



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



In the matter of:)
)
-----) ISCR Case No. 08-03999
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro Se*

November 5, 2009

Decision

HARVEY, Mark, Administrative Judge:

Applicant has property in France, is a French citizen, has a French bank account, and holds a French-sponsored security clearance. She has received social and medical benefits based on her French citizenship. She wants to continue to receive the benefits of French citizenship. Security concerns pertaining to foreign preference are not mitigated. Eligibility for a U.S. security clearance is denied.

Statement of the Case

On October 23, 2007, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Government Exhibit (GE) 1). On October 14, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to her (GE 7) pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised; 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. The SOR alleges security concerns under Guideline C (foreign preference) (GE 7). 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 her security clearance, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On July 30, 2009, Applicant signed her response to the SOR and provided it to DOHA on August 3, 2009 (GE 8). On September 10, 2009, Department Counsel indicated he was ready to proceed. The case was assigned to me on September 21, 2009.

At the video teleconference hearing held on October 22, 2009,¹ Department Counsel offered five exhibits (GE 1-5) (Transcript (Tr.) 18). There were no objections, and I admitted GE 1-5 (Tr. 18-19). Applicant offered two exhibits (AE A, B), which were admitted into evidence without objection (Tr. 20-21). Additionally, I admitted the Hearing Notice (GE 6), SOR (GE 7), and Applicant's response to the SOR (GE 8). I received the transcript on October 29, 2008.

Administrative Notice

At the hearing, on my own motion I took administrative notice of some basic facts concerning France, as well as about France's relationship to the United States (Tr. 38-41).² I offered the parties an opportunity to object to those facts (Tr. 40-41). I did not receive any objections (Tr. 40-41). The specific facts noticed are in the section of this opinion labeled "French Republic."

¹ Applicant waived her right under Directive ¶ E3.1.8 to 15-days' notice of date, time, and location of her hearing (Tr. 14-15). Applicant was located at an overseas location. Department Counsel and I were located in Arlington, Virginia.

²Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from government reports. See Stein, *ADMINISTRATIVE LAW*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Requests for administrative notice may utilize authoritative information or sources from the internet. See, e.g. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (citing internet sources for numerous documents). In this case the source for the facts is the U.S. Department of State, Bureau of European and Eurasian Affairs April 2009, "Background Note: France," available at <http://www.state.gov/r/pa/ei/bgn/3842.htm> (Administrative Judge's Exhibit (AJ Ex.) I).

Findings of Fact³

Applicant admitted the SOR allegations in SOR ¶¶ 1.a to 1.c with explanations (GE 5). For SOR ¶ 1.d, she admitted she had a currently valid French passport; however, she denied that she used it to travel in the European Union and noted it was not necessary to use a French passport for such travel (GE 5). In regard to SOR ¶ 1.e, she admitted that she owned real property in France valued at about \$230,000 (GE 5). Her admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 36 years old (Tr. 7, 21). In 1995, she earned a bachelor of arts degree in English from a U.S. university (Tr. 7). She married her husband in 1998 (Tr. 22). Her husband is a French citizen and lives in France (Tr. 24). For at least the last five years, her husband has been a school teacher in France (Tr. 37). From 1998 to 2008, Applicant lived in France (Tr. 24). She currently lives in a nearby European country so that she can be closer to her employment (Tr. 24). On May 10, 2004, she was hired as a temporary employee at a North Atlantic Treaty Organization (NATO) installation (Tr. 5; AE B). On March 1, 2005, she was hired as a permanent employee at the NATO installation (AE B).

Foreign Preference

Applicant became a French citizen in 1999 (Tr. 24; GE 3). She became a French citizen so that she could receive French employment (GE 3). She needed money to pay off her student loans (GE 3). Over the last decade she has received the benefits of being a French citizen, such as medical benefits and other social benefits (Tr. 24). She received a French passport in 1998 (Tr. 25). Her current French passport is valid until 2015 (Tr. 25). When she began her employment at NATO and applied for a U.S. security clearance, she agreed not to use her French passport (Tr. 26). She recently turned her French passport in to the U.S. Mission to NATO, where it was destroyed (Tr. 25; AE A).

Applicant has a checking and savings account in France (Tr. 22). She does not have any bank accounts in the United States (Tr. 35). She has a French NATO security clearance (Tr. 8). She and her husband own property in France. The location of the property in France is due to geographical convenience rather than political or national preference (Tr. 28-29). If she lived in the United States, she would own property in the United States (Tr. 28-29).

Applicant has voted in both United States and French elections (Tr. 36). She voted in the 2008 U.S. presidential election (Tr. 36). She voted in a French election about two years ago (Tr. 36).

³Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

When Applicant applied for NATO employment, she had to elect her primary citizenship (Tr. 30). She selected French citizenship because she received her initial employment from a French temporary employment agency, and she was informed that a French security clearance would be processed faster than a U.S. security clearance (Tr. 30-31). She learned she could immediately receive an interim French security clearance and continue her employment (Tr. 31). However, she would have to wait a year for a U.S. security clearance and would not be permitted to retain her employment until the U.S. security clearance was approved (Tr. 31). She announced a preference for France for economic reasons and not as an expression of loyalty.

Applicant does not intend to renounce her French citizenship (Tr. 26).⁴ She wanted to retain her French citizenship because it helps with employment in France. Her French citizenship makes it possible to receive medical services at a French hospital, and it provides a social and financial safety net (Tr. 27). European citizens receive priority for employment, and that priority is an important factor in her decision to remain a French citizen (Tr. 27). Another factor is her desire to adopt the culture of her husband (Tr. 28).

Applicant has been employed at a NATO installation more than five years (AE B). Her NATO security officer notes her conscientious treatment of classified, sensitive or protected information (AE B).

Applicant wanted her employer (a subdivision of NATO) to consider her to be an American (Tr. 32). Being considered a U.S. citizen will improve her employment possibilities in NATO (Tr. 33). Americans have an excellent reputation as dedicated, hard workers (Tr. 33). She is very proud of her American nationality (Tr. 33). She considers her preference to be American over French (Tr. 34). She has a large family in the United States, and her family connections are very strong (Tr. 34). She stays in contact with her American family and visits the United States whenever possible (Tr. 34, 35). She enjoys experiencing American food and culture even while she is in Europe. For example, she enjoys visiting the American facilities at the U.S. military bases in the Kaiserslautern area of Germany (Tr. 35).

French Republic⁵

France is a permanent member of the United Nations Security Council, North Atlantic Treaty Organization (NATO), the G-8, the European Union, the Organization for Security and Cooperation in Europe (OSCE), the World Trade Organization and various multilateral organizations. France is America's oldest ally; French military assistance was instrumental in helping Britain's American colonies establish independence. More American soldiers have been killed on French soil (because of World Wars I & II) than on that of any other foreign country. France supports the U.S. initiative under Quartet for

⁴ Failure to offer to renounce or to actually renounce foreign citizenship is not a negative factor weighing against approval of a security clearance.

⁵ AJ Ex. I is the source for the facts in this section. See *also* Administrative Notice, *supra*.

resolving Middle East problems. Since 2003, France has supported four U.N. Security Council resolutions in Iraq and provided funds as part of the European Union—Iraq contribution. Since 2006, France has joined the United States and others in actively discouraging Iran from pursuing nuclear weapons.

The U.S. State Department describes the international relationship with France as active and friendly. The United States and France share common values and have parallel policies on most political, economic, and security issues. Differences are discussed frankly and have not generally been allowed to impair the pattern of close cooperation that characterizes relations between the two countries. France has significantly increased participation in NATO's military wing in recent years. France ended conscription in 2002 and is modernizing its military forces. Although France opposed the U.S. invasion of Iraq, France has about 2,000 soldiers serving in Afghanistan, and assisted in assembling \$21 billion in pledges for economic assistance to Afghanistan. France is a close ally of the United States in the war on terrorism. In December 2007, France convicted five former Guantanamo detainees on terrorism charges.

The United States and France have strong economic relationships with each other. The United States is France's sixth-ranked supplier of imports. The United States is the top destination for French investments worldwide. The United States is the largest foreign investor in France, employing over 619,000 French citizens. France is the United States' eighth trading partner for total goods.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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 overarching adjudicative goal is a fair, impartial, and commonsense 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. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. 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). 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). “[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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guideline C (foreign preference) with respect to the allegations set forth in the SOR.

Foreign Preference

AG ¶ 9 describes the foreign preference security concern stating, “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 in Applicant's case:

(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;

(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;

(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 became a French citizen, received French social and/or medical benefits, and obtained a French passport after becoming a U.S. citizen. Her voting in a French election is not a disqualifying condition because she did not receive notice about this concern in the SOR. She does not currently possess a French passport. AG ¶¶ 10(a)(3), 10(b) and 10(d) apply.

AG ¶ 11 provides conditions that could mitigate 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.

AG ¶ 11(e) applies and mitigates any concern about Applicant's possession of a French passport. None of the other mitigating conditions fully apply. Applicant was born in the United States and her parents are U.S. citizens. She became a French citizen in 1998 or 1999 even though she was a U.S. citizen. She did not offer to renounce her French citizenship. She received French medical/social benefits as an adult after leaving the United States and becoming a French citizen.

Whole Person Concept

In all adjudications, the protection of our national security is the paramount concern. The adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of his or her acts, omissions, and motivations as well as various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances and applying sound judgment, mature thinking, and careful analysis. Under the whole person concept, the Administrative Judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1:

(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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 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.

There is considerable evidence supporting approval of Applicant's clearance. The foreign preference issue in this case relates to France. The French geopolitical situation and France's relationship with the United States are pertinent factors in this analysis.⁶ France's relationship with the United States has changed over the decades and is likely to change again in the future. France is and has been an important U.S. ally; however, on some occasions, such as the U.S. invasion of Iraq, France has contested U.S. policy. France currently has an excellent human rights record. France has weapons of mass destruction, is an important trading partner, and vigorously suppresses terrorism.⁷ The French relationship with the United States is an important factor weighing towards approval of Applicant's security clearance.

There are other significant factors supporting approval of Applicant's access to classified information. Applicant has lived in the United States for most of her adult life. She was born in the United States, and she was educated in the United States through her bachelor's degree. Her parents and siblings are U.S. citizens and residents of the United States. Applicant's deep relationship with her family living in the United States and her strong connections to the United States tend to mitigate security concerns. She is a law-abiding U.S. citizen, and there is no evidence of any performance or work-related problems. She is fully inculcated with U.S. values. I found her statements to be honest, candid and credible. Her expression of preference for the United States over France is credible and given great weight.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant became a French citizen in 1998 or 1999 even though she had already held U.S. citizenship from birth in the United States. She was about 25 or 26 years old when she became a French citizen. She was not a minor. Applicant currently has a checking and savings account in France. She does not have any bank accounts in the United States. Applicant has a French NATO security clearance. When she began her NATO employment, she elected a French nationality over a U.S. nationality for economic reasons. She received French medical and/or social benefits as a result of

⁶ See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).

⁷The nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an Applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the United States. France and the United States have been allies since the Revolutionary War. It is very unlikely that France would put Applicant into a position where she would be forced to choose between loyalty to the United States and her husband who lives in France. With its strong human rights record, and friendly political and military relationship with the United States, it is not conceivable that France would coercively target any French citizen or former citizen living outside France in an attempt to gather valuable information from the United States.

her French citizenship. Applicant and her husband own property in France. The location of her French property is due to geographical convenience rather than political or national preference, and I find “For Applicant” with respect to SOR ¶ 1.e. Applicant has voted in both United States and French elections. She voted in the 2008 U.S. presidential election. She voted in a French election about two years ago.

The Appeal Board’s analysis in ISCR Case No. 08-05869 (App. Board July 24, 2009) is instructive concerning the application of mitigating factors for an applicant with a strong foreign preference for Australia, who attempted to re-establish a preference for the United States. The Appeal Board reversed the administrative judge’s decision to grant a security clearance for a U.S. born citizen, who moved to Australia to be with his wife, became an Australian citizen, served in the Australian Army as a commissioned officer in an intelligence-related position, and held an Australian security clearance. *Id.* at 2. The Appeal Board cited as error the judge’s interpretation of that applicant’s desire to provide for his family as his reason for showing preference for Australia as mitigating, whereas the Appeal Board considered this economic motive to be a negative demonstration of personal interests taking priority over the interests of the United States. *Id.* at 5. The Appeal Board did not find that applicant’s return to the United States more than ten years ago, divorce from his Australian spouse, renunciation of his Australian citizenship, and surrender of his Australian passport to be sufficient to re-establish his preference for the United States over Australia.

After carefully weighing the evidence of her connections to France and to the United States, as well as her actions showing preference for each nation, I conclude Applicant has failed to carry her burden of mitigating the foreign preference security concern.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”⁸ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude she is not eligible for a United States security clearance at this time.

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
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraphs 1.c to 1.e:	For Applicant

⁸See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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 Applicant eligibility for a U.S. security clearance. Her eligibility for a U.S. security clearance is denied.

Mark Harvey
Administrative Judge