



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



In the matter of: )  
 )  
----- ) ISCR Case No. 08-11416  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Caroline H. Jeffreys, Esq., Department Counsel  
For Applicant: *Pro se*

October 27, 2009

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline C (Foreign Preference). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted his security clearance application on July 29, 2008 (Government Exhibit (GX) 5). On June 19, 2009, 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 (GX 1). 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 the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant received the SOR on June 30, 2009; answered it on July 6, 2009; and requested a decision on the record without a hearing (GX 4). DOHA received his response on July 20, 2009. Department Counsel submitted the government's written case on August 5, 2009. On August 6, 2009, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's evidence. Applicant received the FORM on August 11, 2009, but did not respond. The case was assigned to me on October 8, 2009.

Applicant is a 50-year-old engineer employed by a federal contractor (GX 6 at 1). He has worked for his current employer since March 1995. He has never held a security clearance.

Applicant married a U.S. citizen in June 1973 and was divorced in June 1997. He married his current spouse in September 2004. His current spouse was born in the Republic of Vietnam and became a U.S. citizen in September 1974. He has three children from his first marriage and a stepson from his second marriage. All are U.S. citizens. At the time he submitted his security clearance application, his stepson was a U.S. Army captain serving in Iraq.

Applicant was born in Italy. His parents and brother are citizens and residents of Italy. He served as an officer in the Italian Air Force from October 1969 to April 1989 (GX 6 at 4). He attended college in the U.S. from January 1993 to March 1995 and obtained a degree in electrical engineering (GX 5 at 5-6). He became a U.S. citizen in October 2005 and obtained a U.S. passport in November 2005 (GX 6 at 3).

During an interview with a security investigator in September 2008, Applicant stated his allegiance is to both Italy and the U.S., but his ultimate allegiance is to Italy (GX 6 at 3). He is not willing to renounce his Italian citizenship. He has held an Italian passport since 1967 and renews it periodically. He uses his Italian passport for travel to Italy three times a year (GX 6 at 4).

In response to DOHA interrogatories in March 2009, Applicant stated he intended to renew his Italian passport because it is his only government identification while he is in Italy and it allows him to stay in Italy for as much time as he desires (GX 6 at 10). He last renewed his Italian passport in March 2008 (GX 6 at 15).

Applicant votes in Italian elections every five years (GX 4 at 42). He last voted in an Italian election in April 2008 (GX 6 at 12).

## **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 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 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 by possessing a current Italian passport (SOR ¶ 1.a(1)), by renewing his Italian passport in 2008 after becoming a U.S. citizen in 2005 (SOR ¶ 1.a(2)), by using his Italian passport for travel to Italy (SOR ¶ 1.a(3)), and by voting in Italian elections after becoming a U.S. citizen (SOR ¶ 1.a(4)). It also alleges he told a security investigator that his ultimate allegiance is to Italy (SOR ¶ 1.b).

The concern under Guideline C 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. A disqualifying condition may arise from “exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen,” including but not limited to “possession of a current foreign passport” (AG ¶ 10(a)(1)) and “voting in a foreign election” (AG ¶ 10(a)(7)).

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).

Applicant’s possession and use of an Italian passport and his participation in Italian elections after becoming a U.S. citizen raise AG ¶¶ 10(a)(1) and (7), shifting the burden to him 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).

Four mitigating conditions under this guideline are relevant:

AG ¶ 11(a): “dual citizenship is based solely on parents’ citizenship or birth in a foreign country”;

AG ¶ 11(b): “the individual has expressed a willingness to renounce dual citizenship”;

AG ¶ 11(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”; and

AG ¶ 11(e): “the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.”

None of the above enumerated mitigating conditions are established by the evidence in this case.

### **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 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.

Applicant is a mature, well-educated adult with many ties to the U.S., but he also has deep ties to Italy. He is unwilling to sever those ties. He was candid during his security interview and admitted that his ultimate allegiance is to Italy.

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 not mitigated the security concerns based on foreign preference. Accordingly, I conclude he has not 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 in the SOR:

Paragraph 1, Guideline C (Foreign Preference):	AGAINST APPLICANT
Subparagraphs 1.a(1)-1.a(4):	Against Applicant
Subparagraph 1.b:	Against Applicant

**Conclusion**

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

LeRoy F. Foreman  
Administrative Judge