



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



In the matter of:)
)
-----) ISCR Case No. 08-03389
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro Se*

January 14, 2009

Decision

ABLARD, Charles D., Administrative Judge:

Applicant failed to mitigate security concerns regarding Foreign Preference (Guideline C). Clearance is denied.

Statement of the Case

On February 26, 2007, Applicant submitted a Security Clearance Application (SF 86). On July 15, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised. The SOR alleges security concerns under Guideline C.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations in a sworn statement signed on August 4, 2008, and requested a hearing before an administrative judge. The case was assigned to me on October 20, 2008. DOHA issued a notice of hearing on November 5, 2008, for a hearing on November 18, 2008, and it was held on that day.

At the hearing, the government offered two exhibits (Exhs.) that were admitted in evidence without objection. Applicant submitted no exhibits at the hearing but testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on November 26, 2008. At the request of Applicant, the record was held open for 30 days and three evidentiary documents were submitted within that time and admitted without objection.

Procedural Rulings

Notice of Hearing

The hearing notice was dated less than 15 days before the hearing date. I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to the 15 days notice and indicated he was ready to proceed (Tr. 7).

Findings of Fact

Applicant admitted all of the factual allegations of the SOR in his answer but denied the general allegation that he has a preference for a country other than the U.S. After a complete and thorough review of the evidence of record, I make the following findings of fact:

Applicant is a 41-year-old heavy equipment operator employed by a government contractor since 2007 who was born in Mexico. His father was a laborer in the harvests in the U.S. at various locations. The family decided to stay in the U.S. Applicant obtained an associate's degree from a technical college in 1987. He obtained a green card in 1978 and became a U.S. citizen in 1993.

When Applicant was married in 1991, his wife owned some property in Mexico only a few miles from the U.S. border. In 1994 he built a house on the property using his money. He was, at that time, working for a U.S. company that had business in Mexico and he often traveled there for work (Tr. 35). He obtained a Mexican national identity card identifying his Mexican parentage to facilitate travels to Mexico for his work (Tr. 22 and 60). He has not had a Mexican passport since becoming a U.S. citizen (Tr. 66).

In 2003 he applied for and received Mexican citizenship. He acknowledged this on his SF 86. The reason for so doing was so that he could legally assume ownership of the house, and be able to sell the house at a future time since Mexico requires property owners to be citizens (Tr. 36). He was also fearful about his investment since, because of the Mexican law requiring ownership, squatters claim such property and it is difficult to evict them. He is now trying to sell the house through advertisements in local

Mexican newspapers (Exh. A). The value of the property is between \$30,000 and \$50,000. He owns a home in the U.S. valued at \$140,000 and intends to buy another.

In 2006 he voted in the Mexican elections (Tr. 26). That election was a general election with candidates for president as well as local officials. The principal reason he voted was to have some influence in the selection of local officials who would be deciding municipal issues. He also voted for one of the presidential candidates in the same election (Tr. 27). He regularly votes in all U.S. elections (Tr. 30).

Applicant has expressed a willingness to revoke his Mexican citizenship (Tr. 49). He has a strong preference for U.S. citizenship based on having lived here for 30 years and love for the country (Tr. 30). He has met with the Mexican consulate in the city where he lives to explore revocation of Mexican citizenship. However, he does not want to revoke until he can sell the property in Mexico (Tr. 34). He is somewhat fearful of discussions with the consul at this time as he feels they may cause some difficulties for him or the property if he should revoke his citizenship now (Tr. 52-53). When he became a Mexican citizen again in 2003 and voted in the 2006 election he was not employed by a defense contractor and had no idea these actions might later jeopardize his work.

Applicant has three children who are 18, 14 and 2. He has another who is 18 by another woman for whom he pays child support. He has never served in the military in either the U.S. or Mexico. He is an hourly worker with an annual income of approximately \$60,000. He does not hold a security clearance but was given an interim clearance soon after filing his application for a security clearance. It was revoked when this matter arose (Tr. 68). He does not have access to classified information but needs a clearance to have access to the military installation where he works.

Applicant is highly regarded by his supervisors who describe him as loyal, competent, and hard-working (Exhs. B and C).

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.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence,” demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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 *a/so* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude that the following Adjudicative Guidelines provide the standard for resolution of the allegations set forth in the SOR.

Guideline C Foreign Preference

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors and conditions above, I conclude the following with respect to all allegations set forth in the SOR:

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

“[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.

AG ¶ 10 describes possible 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.

The fact that Applicant has used foreign citizenship to protect financial interests in a foreign country by becoming a citizen of Mexico, and by voting in a foreign election to influence the outcome of local elections to protect property interests have raised security concerns under Sec. (a). (5) and (7). of the guideline.

AG ¶ 11 provides the following conditions that could mitigate security concerns (MC):

(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.

The only possible MC applicable is paragraph (b) since he has expressed such a willingness to revoke his Mexican citizenship. However, he has placed conditions on doing so, namely the sale of the property in Mexico. The Appeal Board has held in a similar case also involving Mexico that a person owning property there who expressed a willingness to revoke but declined to do so to protect property interests had placed conditions that were not consistent with the requirement of willingness to revoke (ISCR Case No. 01-16098 Appeal Board May 29, 2003).

Although Applicant has taken some steps to sell the property which would remove the condition, that has not yet happened. Thus, his intent remains conditional. As long as he owns the house he likely will have dealings with officials in Mexico, and he is fearful of repercussions if it becomes known that he is renouncing his citizenship. Since the Applicant's vote in a foreign election was not encouraged by the U.S. that MC is not applicable.

I place no emphasis on the fact that he was initially a citizen of Mexico by virtue of his parentage, but only on actions he has taken after becoming a U.S. citizen.

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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to foreign preference allegations. While there is no reason other than the dual citizenship and voting to question Applicant's ability to hold a security clearance, his refusal to revoke his Mexican citizenship until he sells his property places a condition on the willingness to revoke and precludes a finding in his favor. While Applicant took these actions which cause him to be denied a security clearance before his employment by a defense contractor, he has chosen a course that protects his foreign property interests and is unwilling to take steps to reverse those actions at this time. There is no reason based on the facts that are known that he should not receive a security clearance at some future time when he can do so without fear of losing his investment or his property. While he is making efforts to resolve the issue through sale of the property, that has not occurred as yet.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), a careful consideration of the whole person factors and supporting evidence, application of the pertinent factors under the adjudicative process, and interpretation of my responsibilities under the guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

Formal findings 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

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant at this time. Clearance is denied.

Charles D. Ablard
Administrative Judge