



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



In the matter of:)	
)	
)	ISCR Case No. 07-10649
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: Pro Se

May 8, 2008

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), on August 16, 2006. On December 13, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline C, Foreign Preference, 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.

On January 17, 2008, Applicant answered the SOR and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on February 11, 2008. The case was assigned to me on February 14, 2008. On March 11, 2008, a Notice of Hearing was issued scheduling the hearing for March 27, 2008. The hearing was held as scheduled. The Government offered Government Exhibits (Gov) 1-3, which were admitted without objection. Applicant testified at the hearing. The record was held open until March 27, 2008, to allow the Applicant to submit further documents.

Applicant timely submitted two documents prior to the close of the record which were admitted as Applicant Exhibit (AE) A-B without objection. DOHA received the transcript of hearing on April 9, 2008. The record closed on April 9, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, dated December 6, 2007, Applicant admitted to SOR allegations ¶¶ 1.b -1.e, and denies the allegations in SOR ¶¶ 1.a, 1.f, and 1.g.

Applicant is a 34-year-old information technology (IT) manager employed with a Department of Defense contractor. He has been employed with his current employer since October 2005. He has a Master's Degree in Computer Science. He is single and has no children. This is his first time applying for a security clearance. (Tr at 4-5; Gov 1.)

Applicant's parents were Mexican citizens at the time of his birth. He was born in the U.S. but his family lived in Mexico across the border from the U.S. city where he was born. His parents registered his birth in the U.S. and in Mexico. (Tr at 14–15.) His parents migrated to the U.S. in the early 1970s to raise their standard of living and to provide better educational opportunities for their children. (Gov 3.) His mother became a U.S. citizen in 1991. His father became a U.S. citizen in 2000. (Gov 1.) He has a sister and brother who are citizens of and live in the U.S. His sister is a naturalized U.S. citizen. His brother was born in the U.S. (Tr at 29-30; Gov 1.)

From January 2000 to October 2005, Applicant worked for a company located across the border in Mexico. He commuted from the U.S. during this time. U.S. citizens were required to obtain work permits to work in Mexico. Applicant's company applied for the work permit on his behalf. (Gov 1; Gov 3.)

Applicant's grandmother lives in Mexico. He visits her in Mexico approximately once a week on the weekends. She lives in the city just across the border from where Applicant resides. Applicant also occasionally visits several school friends who reside in the same city in Mexico on the weekends as well. His visits are usually day trips. (Tr at 27.)

In early 2006, Applicant entered into a business agreement with two of his friends. They opened up a fast food burrito business in Mexico in the fall 2006. As a prerequisite to operate a business in Mexico, Applicant was required to obtain a Mexican passport to show Mexican heritage. In 2006, Applicant applied for a Mexican passport. The passport was valid from June 23, 2006 to June 23, 2007. The Mexican passport also made it easier for Applicant to travel in Mexico. He also has a U.S. passport issued on February 2, 2000, with an expiration date of February 1, 2010. (Tr at 11,18; Gov 1; Gov 2; Gov 3.)

Applicant invested approximately \$13,000 in the business. One of his friends lives in the city where the business is located and oversees the daily operations of the business. Applicant would travel approximately once every two months to the city where the business is located to check out the operations. The business is not making a profit. (Tr at 21-23; Gov 3.)

Upon learning that possession of a valid Mexican passport and the investment in the Mexican business might affect his security clearance status, Applicant took measures to divest himself from the business. He has not been active in the business since December 2007. He took his name off a Mexican bank account that was registered to the business, and transferred his shares of the business to his two business partners. (Tr at 23-25; AE A; AE B.) He does not intend to renew his Mexican passport. (Tr at 29.)

Applicant has no other business interests in Mexico. He does not own any property in Mexico. He does not possess a Mexican driver's license. He has not served in the Mexican military. He does not vote in Mexican elections. He receives no benefits from the Mexican government. None of his friends are involved with the Mexican government. (Tr at 19-20, 26, 28.)

Applicant earns \$96,000 a year in his current job. His loyalties are with the U.S. He intends to reside in the U.S. when he retires. (Tr at 12, 20, 29.) His supervisor states that Applicant is an exemplary employee who supports a difficult customer. She states that Applicant goes above and beyond what is expected to provide quality service to his customers, and is a trusted member of her staff. (AE A at 2.)

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.

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

The security concern relating to the guideline for Foreign Preference is set out in AG ¶9:

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.

The guideline notes several disqualifying conditions that could raise security concerns. Of the Foreign Preference Disqualifying Conditions (FP DC), the following apply to Applicant’s case.

Foreign Preference Disqualifying Condition (FP DC) ¶ 10(a) (*exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport; (5) using foreign citizenship to protect financial or business interests in another country*) and FP DC ¶ 10(b) (*action to acquire or obtain*

recognition of a foreign citizenship by an American citizen) apply. During his security investigation, Applicant possessed a valid current Mexican passport. He applied for the passport in order to use his Mexican citizenship to invest in a business venture in Mexico. It is his understanding that only Mexican citizens are allowed to invest in Mexico. His actions indicate that he was using his Mexican citizenship in order to open a business in Mexico. He applied for a Mexican passport in June 2006 in order to obtain recognition of his Mexican citizenship.

The guideline also includes examples of conditions that could mitigate security concerns arising from Foreign Influence.

FP MC ¶ 11(a) (*dual citizenship is based solely on parents' citizenship or birth in a foreign country*) does not apply. While Applicant obtained his dual citizenship based on his parents' citizenship, he exercised his dual citizenship by applying for and using a Mexican passport in 2006. His Mexican citizenship also allowed him to start a business venture in Mexico.

FP MC ¶ 11(e) (*the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated*) applies. Applicant's Mexican passport expired in June 2007. It is no longer valid. He has no intention to renew his Mexican passport.

The allegations concerning Applicant visiting his grandmother and several childhood friends in Mexico on the weekends is not a security concern. (SOR ¶ 1.d) His grandmother is elderly. His friends are childhood friends with whom he went to elementary school. Applicant lives in a border city. His visits to his grandmother and friends are the equivalent of driving across town with the exception that there is an international border in between.

Once Applicant learned that possession of a foreign passport and his investment in the fast food business in Mexico raised a security concern, he took action to divest his interest in the fast food business. Applicant earns approximately \$96,000 a year in his full-time job. He depends more on his annual income as opposed to the \$13,000 invested in the fast food business located in Mexico. His business venture did not subject him to heightened risk of foreign influence or exploitation. Applicant's divestment of the business interest located in Mexico negates any concern raised under Foreign Preference.

Applicant has mitigated the security concerns raised under Foreign Preference.

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 common sense 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. Although Applicant applied for a Mexican passport in order to open a business in Mexico with his friends, he has no intentions to renew his Mexican passport. His passport is expired. This was Applicant's first time applying for a security clearance. He was not aware of the security concerns raised by his applying for and possessing a foreign passport, and his investment in a foreign business. Once he discovered the issue, he took steps to mitigate those concerns. He was forthcoming about all of this information during his security background investigation. Applicant has lived in the U.S. since he was in third grade. He attended college and graduate school in the U.S. He has no foreign financial interests. He is well regarded at his current place of employment.

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
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	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 security clearance. Eligibility for access to classified information is granted.

ERIN C. HOGAN
Administrative Judge