing transcript (Tr.) on June 17, 2009.

### **Findings of Fact**

In her Answer to the SOR, Applicant admitted the factual allegations in SOR ¶¶ 1.a. and 1.b., and denied, in part, the factual allegations in SOR ¶ 1.c. After a complete and thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 36-year-old drug interaction pharmacist, who has been employed by her defense contractor employer since January 2006. GE 1, Tr. 27. She seeks to retain her access to sensitive information in conjunction with a public trust position as a condition of her employment. Tr. 27.

Applicant was born in Poland in January 1973, where she was raised, educated, and spent her formative years. In 1995, she won the U.S. State Department sponsored “green card lottery” and in June of that year at age 22, she immigrated to the U.S. In June 2005, she became a U.S. citizen, and in June 2006, she was issued her U.S. passport. GE 1, GE 3, Tr. 21-22.

Applicant is highly educated. She was awarded a master’s degree in pharmaceutical science in July 1998 from a Polish university, and was later awarded a doctorate degree in pharmacy in May 2005 from a U.S. university. GE 1, Tr. 23-25.

Applicant married her husband in the U.S. in July 1995. Her husband, like her, was born and raised in Poland, and immigrated to the U.S. He too is a naturalized U.S. citizen, and is a U.S. Government employee. Applicant’s parents reside in the U.S. and are permanent resident aliens. Applicant’s in-laws are elderly and reside in Poland. Neither Applicant nor her husband have any financial interests in Poland. GE 3, Tr. 25-27. Applicant and her husband have two children, a nine-year-old daughter, and a one-year-old son. Both children are U.S. citizens. GE 1, Tr. 19-20.

Because of Applicant’s birth in Poland to Polish parents, she holds dual citizenship. (SOR ¶ 1.a.) In September 2004, she applied for and was issued a Polish

passport with an expiration date in September 2014. (SOR ¶ 1.b.) She applied for a Polish passport for ease of travel to Poland. GE 3. In October 2006, she used her Polish passport for a 10-day family visit to Poland. She was accompanied by her husband and oldest child. GE 3. Contrary to what was alleged in the SOR, she used her Polish passport to enter Poland and used her U.S. passport to exit Poland. Response to SOR, GE 3. (SOR ¶ 1.c.) At the time, Applicant was unaware that possession or use of a Polish passport would later cause a security concern.

During a December 2006 Office of Personnel Management (OPM) interview, Applicant stated she would be willing to renounce her dual citizenship. GE 3. Post-hearing, Applicant submitted documentation that her Polish passport was destroyed by shredding on June 19, 2009, and the shredded contents were disposed in a secure disposal bin. AE C.

Applicant submitted a reference letter from her supervisor, who stated Applicant “is an asset to the company and does a great job.” AE D.

### **Policies**

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) “The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person’s loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security.” (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an Applicant’s suitability for a public trust position, the Administrative Judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole person concept.” The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on

the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline C, Foreign Preference**

AG ¶ 9 explains the Government’s concern:

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.

AG ¶ 10 sets out one condition that could raise a security concern and may be disqualifying in this 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.

At the time the SOR was issued, Applicant held dual citizenship with Poland and held a valid Polish passport. AG ¶ 10(a)(1) has been raised by the evidence.

Three Foreign Preference Mitigating Conditions under AG ¶ 11 are potentially mitigating to this disqualifying condition:

- (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; and
- (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Applicant's dual citizenship was derived from her birth in Poland. Applicant expressed a willingness to renounce her dual citizenship during her December 2006 OPM interview. Post-hearing, Applicant submitted evidence that her Polish passport had been destroyed. In light of the evidence presented and Applicant's affirmative action to comply with the Directive, this concern is deemed mitigated under AG ¶¶ 11(a), 11(b), and 11(e).

The objective of a trustworthiness determination is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to sensitive information. Indeed, the "whole person" concept recognizes we should view a person by the totality of her 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.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has mitigated the foreign preference security concern. She has overcome the case against her and satisfied her ultimate burden of persuasion.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"<sup>1</sup> and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the Government's case. For the reasons stated, I conclude she is eligible for access to a public trust position.

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<sup>1</sup> See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

### **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. – 1.c.:           For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

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ROBERT J. TUIDER  
Administrative Judge