



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



In the matter of:)
)
-----) ISCR Case No. 08-04347
SSN:-----)
)
Applicant for Security Clearance)

Appearances

For Government: Paul M. Delaney Esquire, Department Counsel
For Applicant: *Pro Se*

December 31, 2008

Decision

ABLARD, Charles D., Administrative Judge:

Applicant failed to mitigate security concerns regarding Foreign Preference (Guideline C) because he holds a valid United Kingdom (U.K.) passport, and became a U.K. citizen in 2005. Clearance is denied.

Statement of the Case

On October 23, 2007, Applicant submitted an Electronic Questionnaire For Investigations Processing (e-QIP) also known as Security Clearance Application (SF 86). On August 13, 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 28, 2008, and elected to have his case decided on the written record in lieu of a hearing. Documents were attached to the answer with explanatory information. A complete copy of the file of relevant material (FORM), dated October 3, 2008, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant provided no additional material. The case was assigned to me on December 12, 2008.

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 another country 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 project engineer who was born in the U.S. He holds an MBA from a major U.S. business school. Since May 2005, he has worked for a U.S. defense construction contractor. He lives in the United Kingdom (U.K.) where he has worked since 1999. His first employment was as a strategy director for company in the U.K. until 2002. He then worked in the U.K. and Spain for a major international oil company until he was made redundant in 2005. He became a citizen of the U.K. in 2005. He has an active U.K. passport that was issued in February 2005. His present work requires that he travel frequently to other countries in Europe.

Applicant is married to a U.S. citizen and has three children all of whom were born in either the U.K. or Spain. They all hold dual citizenship with the U.S. and U.K. according to information supplied on his SF 86. He has a foreign bank account with some funds on deposit in the account.

Applicant declines to surrender his U.K. passport since he finds it is helpful in his travels in Europe for his employer.

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 *also* 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 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 holds a foreign passport and is a dual citizen has raised security concerns under Sec. a. 3. of the guideline.

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.

Since Applicant declines in his answer to surrender his U.K. passport, I conclude that the security concerns arising from dual citizenship and holding a foreign passport have not been mitigated by application of any of the above mitigating conditions.

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 passport issue to question Applicant's ability to hold a security clearance, his refusal to surrender the foreign passport precludes a finding in his favor.

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

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. Clearance is denied.

Charles D. Ablard
Administrative Judge