



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



In the matter of:)	
)	
)	ADP Case No. 09-07654
SSN:)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Pamela Benson, Esq., Department Counsel
For Applicant: *Pro se*

September 17, 2010

Decision

LAZZARO, Henry, Administrative Judge

Applicant mitigated the trustworthiness concerns that arose from his exercise of dual citizenship with Canada by his possession of a Canadian passport. Eligibility for access to sensitive information is granted.

On April 30, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing its trustworthiness concerns.¹ The SOR alleges a security concern under Guideline C (foreign preference). Applicant's response to the SOR was received by DOHA on May 17, 2010. He admitted the SOR allegation and requested a hearing.

The case was assigned to me on July 1, 2010. A notice of hearing was issued on July 16, 2010, scheduling the hearing for August 4, 2010. The hearing was conducted as scheduled. The Government submitted three documentary exhibits that were marked as

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), DoD Regulation 5200.2-R, dated January 1987, as amended (Regulation), and the adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

Government Exhibits (GE) 1-3 and admitted into the record without objection. Applicant testified and submitted two documentary exhibits that were marked as Applicant Exhibits (AE) 1 & 2 and admitted into the record without objection. The record was held open to allow Applicant the opportunity to submit verification that he had surrendered his Canadian passport. Following the hearing, a chain of e-mails was forwarded to me by Department Counsel that were marked as AE 3 and made part of the record without objection. The transcript was received on August 26, 2009.

Findings of Fact

Applicant's admission to the SOR allegation is incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is a 30-year-old man who is employed as a business intelligence consultant by a company doing business with the Department of Defense. He is currently assigned to a position that provides him access to sensitive information, primarily social security numbers. His initial assignment to this position was for a term of six months, however, he has been extended in the position for an additional year. He may or may not receive further extensions in this position.

Applicant was born in Kenya. His parents were citizens of India when Applicant was born and he thus acquired Indian citizenship but not Kenyan citizenship. His parents immigrated to Canada with Applicant and his older sister when Applicant was about 14 years old. He, his parents, and his sister became naturalized Canadian citizens in about 1998. According to Applicant, he and his family forfeited their Indian citizenship when they became Canadian citizens because India does not recognize dual citizenship.

Applicant moved from Canada to the United States in either 1998 or 1999 to attend school. He obtained a bachelor of science degree in computer engineering from a U.S. university in April 2003. Applicant worked at a series of short-term jobs in the computer field following his college graduation until he obtained employment with his current employer in November 2006.

Applicant and his mother became naturalized U. S. citizens in May 2007. Applicant's father applied for U.S. citizenship at the same time, but his application has been delayed because he has a very common Indian name and he had to resubmit fingerprints. Applicant's parents reside with him in the United States. Applicant's sister is 32 years old and she works and resides in a different state within the United States. She possesses a green card. Applicant obtained a U. S. passport in August 2007.

Applicant has been married since January 2008, to an Indian citizen. They have a ten-month old child who was born in the United States. Applicant's wife currently possesses a green card. She intends to apply for U.S. citizenship when she is eligible. Applicant's mother-in-law and father-in-law reside in India. Applicant traveled to India to meet them for two weeks from December 2007 to January 2008. He used his U.S. passport to enter and exit India.

Applicant obtained a Canadian passport in November 2003, that expired in September 2009. He renewed that passport in September 2009, and it is not scheduled to expire until September 2014. Before the hearing, Applicant declined to surrender his Canadian passport because he believed he would only be working in a position that provided him access to sensitive information for about six months. Applicant explained that he wanted to retain his Canadian passport because it would allow him to travel to European Commonwealth nations without the need to obtain a visa if he so desired.

At the hearing, Applicant expressed his intent to surrender the passport to his facility security officer. I received a chain of e-mails following the hearing indicating that Applicant had indeed surrendered his Canadian passport to his employer's personnel security specialist and that the passport had been forwarded to the employer's director of industrial security for retention.

Policies

Positions designated as ADP I and ADP II are classified as sensitive positions.² The standard to be met for assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that assigning the person to sensitive duties is clearly consistent with the interests of national security.³ Trustworthiness adjudications apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management.⁴ Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination is made.⁵

An administrative judge must consider the disqualifying and mitigating conditions in the Adjudicative Guidelines when evaluating an Applicant's suitability for a public trust position. The administrative judge must also consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The protection of the national security is the paramount consideration, and any doubt concerning personnel being considered for access to sensitive information will be resolved in favor of national security. Decisions are made in terms of the national interest and are not determinations as to the loyalty of the applicant concerned.⁶

² Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

³ Regulation ¶ C6.1.1.1.

⁴ Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004.

⁵ Regulation ¶ C8.2.1.

⁶ Section 7 of Executive Order (EO) 10865.

The Government is required to present evidence to establish controverted facts alleged in the SOR.⁷ 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.⁸ The applicant has the ultimate burden of persuasion to obtain a favorable trustworthiness decision.

Analysis

Guideline F, Foreign Preference

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. (Adjudicative Guideline [AG] 9)

The only allegation of foreign preference alleged in the SOR was Applicant's possession of a Canadian passport that was not due to expire until September 2014. At the time the SOR was issued, Disqualifying Condition (DC) 10(a): *exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen This includes but is not limited to (1) possession of a current foreign passport* applied.

Applicant surrendered his Canadian passport following the hearing to his employer's security specialist who forwarded the passport to the employer's director of industrial security for retention. As a result, Mitigating Condition (MC) 11(e): *the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated* applies. As Department Counsel conceded at the hearing, Applicant's surrender of his Canadian passport negated any concern the Government previously had with granting Applicant eligibility for access to sensitive information.

Considering all relevant and material facts and circumstances present in this case, the whole-person concept, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying and mitigating condition, Applicant has mitigated the foreign preference concern. He has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant access to sensitive information.

⁷ Directive ¶ E3.1.14.

⁸ Directive ¶ E3.1.15.

Formal Findings

Formal findings for or against Applicant on the allegation 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

Conclusion

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

Henry Lazzaro
Administrative Judge

