



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



In the matter of:)
)
-----) ISCR Case No. 08-11618
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government:
Melvin A. Howry, Esquire, Department Counsel

For Applicant:
Darrell C. Menthe, Esquire
McGuire Woods LLP

April 12, 2010

Decision

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigation Processing (e-QIP), on August 26, 2008 (Government Exhibit 1). On April 9, 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 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 submitted an Answer to the SOR on April 28, 2009, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on June 10, 2009. I received the case assignment on June 11, 2009. DOHA issued a notice of hearing on July 1, 2009; and August 3, 2009. I convened the hearing as scheduled on September 9, 2009. The Government offered Government Exhibits 1 through 3, which were received without objection. Applicant testified on his own behalf, called three additional witnesses, and submitted no exhibits at the hearing. Applicant requested that the record remain open for a period of time to allow for the receipt of additional documentation. Applicant submitted Applicant Exhibit A on September 15, 2009, which was received without objection. DOHA received the transcript of the hearing, and the record closed, on September 21, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 31, married with one child, and has a post-graduate degree. He is employed by a defense contractor and seeks a security clearance in connection with his employment in the defense industry. Applicant admitted the allegations in the SOR. Those admissions are hereby deemed findings of fact. He also provided additional information to support his request for eligibility for a security clearance.

Guideline C - Foreign Preference

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has acted in a way that shows a preference for another country ahead of the United States.

The Applicant is a native-born American citizen. During his college days, he studied abroad in Europe. While in Europe during the 1998-99 school year, he met his future wife. She is a citizen of France and is a licensed professional there. After their marriage in 2001, Applicant and his wife returned to the United States so that he could attend graduate school. (Transcript at 20-22.)

The Applicant attended graduate school from 2001 to 2007. During that time, his wife was attempting to obtain a license in their state of residence to practice her profession. In order to obtain her license, the Applicant's wife had to take several examinations over a period of years. She successfully passed the examinations, and received her license in 2007. She began practicing her profession in January 2008. (Transcript at 23-25, 49, 67-70.)

In 2005, the Applicant made the decision to become a citizen of France. He did this because of the uncertainty over whether his wife could pass her examinations. They thought a return to Europe might be necessary for her to work in her profession, though neither one of them desired to leave the United States. He also believed that obtaining

French citizenship would make him more marketable in the European Community after he obtained his graduate degree. Applicant had no intention of renouncing his American citizenship. (Transcript at 25-26, 33-34, 56-58, 71-72.) Applicant repeatedly stated that he was willing to renounce his French citizenship, since he has no emotional connection to that country. (Transcript at 44-46, 53-54, 60-62.)

After becoming a French citizen, the Applicant received a French passport, and also voted in a French presidential election. (Transcript at 27-29.) Applicant used the passport to travel to Europe in 2006. (Transcript at 29-30, 41-43.) He also attended several events at the home of the French Consul-General in the city where he lives. The last event occurred in 2006. (Transcript at 31-32, 49-51, 74-75.)

Applicant received his advanced degree in 2007. (Government Exhibit 1 at Section 10.) The Applicant engaged in all the above actions *before* he began working in the defense industry in August 2008.

Applicant was interviewed by an investigator from the Office of Personnel Management in September 2008. At that point he was made aware of the Government's concerns regarding his dual citizenship and possession of a foreign passport. (Government Exhibit 2.) His French passport was destroyed by his employer's Assistant Facility Security Officer on November 26, 2008. (Government Exhibit 3; Transcript at 27.)

Applicant submitted his American passport, which shows transit stamps from a 2007 trip to France. This is after he received his French passport and before he began work in the defense industry. (Applicant Exhibit A; Transcript at 54-55.)

Mitigation

A close friend of the Applicant testified for him. This person is employed in the defense industry for a different company and has a security clearance. He has known the Applicant for ten years. The witness testified that he attempted to recruit the Applicant to work for his employer because of his confidence in the Applicant's abilities and intelligence. He further states that Applicant "is one of the most trustworthy people I know." (Transcript at 90-104.)

The president of the Applicant's employer also testified. He is one of the founders of the company, which has about 30 employees. The small number of employees allows the witness to observe and evaluate the Applicant. He finds the Applicant to be trustworthy and recommends that he receive his security clearance. (Transcript at 104-117.)

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.

Guideline C - Foreign Preference

In this case the Government has met its initial burden of proving by substantial evidence that Applicant is a dual citizen of France and the United States, and that he had a valid French passport.

Applicant has mitigated the Government's concerns about his possible dual citizenship with France, and his possession of French 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.*

Applicant obtained a valid French passport after becoming an American citizen, and also voted in a French national election. Accordingly, Disqualifying Condition 10 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; (7) voting in a foreign election.*

Applicant obtained French citizenship even though he is a native-born American citizen. Disqualifying Condition 10(b) applies: *action to acquire or obtain recognition of a foreign citizenship by an American citizen.*

As shown above, Applicant made the decision to obtain French citizenship before he began work in the defense industry. He did it primarily to help his wife, when she was having difficulty obtaining her professional license in the United States. As stated above, she passed her exams and received a license in 2007. Once he began working in the defense industry in 2008, the reason for having the foreign citizenship evaporated. Mitigating Condition 11(b) states it is mitigating where: *the individual has expressed a*

willingness to renounce dual citizenship. Applicant has repeatedly and credibly testified that he is willing to renounce his French citizenship. I find that this Mitigating Condition applies.

The Applicant's French passport has *been destroyed, surrendered to the cognizant security authority, or otherwise invalidated* as required by Mitigating Condition 11(e). Guideline C is found for 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. My Guideline C analysis is applicable to the whole-person analysis as well. The evidence shows that the Applicant is a patriotic American citizen. His decision to obtain French citizenship was made before he began working in the defense industry, and also before his wife was allowed to practice her profession here. I find that his contacts with the French community have no security significance. The Applicant eloquently testified about the importance of his family in the United States, and his pride in being an American citizen and a member of the defense industry. He is knowledgeable about security and understands his responsibility. I find that there is little or no "potential for pressure, coercion, exploitation, or duress" as set forth in AG ¶ 2(a)(8). Using the whole person standard, the Applicant has mitigated the security significance of his alleged foreign preference and is eligible for a security clearance.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for 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:

FOR THE APPLICANT

Subparagraphs 1.a through 1.e.:

For the Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge