



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-07214
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John B. Glendon, Esq., Department Counsel
For Applicant: Kristen E. Ittig, Esq.

May 7, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline C (Foreign Preference), based on Applicant's possession of an Italian passport and voting in an Italian election. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on November 21, 2007. On December 16, 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 January 5, 2009; answered it on January 12, 2009; and requested a hearing before an administrative judge. DOHA received the request on January 14, 2009. Department Counsel was ready to proceed on February 27, 2009, and the case was assigned to me on March 3, 2009. DOHA issued a notice of hearing on March 11, 2009, scheduling the hearing for April 1, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. The record closed upon adjournment of the hearing on April 1, 2009. DOHA received the transcript (Tr.) on April 9, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a through 1.f, and he denied the allegation in SOR ¶ 1.g. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is 60 years old. He was born in Italy, grew up in France, and returned to Italy to complete his education. He received a doctoral degree in electrical engineering and then performed his compulsory military service in the Italian Navy (Tr. 24). While in the Italian Navy, he applied for a scholarship to obtain a degree in business administration in the U.S. In December 1975, he obtained a master's degree in business administration and a master's degree in international management (Tr. 24-25). The terms of his scholarship required him to return to Italy for two years, but he obtained a waiver of that requirement and worked for four years at an Italian multinational corporation in the U.S. (Tr. 26-27).

Applicant has worked for his current employer, a federal contractor, since March 2006, and he currently is the vice-president for international sales. For the past 30 years, Applicant has been working for U.S. international businesses in the field of information technology (Tr. 27-28). He was assigned to work in Italy and France from 1991 to 1995 (Tr. 43). He has never held a clearance.

Applicant was married in October 1977 to a native-born U.S. citizen. They have four children, ages 29, 26, 22, and 15. The three oldest children were born in the U.S. and the youngest was born in France while Applicant was assigned there by his employer. Their children are dual citizens of the U.S. and Italy. Applicant requested termination of his overseas assignment because he wanted his children to complete their education in the U.S. (Tr. 31-32).

Applicant testified that he and his U.S.-born wife started serious consideration of the implications of his non-citizen status in 1997, about two years after they returned to the U.S. Among other considerations, they were concerned that his status could have adverse financial consequences if he predeceased his wife (Tr. 43-44).

Applicant became a U.S. citizen in September 2000, and he holds two U.S. passports that expire in 2010. He applied for and received an Italian passport in

December 2005 that will expire in December 2015, which he used for multiple business trips in 2006 and 2007. He used his passports interchangeably, depending on which was most convenient, politically expedient, and least expensive. He did not use any passport containing Israeli entry and exit stamps to enter Arab countries; he used his Italian passport to travel within the European Union because of the ease of entry and short waiting lines; and he generally used whichever passport would incur the least expensive visa fees (Tr. 32-34). Overall, he used his U.S. passports substantially more often than his Italian passport (Tr. 60).

During an interview with a security investigator on January 4, 2008 (GX 2 at 2-3), Applicant expressed reluctance to relinquish his Italian passport because of the convenience it offers and for sentimental reasons related to his Italian heritage. When asked how he would resolve a conflict between his sense of allegiance to Italy and his obligations as a U.S. citizen, he responded that he would need to be faced with a specific situation to make that determination. At the hearing, he was asked what he would do if there was a conflict between U.S. and Italian interests, and he responded that he had lived in the U.S. for a long time, all his interests are in the U.S., and he would be "biased" toward the U.S. (Tr. 41).

Applicant is his mother's only surviving son. In his interview with the security investigator, he expressed reluctance to renounce his Italian citizenship because of his heritage and because it would facilitate dealing with property issues if he inherited property from his mother, a citizen and resident of Italy. At the hearing, he explained that he knows his Italian citizenship is not a prerequisite for inheriting his mother's property, and he is aware of instances where non-Italian persons inherited property from their Italian parents (Tr. 51, 56).

Applicant has no property in Italy, except for his contributions to an Italian retirement plan for about a year and a half while working in Italy and before becoming a U.S. citizen. He has not attempted to withdraw any of those contributions. All his other assets, including his home and retirement funds, are in the U.S. (Tr. 37-38). He does not intend to return permanently to Italy (Tr. 59).

On March 16, 2009, after Applicant was advised by his lawyer that possession and use of his Italian passport was viewed as indicative of a foreign preference, he surrendered it to the vice-president and associate general counsel of his company, who in turn surrendered it to the company's security manager (Tr. 14; AX D). At the hearing, he declared he is prepared to do whatever being a U.S. citizen involves (Tr. 34).

Applicant voted in an Italian election in 2004. He received an absentee ballot from the Italian Embassy after the Italian government enacted legislation permitting its citizens residing outside Italy to vote by absentee ballot (Tr. 45-46). He testified he felt it was his duty to respond to the ballot (Tr. 35). He also testified he did not believe his vote was harmful to the U.S. because he voted for a candidate who resided in the U.S. (Tr. 36). He did not realize that voting in an Italian election raised security issues (Tr. 36). Now that he better understands the situation, he does not feel he has a duty to vote

in Italian elections (Tr. 36). He has voted in every U.S. election, state and federal, since becoming a U.S. citizen (Tr. 35).

The president and chief executive officer of Applicant's company describes him as a person of great integrity, reliable, honest, and loyal to the U.S. (AX B). The chief operating officer of the company, a veteran of 22 years in a U.S. intelligence agency, hired Applicant. He describes Applicant as hard-working, ethical, honest, and trustworthy (AX C). The security manager of the company considers Applicant honest, trustworthy, reliable, diligent, loyal, and ethical (AX D). Applicant's brother-in-law, a retired professional educator, has known him for 31 years and regards him as dedicated, hard working, and trustworthy (AX E). A 15-year friend of Applicant, who is a scientist and consultant with a top secret clearance, describes Applicant as hard working, honest, mature, and dedicated (AX F). A neighbor who has known Applicant for 11 years regards him as a great role model with high standards and values (AX H). Another neighbor, a retired U. S. Navy vice admiral, has known Applicant for 12 years and considers him a fine family man, a credit to the neighborhood, and "the consummate professional." He believes Applicant's loyalty to the U.S. is without question (AX G).

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 made “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 exercises dual citizenship with Italy and the U.S. (¶ 1.a); he applied for, possessed, and used an Italian passport after becoming a U.S. citizen (¶¶ 1.b, 1.c, and 1.d); he intended to renew his Italian passport (¶ 1.e); he voted in an Italian election in 2004 (¶ 1.f); and he maintained his Italian passport because of the benefits it affords in the European Union (¶ 1.g). The security concern under this guideline 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).

The security concern under this guideline is not limited to countries hostile to the U.S. “Under the facts of a given case, an applicant’s preference, explicit or implied, even for a nation with which the U.S. has enjoyed long and peaceful relations, might pose a challenge to U.S. interests.” ADP Case No. 07-14939 at 4 (App. Bd. Mar. 11, 2009).

A disqualifying condition may arise from “exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen.” AG ¶ 10(a). Exercise of foreign citizenship includes but is not limited to “possession of a current foreign passport”; “accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country”; “using foreign citizenship to protect financial or business interests in another country”; and “voting in a foreign election.” AG ¶¶ 10(a)(1), (3), (5), and (7).

Applicant’s possession of an active Italian passport and voting in an Italian election after becoming a U.S. citizen raise AG ¶¶ 10(a)(1) and (7). He contributed to an Italian retirement fund while working in Italy, but his contributions were made before he became a citizen, and he has not attempted to withdraw any money from it. Thus, I conclude AG ¶ 10(a)(3) is not raised.

Applicant is his mother’s sole heir, and he expects to inherit several parcels of real estate from his mother. During a security interview, he expressed reluctance to renounce his Italian citizenship because it would be more cumbersome for him to deal with the Italian property as a non-citizen. However, there is no evidence that Italian citizenship is a prerequisite to inheriting property in Italy. To the contrary, he testified he knows non-Italian citizens are able to inherit property from their Italian parents. I conclude AG ¶ 10(a)(5) is not raised.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 10(a)(1) and (7), the burden shifted to Applicant to produce evidence 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 based on foreign preference may be mitigated if “dual citizenship is based solely on parents’ citizenship or birth in a foreign country.” AG ¶ 11(a). This mitigating condition is not fully established because Applicant actively exercised his Italian citizenship after becoming a U.S. citizen.

Security concerns also may be mitigated if “the individual has expressed a willingness to renounce dual citizenship.” AG ¶ 11(b). This condition is not established because Applicant has been hesitant to renounce his Italian citizenship, even though he has no plans to return permanently to Italy.

Finally, security concerns under this guideline may be mitigated if “(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.” AG ¶ 11(e). This mitigating condition is established by Applicant’s surrender of his Italian passport to his security manager.

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 mature, well-educated, and articulate. His testimony at the hearing was candid, careful, thoughtful, and precise. He married a native-born U.S. citizen shortly after completing graduate school in the U.S. He decided after completing his education that he preferred living and working in the U.S. He later spent almost five years overseas, but he requested a transfer back to the U.S. so that his children could complete their educations in the U.S. He exercised dual citizenship before applying for a clearance, because he was unaware of the security implications of his acts. After his lawyer advised him that his acts raised security concerns, he surrendered his Italian passport. He has a reputation as a loyal, reliable, honest, and dedicated citizen of the U.S. He retains his attachment to his Italian heritage, but he made it clear at the hearing that his family, his future, and his loyalties are in 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.g: 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