



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



In the matter of:)
)
) ISCR Case No. 10-00641
)
)
Applicant for Security Clearance)

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro se*

December 22, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the written record in this case, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Guideline C, Foreign Preference. His eligibility for a security clearance is denied.

Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) on September 10, 2009. On July 6, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline C, Foreign Preference. DOHA acted 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) effective within the Department of Defense for SORs issued after September 1, 2006.

On August 2, 2010, Applicant answered the SOR in writing and requested that his case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) and provided the FORM to Applicant on September

20, 2010. The FORM contained documents identified as Items 1 through 6. By letter dated September 20, 2010, DOHA provided a copy of the FORM to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the FORM on September 28, 2010. His response was due on October 28, 2010. He did not submit any information or raise any objections within the required time period. On December 15, 2010, the case was assigned to me for a decision.

Findings of Fact

The SOR contains four allegations that raise security concerns under Guideline C, Foreign Preference (SOR ¶¶ 1.a., 1.b(1), 1(b)(2), and 1(c).). In his Answer to the SOR, Applicant admitted all Guideline C allegations. His admissions are admitted as findings of fact.

Applicant is 56 years old, married, and employed as a manager by a government contractor. His work involves extensive travel outside of the United States to develop business opportunities for his employer. (Item 1; Item 5.)

Applicant was born, raised, and educated in Mexico. In 1977, he received a bachelor's degree from a Mexican university. He became a naturalized U.S. citizen in 1995. He seeks a security clearance for the first time. (Item 1; Item 6.)

Applicant's father, who is deceased, was a citizen and resident of Mexico. His mother, two brothers, and five sisters are residents and citizens of Mexico. Applicant travels to Mexico to visit his family members about six times a year. He speaks on the telephone with his mother in Mexico two or three times a week. He communicates with his siblings by e-mail and by telephone about two times a month. (Item 1; Item 5.)

Applicant holds a U.S. passport, which he acquired in 2005. Since becoming a U.S. citizen, he has not held an active Mexican passport. Since 2000, he claims dual citizenship with Mexico. He asserts that his Mexican citizenship is passive and based on his birth in Mexico to parents who were citizens of Mexico. He also stated that when he became a U.S. citizen, he renounced his Mexican citizenship. (Item 1; Item 5 at 3-4.)

On November 11, 2009, Applicant was interviewed by an authorized investigator from the U.S. Office of Personnel Management (OPM).¹ Applicant told the investigator that he claimed dual citizenship with Mexico in 2000 because he intended to acquire property in Mexico at a future date. Sometime between 2001 and 2004, Applicant

¹ On April 7, 2010, in response to DOHA interrogatories, Applicant signed a statement affirming that he had read the summary of the interview, and, with the exception of the spelling of one sister's first name, found it to be true and correct. He corrected the spelling of his sister's name but made no other changes, corrections, or revisions to the investigator's summary. (Item 5 at 6-7.)

opened a bank account in Mexico and purchased real property in Mexico.² (Item 1; Item 5.)

Applicant told the OPM investigator that he was having a home built in Mexico as an investment or retirement home. He estimated the value of the property at \$300,000. He estimated the value of his Mexican bank account at \$1,500. He has authorized his sister, a citizen and resident of Mexico, to act on his behalf and disburse funds from the account, as needed, for building the house. (Item 5 at 3.)

Applicant estimated that the house would be completely finished in 2009 or 2010. His mother was living in the home in November 2009. Applicant stated that his mother would reside in the home until he retired or sold the property. (Item 5 at 3.)

Applicant told the investigator that his main purpose for exercising dual citizenship with Mexico was to protect his property investment in Mexico. He does not want to lose his property if Mexican laws change in the future. (Item 5 at 3-4.)

Applicant asserted he would have no problem in renouncing his Mexican citizenship if he did not have a real estate investment in Mexico. He told the investigator that if he were required to renounce his Mexican citizenship, he would have to find another way to protect his property. (Item 5 at 4.)

Applicant stated that he does not exercise any other rights of his Mexican citizenship. He has not served in the Mexican military, and he has no non-military service with the Mexican government. He has not voted in elections in Mexico. He has not taken part in political activities in Mexico, and he has no contact with the Mexican government. (Item 5 at 3-4.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that “no 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 an applicant’s 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.

² In response to questions in Section 20, Foreign Activities, on his e-QIP, Applicant stated that he purchased real property in Mexico in September 2001. In his personal subject interview, however, he advised the OPM investigator that he purchased land in 2003 or 2004 and intended to build a home on the property. At about the same time, he opened a bank account in Mexico to facilitate money transactions associated with building the house. (Item 1 at 33; Item 5 at 3.)

When evaluating an applicant's suitability for a security clearance, an 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, the administrative judge applies these 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.

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 in seeking 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 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.

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.” Such an individual “may be prone to provide information or make decisions that are harmful to the interests of the United States.”

AG ¶ 10 describes several conditions that could raise a security concern and may be disqualifying. These disqualifying conditions are as follows:

(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;
- (2) military service or a willingness to bear arms for a foreign country;
- (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
- (4) residence in a foreign country to meet citizenship requirements;
- (5) using foreign citizenship to protect financial or business interests in another country;
- (6) seeking or holding political office in a foreign country; and,
- (7) voting in a foreign election;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;

(c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest; and

(d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

Applicant renounced his Mexican citizenship when he became a naturalized U.S. citizen in 1995. In 2000, however, Applicant claimed dual citizenship with Mexico

because he intended to purchase real property in Mexico. He then purchased real estate and opened a bank account in Mexico. He estimated the value of his Mexican bank account at \$1,500 and the value of his real property in Mexico at \$300,000. Applicant holds dual citizenship with Mexico to protect his property interests in Mexico. Asserting dual citizenship with Mexico after becoming a U.S. citizen raises a concern that Applicant actively exercises dual citizenship with Mexico. I conclude that Applicant's conduct raises potentially disqualifying security concerns under AG ¶10(a)(5) and ¶10(b).

Under AG ¶11(a), dual citizenship might be mitigated if "it is based solely on [an applicant's] parents' citizenship or birth in a foreign country." Under AG ¶ 11(b), an individual's dual citizenship might be mitigated if he or she "has expressed a willingness to renounce dual citizenship." Under AG ¶11(c), an individual's "exercise of the rights, privileges, or obligations of foreign citizenship might be mitigated if it occurred before becoming a U.S. citizen or when the individual was a minor." Under AG ¶11(d), an individual's use of a foreign passport might be mitigated if it were "approved by the cognizant security authority." Under AG ¶ 11(e), an individual's use of a foreign passport might be mitigated if he or she presents credible evidence that "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated."

Applicant claimed dual citizenship with Mexico as an adult after renouncing his Mexican citizenship and after becoming a naturalized U.S. citizen. His dual citizenship with Mexico was not based solely on his parents' Mexican citizenship or on his own birth in Mexico. Instead, as a U.S. citizen, he actively exercised Mexican citizenship to acquire legal benefits that would protect his property interests in Mexico. His willingness to renounce his Mexican citizenship for a second time was conditioned upon finding a suitable alternative to protecting his Mexican property interests, which he valued at \$300,000. A conditional offer of renunciation is entitled to less weight in mitigation than is an unconditional offer. See ISCR Case No. 01-16098 (App. Bd. May 29, 2003.).

Applicant requested a decision on the written record. He did not file a response to the FORM. Without an opportunity to assess Applicant's credibility at a hearing, I am unable to conclude that he met his burden of persuasion in mitigation under the Foreign Preference mitigating condition 11(b). See ISCR Case No. 07-14151 (Sep. 10, 2008.) The written record in this case demonstrates Applicant's preference for foreign citizenship and property interests over the interests of the United States. His concern for protecting his Mexican property interests could increase his potential to be subject to foreign coercion or pressure. Accordingly, I conclude that AG ¶¶ 11(a) and 11(c) also do not apply in mitigation in this case. AG ¶¶ 11(d) and 11(e) do not apply to the facts 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 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 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. Applicant is a mature and well-educated professional with a specialty in management and business development. After renouncing his Mexican citizenship and becoming a naturalized U.S. citizen, he claimed dual citizenship with Mexico to acquire and then protect financial and property interests in Mexico. Applicant was willing to renounce his dual citizenship with Mexico only if a suitable alternative for protecting his Mexican property interests could be found. Applicant's active preference for his Mexican citizenship raises security concerns that are not mitigated by the record in this case.

Overall, the record evidence leaves me with questions and doubts at the present time about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate security concerns under Guideline C, Foreign Preference.

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.:	Against Applicant
Subparagraphs 1.b(1) – 1.b(2):	Against Applicant
Subparagraph 1.c.:	Against 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.

Joan Caton Anthony
Administrative Judge