



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



In the matter of:)	
)	
)	ISCR Case No. 09-01894
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: Bobby Olds, Esquire

January 13, 2010

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I grant Applicant's eligibility for access to classified information.

Applicant completed her Security Clearance Application (SF 86) on February 15, 2005 and signed it on November 21, 2005. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines C and E on May 26, 2009. 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 acknowledged receipt of the SOR on June 8, 2009. She answered the SOR in writing on June 24, 2009, and requested a hearing before an administrative judge. DOHA received the request on June 29, 2009. Department Counsel was prepared to proceed on August 31, 2009, and I received the case assignment on September 17, 2009. DOHA issued a notice of hearing on September 25, 2009, and I convened the hearing as scheduled on October 21, 2009. The government offered three exhibits (GE) 1 through 3, which were admitted into evidence without objection. Applicant and five witnesses testified. DOHA received the transcript of the hearing (Tr.) on October 29, 2009. I held the record open until November 5, 2009, for Applicant to submit additional matters. On November 5, 2009, she submitted one exhibit, AE A, which was admitted without objection. The record closed on November 5, 2009.

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a, and 1.b of the SOR, with explanations. She denied the factual allegations in ¶¶ 2.a and 2.b of the SOR, with explanation.¹

Applicant, who is 33 years old, works as an administrative assistant for a Department of Defense contractor. She began working in this position in January 2005. Her duties include managing an office staff of five, and inputting work orders and related information into a federal government data base. This information relates to repair and maintenance work orders for work her employer performs under contract with the military base. The data base, the computer, and the work orders do not contain classified information. The federal government requires a clearance for her common access card (CAC) which gives her access to the unclassified data base.²

Applicant's 63-year-old parents are citizens of the United States and Panama. Her father worked for the United States Government in the Panama Canal Zone and is a retired federal employee. Her parents reside in Panama, where Applicant was born. Applicant has been a citizen of Panama since birth and a citizen of the United States since 1985. At 1996, at age 20, Applicant obtained a GS-4 summer position working for the United States Government in the Panama Canal Zone. At the end of the summer, her manager offered her a permanent position. He testified on her behalf and described her as a quick learner and excellent employee.³

¹When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts, and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted).

²GE 1; Tr. 25, 51-55, 62-65, 67.

³GE 1; Tr. 13-14, 25-27, 58-59.

Applicant met her husband, who is a United States Citizen by birth, when he was working in the Panama Canal Zone for the housing division of the United States Army. They married in December 1999 in Germany. Since their marriage, Applicant and her husband have lived in Germany, Puerto Rico, and the United States mainland. Their daughter is seven years old, and a resident in and citizen of the United States. Applicant's 40-year-old brother is a United States citizen, living in the United States. Applicant's 36-year-old sister is a United States citizen, living in the United States.⁴

Applicant has a Panamanian identification card, which she believes she had from birth. She also has a United States passport, which she obtained after she became a United States citizen in 1985. She is a dual citizen of both countries. Applicant used her United States passport when traveling outside the United States. She used her Panamanian passport to enter and exit Panama, but does not otherwise use this passport. At the hearing, Applicant testified that she was willing to renounce her Panamanian citizenship or surrender her Panamanian passport to her facility security officer. I held the record open for Applicant to make a decision on her hearing statement.⁵ On November 3, 2009, Applicant surrendered her Panamanian passport to her facility security officer.⁶

Applicant has voted in elections in the United States, but she has not voted in elections in Panama. Applicant does not own any property or hold any financial assets in Panama. At some undefined point in the future, she may inherit a portion of her parents' property in Panama. Applicant does not receive any financial benefits from the Panamanian government. She has not worked for the Panamanian government. Applicant is not involved in political organizations in Panama. She and her husband own property in the United States. Applicant's preference is to the United States.⁷

When she completed her security clearance application, Applicant answered "no" to the following question:

16. Foreign Countries You Have Visited

Have you traveled outside the United States on other than official U.S. Government orders in the last 7 years? (Travel as a dependent or contractor must be listed.) Do not repeat travel covered in modules 4, 5, and 6.

⁴GE 1; Tr. 31-32, 43-44.

⁵Department Counsel advised Applicant that if she surrendered her Panamanian passport to her facility security officer and then requested that her passport be returned to her, the government would be notified of her request. If so notified, the government would initiate proceedings to revoke her clearance. Tr. 76.

⁶GE 3; AE A; Tr. 28-31.

⁷GE 2; Tr. 15-17, 28, 31.

Applicant listed the dates and times she lived in Germany and Puerto Rico when she answered question 4. She listed her education in Panama when she answered question 5. She listed her employment in Panama, Puerto Rico, and Germany when she completed question 6. Because she was not clear on how to answer question 16, Applicant asked for assistance when she was filling out her SF-86 application. She was told to “do the best you can.” She understood question 16 to mean that she was not to list information previously listed. She answered “no” based on this belief. Applicant credibly testified that she had no intent to hide information or to deceive the government.⁸

The government also alleges that Applicant falsified her answers to interrogatories, dated March 18, 2009, when she did not submit a copy of her Panamanian passport. Applicant denied any falsification. She believed that she had submitted her current Panamanian passport. She actually submitted her expired 2007 Panamanian passport with her March 18, 2009 answer. However, six days later, she submitted her current Panamanian passport with her interrogatory answers, dated March 24, 2009.⁹

Applicant’s husband, first line supervisor, government project manager, her employer’s project manager, and a former supervisor and good friend testified on her behalf. All consider her highly trustworthy and loyal to the United States. Her supervisor and project managers describe her as an excellent employee.¹⁰

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 used 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.

⁸GE 1; Tr. 18-20, 34-38.

⁹GE 2; GE 3; Response to SOR.

¹⁰Tr. 42-68.

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, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” An applicant has the ultimate burden of persuasion to obtain 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. Decisions include, by necessity, consideration of the possible risk an 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9 the security concern involving foreign preference arises, “[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.

Applicant had possessed a Panamanian passport since becoming a United States Citizen in 1985. She used this passport to enter and exit Panama when visiting her parents. The government has established a *prima facie* case under Guideline C.

Under AG ¶ 11, Applicant may mitigate security concerns arising under Guideline C through one of the following means:

- (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.

Applicant has expressed an intent to renounce her Panamanian citizenship, but has not done so. She, however, surrendered her Panamanian passport to her facility security officer on November 3, 2009, knowing that if she requests the passport, the government will be notified and her clearance may be revoked. She has exercised her rights of United States citizenship and has shown a preference for the United States. She has mitigated the Foreign Preference concerns under AG ¶ 11 (e). Guideline C is found for Applicant.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16(a) describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

For this guideline to apply, Applicant's omission must be deliberate. The government established that Applicant omitted material facts from her SF-86 when she answered "no" to Question 16 about her travel outside of the United States. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to her honesty. She denies, however, that she deliberately falsified her answer to this question. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹¹ For DC ¶ 16 (a) to apply, the government must establish that Applicant's omission, concealment, or falsification in her answer was deliberate.

When she completed her SF-86, Applicant provided information in her answers to questions 4, 5, and 6 about her residences, education, and employment in foreign countries. She had asked for guidance with answering question 16, as she was not sure how she should answer it. She was told to do her best. Because she had provided information on her foreign residences, employment and education, she followed the question instruction not to provide information already listed.

Applicant believed that she had submitted her most recent Panamanian passport with her March 18, 2009 interrogatory answers. She did not and her failure was nothing more than an oversight as she submitted the correct passport six days later. Applicant had no intent to hide information from the government, a fact the government conceded at the hearing. Guideline E is found in favor of 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 an applicant's conduct and all relevant 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

¹¹See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The evidence in support of granting a security clearance to applicant under the whole person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant grew up in the Panama Canal Zone when it was still a territory under the control of the United States. Her father worked for and retired from the United States government. Her husband, her daughter, her parents, and her siblings are citizens of the United States. Her parents live in Panama. Her closest family members, her husband and daughter, live with her in the United States as do her siblings. She does not own property or have any financial interest in Panama. Other than holding a Panamanian passport, she has not exercised any rights of her Panamanian citizenship. Rather, she has exercised her rights as a United States citizen. She recently surrendered her Panamanian passport to her facility security officer. Her loyalties and preference are to the United States, not to Panama. She answered the questions on the SF-86 to the best of her understanding and did not withhold relevant information from the government when she completed her SF-86 or when she answered the interrogatories sent to her.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from her foreign preference and personal conduct.

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 APPLICANT
Subparagraph 1.a:	For Applicant

Subparagraph 1.b:	For Applicant
Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge