



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-10487
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

March 20, 2008

Decision

MOGUL, Martin H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on September 19, 2006. On November 19, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines C and B for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); 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.

Applicant replied to the SOR (RSOR) in writing on November 29, 2007, and requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on January 31, 2008. DOHA issued a notice of hearing on February 7, 2008, and the hearing was convened as scheduled on March 5, 2008, in San Diego, California.

The Government offered Exhibits (Ex) 1 and 2, which were received without objection. Applicant testified on his own behalf. He also submitted Exhibits A and B, which were admitted. I granted Applicant's request to keep the record open until March 12, 2008, to submit additional documents. On March 11, 2008, he submitted three documents, which have been marked as Exhibits C through E, and entered into evidence without objection, and the record closed on that date. DOHA received the transcript of the hearing (Tr) on March 14, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

On January 24, 2008, Department Counsel filed a Motion to Amend the Statement of Reasons, which was served on Applicant on that date. The proposed amended SOR added two additional allegations to the SOR. At the hearing, Applicant indicated that he had no objection to the amendments to the SOR. In his RSOR, Applicant admitted SOR allegations 1.a. through 1.c., although he denied that this indicated a preference for a foreign country. At the hearing, he admitted new allegations 1.d. and 1.e. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 48 years old and was born in the United States. Applicant is married to a United States citizen, and he has one son.

Applicant is consultant for a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

(Guideline C - Foreign Preference)

1.a. It is alleged in the SOR that as of September 17, 2007, Applicant possessed a passport from the Netherlands (Dutch passport), which was issued on February 7, 2007, and is not scheduled to expire until February 17, 2012. At the hearing Applicant admitted that he still possessed a Dutch passport.

Subsequent to the hearing, Applicant submitted a letter from the Director of Security of his employer, who stated that on March 11, 2008, she personally destroyed Applicant's Dutch passport. She also confirmed that she has retained the remains of the destroyed passport in her security file (Ex C).

1.b. Applicant applied for and was issued a Dutch passport on February 7, 2007, even though he is a United States citizen by birth. Applicant first received his Dutch passport in 1981. He was able to do this since his father was born in Netherlands. At the time he applied, he was living in England, while working for an American company. Applicant has never used this current passport or the one he received before that. In

1981 he first received a passport from Netherlands, which he used while traveling throughout Europe.

1.c. Applicant applied for and was granted citizenship from Netherlands in 1981, during the period that he was living and working in England from 1981 to 1994.

Applicant indicated at the hearing that he was not willing to renounce his Dutch citizenship, as he would like to maintain the option of one day in the future moving back to Europe.

1.d. It is alleged in the SOR that Applicant exercised dual citizenship with Netherlands and the United States, because of allegations 1.a., through 1.c., listed above. Applicant contends that he has not engaged in any of the responsibilities or duties of being a Dutch citizen, as he has never lived in Netherlands, nor voted in a Dutch election. He also owns no property in Netherlands or any other country outside of the United States.

1.e. Applicant maintains a British retirement account that was opened during the period that he worked in England. The account now has a value of close to \$20,000. Applicant testified that he does not have access to this account until he turns 64, but the account is of little consequence to him.

He submitted a statement, dated December 31, 2007, showing his retirement account in the United States to have a net worth of approximately \$153,000 (Ex D). He also testified that he has a savings account in the United States worth approximately \$35,000. Finally, he estimates his consulting business to be worth between \$10,000 and \$15,000.

Applicant also submitted a letter from an attorney, who is the president of a flying club, of which Applicant has served as the co-treasurer and director (Ex E). He endorsed Applicant's request for a security clearance, describing him as a man of "reliability honesty and integrity."

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

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 classified 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 security decision.

A person who seeks access to classified 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 classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 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

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.”

Applicant’s application and receipt of a Dutch passport raises foreign preference concerns under Disqualifying Condition (DC) 10 (a) (1) the exercise of the privilege of foreign citizenship, by possession of a current foreign passport. DC 10 (b) also applies as Applicant did acquire a foreign citizenship even though he was born a United States citizen.

However, Applicant did destroy or invalidate his foreign passport, by turning it over to his employer's security director, who has shredded it and maintains the remains in the company safe. Therefore, I find that Mitigating Conditions (MC) (e) under this guideline apply to this case. After considering all of the evidence of record on Guideline C, I conclude that the mitigating evidence outweighs the disqualifying evidence.

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) 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The basic factors I have considered in reviewing this case under the whole person concept include the fact that Applicant was born in the United States and has lived here for the last 14 years. His wife is also a United States citizen. All of his considerable assets are in the United States. He destroyed his Dutch passport, and he has never lived in Netherlands nor took part in any Dutch elections. Based on all of the reasons cited above, I find that the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude Applicant mitigated the security concerns.

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
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge