



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-11409
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

February 5, 2010

Decision

ROSS, Wilford H., Administrative Judge:

Applicant submitted her Electronic Questionnaire for Investigation Processing (e-QIP), on January 17, 2008 (Government Exhibit 1). On April 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline C (Foreign Preference). 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 revised adjudicative guidelines (AG) promulgated by President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on May 15, 2009, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on June 16, 2009. I received the case assignment on June 22, 2009. DOHA issued a notice of hearing on July 8, 2009, and I convened the hearing as scheduled on August 6, 2009. The Government offered Government Exhibits 1 and 2, which were received

without objection. Applicant testified on her own behalf, and submitted Applicant Exhibits A through K, which were received without objection. Applicant requested that the record remain open for a period of time to allow for the receipt of additional documentation. Applicant submitted Applicant Exhibit L on August 10, 2009, which was also received without objection. DOHA received the transcript of the hearing, and the record closed, on August 17, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant is 49, single, and has a post-graduate degree. She is employed by a defense contractor and seeks a security clearance in connection with her employment in the defense industry. Applicant admits both allegations in the SOR. Those admissions are hereby deemed findings of fact. She also provided additional information to support her request for eligibility for a security clearance.

(Guideline C - Foreign Preference)

The Government alleges that Applicant is ineligible for clearance because she has acted in a way that shows a preference for another country over the United States.

Applicant was born in Germany (then West Germany) in 1959. She left Germany in 1985 to continue her education in Canada. (Applicant's Exhibit A at Section 9; Transcript at 24.) Applicant moved to the United States in 1993. She became a naturalized American citizen in April 2006. (Government Exhibit 1, Section 8.) She has worked for her current employer since 2007. (Government Exhibit 1, Section 11; Applicant Exhibit C; Transcript at 26.) Applicant's net worth in the United States is about \$310,000. She has no financial interests in Germany. (Applicant Exhibit D; Transcript at 26-27.)

Applicant has had a German passport during the entire time she has been an American citizen. In August 2001, before she became an American citizen, she renewed this passport as required by US immigration law. (Government Exhibit 2.) Applicant has made two trips to Germany since she became an American citizen, in 2007 and 2009. She was unclear which passport she used to travel to Germany in 2009, stating, "I used whatever is the slower line, the shorter line for it." Neither passport showed transit stamps from this trip. (Government Exhibit 2; Transcript at 37-38.) Applicant testified that she wishes to retain her German passport in order to have a German language ID when travelling to Germany to visit her elderly parents. (Transcript at 27-28.) Subsequent to the hearing, Applicant surrendered her German passport to her security officer for safe-keeping. (Applicant Exhibit L.)

Applicant is still a dual citizen of Germany and the United States. In fact, she petitioned the German government in 2000 to be allowed to retain her German citizenship after she completed her naturalization process in the United States in 2006.

This permission was granted. (Transcript at 25.) This was required because Applicant's German citizenship would have been automatically revoked upon her acquiring American citizenship. (Applicant Exhibit A.) Applicant stated repeatedly and emphatically that she is not willing to take any steps to renounce her German citizenship while her parents are still alive. (Transcript at 30-35.)

Mitigation

Applicant submitted evidence showing that she has consistently followed the rules concerning reporting foreign travel and foreign contacts to her security office. (Applicant Exhibits J and K.)

Applicant submitted letters and other documents. They show that she is a highly respected expert in her field, and that she has provided valuable services to the defense efforts of the United States. People who have worked with her believe that she is an honest person and recommend her for a security clearance. (Applicant Exhibits E, H, and I.)

Policies

Security clearance decisions are not made in a vacuum. 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 to be used as appropriate 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 overarching adjudicative goal is a fair, impartial, and commonsense 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. In addition, the administrative judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

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. Security clearance decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to 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.

Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that Applicant is a dual citizen of Germany and the United States, and that she has a valid German passport (Guideline C).

(Guideline C - Foreign Preference)

The Applicant has not mitigated the Government's concerns about her dual citizenship with Germany, and her continued possession and use of her German passport after becoming an American citizen. The concern is stated thus under this Guideline, “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.”

Under any analysis of the evidence, it is obvious that Applicant would like to retain her German citizenship and passport if at all possible. The undersigned well understands that the Applicant has emotional ties to her parents. However, Applicant did not even attempt to make a credible showing that she “expressed a willingness to renounce dual citizenship” as required by Mitigating Condition 11.(b). Instead, she credibly stated that she does not intend to even contemplate such an action as long as her parents are alive.

Applicant took steps to retain her German citizenship before she began the process to become an American citizen. Disqualifying Condition 10(b) states that a concern is “action to acquire or obtain recognition of a foreign citizenship by an American citizen.” Applicant was not an American citizen when she took the above action. However, the steps were taken when she was contemplating becoming an American citizen, and approval of the request was important to her in making the decision. This was because her German citizenship would have been revoked upon her becoming an American citizen. I find that this condition has some application, given the particular circumstances of this case.

Disqualifying Condition 10(a)(1) applies to the facts of this case:

Conditions that could raise a security concern and may be disqualifying include: (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. (Emphasis supplied.)

Applicant has surrendered her passport to her company security officer. Therefore, it has “been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.” Accordingly, Mitigating Condition 11(e) applies to this case.

However, the above action is insufficient to completely mitigate the Government’s concerns. As stated above, Applicant made affirmative steps that allowed her to retain her German citizenship after becoming an American citizen. In addition, the record shows that Applicant was reluctant to even surrender her passport. Her ties with Germany obviously still run deep. Accordingly, Guideline C is found against the Applicant.

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. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Two of the factors have the most impact on this case. First, I cannot find that there is the "presence or absence of rehabilitation and other permanent behavioral changes," as set forth under AG ¶ 2(a)(6). Applicant simply has not engaged in sufficient conduct which shows a preference for the United States instead of Germany. Rather, her conduct shows a clear preference for Germany over the United States.

Applicant's obvious reluctance to take the steps necessary to show a preference for the United States make it impossible for me to find that there is little or no "potential for pressure, coercion, exploitation, or duress" as set forth in AG ¶ 2(a)(8).

On balance, it is concluded that Applicant has not successfully overcome the Government's case opposing her request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

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 THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Subparagraph 1.b:	For the Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge