



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-18754
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric M. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

March 31, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline C (Foreign Preference), based on Applicant's possession of a Senegalese passport. Security concerns are mitigated by destruction of the passport. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SF 86) on February 14, 2007. On November 5, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline C. 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on November 12, 2008; answered it on December 16, 2008; and requested a hearing before an administrative judge. DOHA received the request on December 24, 2008. Department Counsel was ready to proceed on January 27, 2009, and the case was assigned to me on February 17, 2009. DOHA issued a notice of hearing on February 18, 2009, scheduling the hearing for March 5, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits (AX) A through F, which were admitted without objection. The record closed upon adjournment of the hearing on March 5, 2009. DOHA received the transcript (Tr.) on March 23, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in the SOR and offered explanations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 51-year-old electrical engineer employed by a defense contractor. He works on avionics systems integration and flight control systems. He was born in Senegal and came to the U.S. in 1986 (Tr. 34). He was married to a native of Senegal in June 1991, and they have four children, ages 14, 11, 7, and 4 (GX 1 at 7). The oldest child was born in Senegal, where he attends school. Their other three children reside with them in the U.S. Applicant became a U.S. citizen in May 1996, and he has voted in every national and local election since becoming a U.S. citizen (Tr. 42). His wife is a permanent resident alien (Tr. 39). He has never held a security clearance.

Applicant worked as a dishwasher and a line cook at several restaurants from September 1995 to June 2001. He helped his spouse manage a hair braiding salon from July 2001 to March 2003, and he worked as a freelance translator from April 2003 until he was hired by his current employer in June 2005 (Tr. 35-36).

Applicant received a degree in physics and chemistry while living in Senegal (Tr. 7). He has attended college in the U.S. since November 1999, while working full-time. He received a bachelor's degree in electrical engineering in October 2002, a master's degree in May 2005, and he is now in a doctoral program and expects to receive his degree in December 2010. All of Applicant's education in the U.S. has been paid for from his own earnings and various U.S.-based grants and scholarships. After he came to the U.S. he received no educational or other benefits from the government of Senegal (Tr. 42). He has no property in Senegal (Tr. 43). Applicant testified he is grateful for the opportunities the U.S. has given him, and he will do whatever is required to continue working in support of the U.S. (Tr. 52).

Three of Applicant's professors submitted letters on his behalf. One professor described him as in the top one percent of the students, an "unofficial faculty assistant," and highly respected because of his intelligence, motivation, enthusiasm, personable manner, and involvement in class activities (AX B). He volunteers to help other students

who have difficulty keeping up with the pace of instruction (Tr. 28). Another professor described him as a diligent and hard-working student, very respectful, and goal-oriented (AX C). A third professor evaluated him as a model student (AX D). One of Applicant's co-workers also submitted a letter on his behalf, describing him as a serious co-worker, a team player, a person of high integrity, and very conscientious about following work procedures (AX E).

Applicant's parents are deceased. He is the oldest child. He has three brothers who are farmers, and two sisters and one half-sister who are housewives. All his siblings live in a small village in Senegal and have never traveled outside Senegal (GX 3 at 1-2). His siblings are uneducated, have no connection to the Senegalese government, and they do not know he is being considered for a security clearance. (GX 2 at 7; GX 3 at 2).

Applicant traveled to Senegal for his father's funeral in September 1995 and for his mother's funeral in April 1999. He visited his brothers and sisters in Senegal in 2003 and 2004. He obtained a Senegalese passport in December 2005 in order to avoid the harassment he experienced during his previous visits to Senegal using his U.S. passport. The passport had an expiration date of December 13, 2009, but he never used it, because he has not returned to Senegal since 2004.

Applicant testified he did not think having a Senegalese passport would raise any issues because he was advised by an immigration officer that he could keep his Senegalese citizenship so long as he used a U.S. passport to travel to and from the U.S. (Tr. 30). In an interview with a security investigator in June 2007, he told the investigator he was willing to renounce his Senegalese citizenship (GX 3 at 1). He surrendered the Senegalese passport to his employer's security office when he realized it caused security concerns, and a member of the security office destroyed the passport on February 24, 2009, by shredding it (AX A).

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 have 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 criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common

sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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 that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. 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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. 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 AG ¶ 2(b).

Analysis

Guideline C, Foreign Preference

The SOR alleges Applicant is a dual citizen of the U.S. and Senegal (SOR ¶ 1.a), that he renewed his Senegalese passport after becoming a U.S. citizen (SOR ¶ 1.b), and that he currently possesses a valid Senegalese passport that does not expire until December 13, 2009 (SOR ¶ 1.c). The concern under Guideline C is as follows: “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 ¶ 9.

Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision. ISCR Case No. 99-0454 at 5, 2000 WL 1805219 (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). A disqualifying condition may arise from “exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen,” including but not limited to “possession of a current foreign passport.” AG ¶ 10(a)(1). Applicant’s possession of a valid Senegalese passport after becoming a U.S. citizen raises AG ¶ 10(a)(1), shifting the burden to him to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated by evidence that “dual citizenship is based solely on parents’ citizenship or birth in a foreign country.” AG ¶ 11(a). Security concerns under this guideline also may be mitigated if “the individual has expressed a willingness to renounce dual citizenship.” AG ¶ 11(b). Finally, security concerns based on possession or use of a foreign passport may be mitigated if “the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.” AG ¶ 11(e). All three mitigating conditions are established by the evidence in this case.

Whole Person Concept

Under the whole person concept, an 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. An 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 have incorporated my comments under Guideline C in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a remarkable man. He emigrated from a small village in Senegal, worked at menial jobs for several years, obtained a responsible job with a defense contractor, and distinguished himself as a college student while working full time. He is now on the verge of obtaining a doctorate in electrical engineering. He obtained a Senegalese passport to avoid harassment when entering and leaving Senegal, but he has never used it. He obtained it because he misunderstood the advice given by an immigration official, and he surrendered it after learning it raised security concerns. In words and in deeds, he has demonstrated his strong preference for the U.S.

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 mitigated the security concerns based on foreign preference. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline C (Foreign Preference):	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge