



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----, -----) ISCR Case No. 07-15508
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel
For Applicant: *Pro Se*

September 22, 2008

Decision

WHITE, David M., Administrative Judge:

Applicant married a U.S. service member and became a naturalized U.S. citizen during the four and a half years they lived in the U.S. They are now separated, pending divorce, and she lives and works in Germany, where she retains dual citizenship, holds an active passport, and votes. All of her immediate family and most of her assets are in Germany. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Applicant submitted her Security Clearance Application (SF 86), on January 20, 2005. On April 3, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guidelines C and B.¹ 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

¹Item 1.

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 answered the SOR in an undated, notarized letter, and requested that her case be decided by an Administrative Judge on the written record without a hearing.² Department Counsel submitted the Government's written case on June 24, 2008. A complete copy of the file of relevant material (FORM)³ was provided to Applicant, and she was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant signed the document acknowledging receipt of her copy of the FORM on July 8, 2008, and returned it to DOHA. She provided no further response to the FORM within the 30-day period she was given to do so, did not request additional time to respond, and made no objection to consideration of any evidence submitted by Department Counsel. I received the case assignment on September 15, 2008.

Findings of Fact

Applicant is a 37-year-old employee of a defense contractor. She was born and raised in Germany. In 1997, she married a U.S. service member who was serving there. They moved to and lived in the U.S. from July 1998 to March 2003, and she became a naturalized U.S. citizen in March 2002. In 2003, she and her husband separated, pending divorce. She moved back to Germany, and obtained her present job in April of that year, working for the same company that had employed her in the U.S. from January 2000 through February 2003.⁴

In her answer to the SOR, Applicant admitted the truth of all the factual allegations in SOR ¶¶ 1.a through 1.e and 2.a through 2.c. Applicant retained her German citizenship, and obtained a German passport in 2007 with a 2017 expiration date to replace her 1997 German passport that expired in 2007. She is not willing to renounce her German citizenship or to surrender her German passport, and professes ongoing loyalty to Germany. She regularly voted in German elections both before moving to the U.S. and since her return.⁵ She has about \$260,000 in savings and inherited assets in German financial institutions, and about \$20,000 in a U.S. savings account. Her mother, step-father, sister, aunt and niece are all German citizens and residents, as are the majority of her friends and acquaintances. Neither she nor any of her family members have ever been affiliated with the German or another foreign government.⁶

²Item 3.

³The government submitted five items in support of the allegations.

⁴Item 4 at 1 through 4.

⁵Item 3 at 2; Item 4 at 6; Item 5 at 7, 8, 10-11, 14.

⁶Item 3 at 1, 2; Item 4 at 5-6; Item 5 at 4-6, 10.

Department Counsel neither sought administrative notice nor submitted any evidence concerning the nature of Germany's government or its relations with the U.S. that would indicate any heightened risk of foreign exploitation. Department Counsel's reliance on interpretations of Appeal Board precedents that pre-dated the substantial revision of the Guideline B disqualifying conditions in the current AG is unpersuasive. Similarly, her assertion that Guideline C security concerns arise under AG ¶ 10(a)(4)⁷ is unsupported. This disqualifying condition requires "residence in a foreign country to meet citizenship requirements," and does not apply to Applicant who is a German citizen by birth. Since Applicant elected a determination on the written record, no in-person evaluation of her character or credibility was possible.

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 to be used 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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

⁷Department Counsel incorrectly identified this disqualifying condition as "DC 10(a)(2)." (FORM at 4.) That provision actually concerns foreign military service.

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9 security concerns involving foreign preference arise because, “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 describes conditions that could raise a security concern and may be disqualifying:

(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;
- (2) military service or a willingness to bear arms for a foreign country;
- (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
- (4) residence in a foreign country to meet citizenship requirements;
- (5) using foreign citizenship to protect financial. or business interests in another country;
- (6) seeking or holding political office in a foreign country; and,
- (7) voting in a foreign election;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;

(c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest; and,

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

Applicant's actions in obtaining and maintaining her currently valid German passport in 2007 raise security concerns under §§ 10(a)(1) and 10(b) above. She was born a German citizen, but became a U.S. citizen in 2002. Obtaining the German passport in 2007 was an action to obtain recognition of her continuing German citizenship by the German government. She intends to continue possession and use of her German passport. Her past and intended future voting in German elections raises potential concerns under AG § 10(a)(7) as well. Finally, her declaration of ongoing loyalty to Germany, refusal to renounce dual citizenship, and resumption of residence and employment there after separation from her U.S. citizen husband all show ongoing allegiance to Germany, as contemplated under AG § 10(d).

AG § 11 provides conditions that could mitigate these security concerns:

(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;

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

(d) use of a foreign passport is approved by the cognizant security authority.

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

(f) the vote in a foreign election was encouraged by the United States Government.

Applicant neither asserted nor provided any evidence to support application of any of these potentially mitigating conditions. While she apparently wants to maintain her U.S. citizenship as well, she resumed residence, employment, and the full exercise of the rights, privileges and obligations of her German citizenship upon separation from her American husband in 2003. She is unwilling to surrender or invalidate her German passport and her family, friends, and financial assets are predominantly in Germany.

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding foreign influence:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying. Department Counsel argued that the evidence in this case established two of them: ¶ 7(a), “contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;” and ¶ 7(b), “connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.” There is no evidence on which to base any conclusion that the German government would attempt to exploit or coerce Applicant to disclose protected information based on her family or property there. Other than their mere presence in Germany, nothing about Applicant's contacts with her family and friends suggests any heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion. AG ¶ 7(a) is not supported by the record. However, Applicant's residence, together with that of her close family members and substantial property in Germany create a potential conflict of interest between her obligation to protect sensitive information and desire to help her native country. Should she obtain sensitive U.S. information that she felt would be of value to the German government, her substantial ties there would generate such a conflict. Thus, legitimate security concerns are raised under AG ¶ 7(b).

AG ¶ 8 provides conditions that could mitigate security concerns. Those with potential application in this case are:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.; and

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

Applicant's relationships with her family in Germany are close and important to her, and she has substantial financial investments there. None of her family members have any government connection, or are in any position to benefit from her compromise of protected information. Particularly since Germany is a close ally with no record of targeting U.S. citizens for protected information, it is not very likely that Applicant would be put in a position of having to choose between any foreign interests and those of the U.S. However, should such potential conflict of interest arise, her relative ties to Germany and the U.S. are such that she could not necessarily be expected to resolve it in favor of the U.S. interest. This establishes some mitigation under AG ¶ 8(a), but not under AG ¶ 8(b).

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) the 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. Applicant is a mature individual who is responsible for her choices and conduct. After a relatively brief period of residence in the U.S., accompanying her new husband due to military reassignment, she separated from him and returned to live and work in Germany where her family and most of her friends reside. She intends to retain and exercise her rights, privileges and responsibilities as a German citizen, and professes her continuing loyalty to her native country. None of this is either improper or unusual. However, it establishes legitimate foreign preference and foreign influence security concerns that she carries the burden

of proof to rebut or mitigate. She offered no other evidence about her character or responsibility to mitigate these concerns, or tending to make their continuation less likely.

Overall, the record evidence creates substantial doubt as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from her foreign preference and foreign influence.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

DAVID M. WHITE
Administrative Judge