



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 09-01934
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

April 7, 2010

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated the Foreign Preference security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 11, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline C, Foreign Preference. The action was taken under Executive Order (EO) 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).

Applicant answered the SOR on November 13, 2009, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on December 22, 2009. DOHA issued a notice of hearing on January 4, 2010, scheduling the hearing for January 28, 2010. Applicant's request for a continuance was

granted. The continuance request, Department Counsel's objection, and the previous judge's memorandum for the record are marked collectively as Hearing Exhibit (HE) I. The case was reassigned to me on January 20, 2010. DOHA issued a second notice of hearing on January 22, 2010, and the hearing was convened as scheduled on February 22, 2010. The Government offered Exhibits (GE) 1 through 3, which were received without objection. Applicant testified on her own behalf and submitted Exhibits (AE) A through J, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on March 2, 2010.

Findings of Fact

Applicant is a 44-year-old employee of a defense contractor. She held a clearance from the Department of Homeland Security. She is applying for Department of Defense industrial security clearance. She was born in Germany. She is a graduate of a German university. She was married in 1986 and divorced in 1987. She married a second time in 1992 and divorced in 2000. She married her current husband in 2001. She has two children, ages 22 and 18.¹

Applicant's first two husbands were German citizens. Her current husband has been a U.S. citizen since birth. Applicant immigrated to the United States in 2002, and became a U.S. citizen in September 2006. She received a U.S. passport the following month. Her children live in the United States and both attend U.S. universities. Her mother, aunt, and two siblings still live in Germany.²

Applicant is dual citizen of the United States and Germany. She possesses a German passport that was issued in April 2002, and will not expire until April 2012. She used the German passport to travel to Germany in 2009. She used her U.S. passport when she entered and exited another country in 2007. She is unwilling to relinquish the German passport, and she intends to renew it upon its expiration. Her mother and aunt are both 70 years old. Her siblings do not live close to her mother and aunt. Applicant wants to keep her German passport in order to properly identify herself in Germany in case she has to make a decision or sign any documents on their behalf, such as their admission to a hospital or a nursing home. She stated that she needs the German passport as long as her mother and aunt are alive. She submitted a notarized sworn statement that she will not use the German passport for travel purposes and will only travel on her U.S. passport. She will not renew her German passport after her mother and aunt pass away. Applicant has not voted in any German elections since she became a U.S. citizen. She certified that she will not vote in German elections. She is a registered voter and has voted in the United States.³

¹ Tr. at 17-21, 31, 35; Applicant's response to SOR; GE 1; AE D.

² Tr. at 24, 28, 31-32, 35; Applicant's response to SOR; GE 1-3; AE B.

³ Tr. at 23-25, 28-29, 35-340; Applicant's response to SOR; GE 1-3; AE G, H.

Applicant credibly testified that she is a loyal U.S. citizen. She is a generous donor to U.S. charities. She does not donate to German charities. She pays her U.S. taxes and does not have a criminal record. Except for holding a German passport, she has received no other benefits from Germany since becoming a U.S. citizen. She has about \$16,800 in shares of a German company, as a retirement account. She also has about \$75,000 in checking and savings accounts in German banks. Her U.S. assets in checking and savings accounts, 401(k), and annuities total about \$420,000.⁴

Applicant submitted several letters attesting to her patriotism and loyalty to the United States. She is described as a proud American citizen with strong moral values, integrity, and character.⁵

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the 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 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, administrative judges apply the guidelines 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.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable decision.

⁴ Tr. at 26-36, 40-41; Applicant's response to SOR; AE I, J.

⁵ AE A.

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 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.

Section 7 of EO 10865 provides that adverse 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline C, Foreign Preference

The security concern relating to the guideline for Foreign Preference is set out in AG ¶ 9:

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.

The guideline notes several conditions that could raise security concerns under AG ¶ 10. One is potentially applicable in this case:

(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; and
- (7) voting in a foreign election.

Applicant possesses a current German passport, which is a right and privilege of foreign citizenship. AG ¶ 10(a) is applicable to the information alleged under SOR ¶1.a.(1).

SOR ¶ 1.a.(2) alleges that Applicant “maintained [her] German passport, in part, so that [she is] able to vote in future German elections.” That information has not been established. Applicant has not voted in a German election since becoming a U.S. citizen, and has no intention of voting there in the future. The information alleged under SOR ¶ 1.a.(2) is concluded for Applicant.

Conditions that could mitigate Foreign Preference security concerns are provided under AG ¶ 11. Three are potentially applicable:

- (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; and
- (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Applicant actively exercised her German citizenship by using her German passport after she became an American citizen. She declared that she will not use the passport to travel. She is maintaining the passport to identify herself as a German citizen should the need arise to assist her mother and aunt. As such, she is unwilling to renounce the dual citizenship that accompanies the German passport. No mitigating condition is completely applicable.

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 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 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. 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 was honest and forthright at her hearing. There is no evidence that Applicant is anything other than an intelligent, honest, trustworthy, and loyal U.S.

citizen. However, she was unable to mitigate the considerable security concerns raised by her possession of a current foreign passport.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated Foreign Preference security concerns.

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 APPLICANT
Subparagraph 1.a.(1):	Against Applicant
Subparagraph 1.a.(2):	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

Edward W. Loughran
Administrative Judge