



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



In the matter of:)
)
) ISCR Case No. 10-09516
)
Applicant for Security Clearance)

Appearances

For Government: Candace Le'i Garcia, Esq., Department Counsel
For Applicant: *Pro se*

03/19/2012

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline C, Foreign Preference. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On July 9, 2011¹, 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 on September 1, 2006.

¹ The date is not listed on the SOR; however, the accompanying letter requesting Applicant to sign a receipt for the SOR is dated July 9, 2011 (See Item 2).

Applicant answered the SOR on August 11, 2011, and elected to have his case decided on the written record. Department Counsel submitted the Government's File of Relevant Material (FORM) on November 30, 2011. The FORM was mailed to Applicant and he received it on December 19, 2011. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not provide additional information. The case was assigned to me on February 14, 2011.

Findings of Fact

In Applicant's answer to the SOR, he admitted every SOR allegation. Those admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 44 years old. He is married to a Jordanian national and has no children. He has worked for his current employer, a defense contractor, since March 2007. He graduated from high school in Germany. He is a dual citizen of the United States and Germany. He was born in Germany on September 22, 1967, to a German national mother and a U.S. national father who was in the military at the time of his birth.²

Applicant resided in the United States for some period before 1978; however, the record does not state the specific timeframe. When his parents divorced, he moved to Germany with his mother. He finished his school years there and then was drafted into the German military in 1992. He remained in the military until 1999, reenlisting on at least one occasion. He has never served in the U.S. military and he did not register for the U.S. selective service system. Since leaving the United States in 1978, he has never returned to reside here. Although he works for a U.S. defense contractor, all the work locations have been in foreign countries.³

Applicant was initially issued a German passport when he was 10 years old. He currently holds a German passport that was issued in December 2006 and expires in December 2016. All of his past travel was done using his German passport even though he also holds a U.S. passport. In November 2010, Applicant turned over his German passport to his facilities security officer (SFO), with the caveat that it would not be destroyed and that it would be returned to him when his contract with his employer was completed. There is no evidence he has taken any steps to renounce his German citizenship. He also "considers himself a German with United States citizenship and passport privileges." He has voted in German elections. There is no information in the record on whether he ever voted in any U.S. elections.⁴

² Items 4-5.

³ *Id.*

⁴ Items 3-6.

Applicant's answer to the SOR indicates that his past work includes "putting his life on the line daily to protect and support U.S. troops in a hostile environment from 2003 to 2006."⁵

Policies

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

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, 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, and 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

⁵ Item 3.

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

AG ¶ 9 expresses the foreign preference security concern:

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.

AG ¶ 10 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

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

Applicant is a dual citizen of Germany and the United States. He used his German passport to travel to all foreign locations as recently as 2009. His current German passport does not expire until December 2016. Applicant voted in German elections and there is no evidence that he has ever voted in a U.S. election. In 1992, he was conscripted into the German military, served eight years, and reenlisted at least one time. I find the above disqualifying conditions apply.

I have considered all the mitigating conditions under AG ¶ 11. The following are potentially applicable to this guideline:

(a) dual citizenship is based solely on parents’ citizenship or birth in a foreign country; and

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

Applicant’s German citizenship is based upon his mother’s German citizenship. Applicant exercised dual citizenship by voting in German elections, serving in the German military, and using his German passport to enter and exit Germany. He exercised the rights, privileges, and obligations of a German citizen while he was also a U.S. citizen. The mitigating condition under AG ¶¶ 11(a) does not apply. Applicant

turned over his German passport to his company's FSO; however, he specifically reserved the right to retain the passport once his employment with the company ends. I find mitigating condition AG ¶ 11(e) applies.

Despite the presence of some mitigation, Applicant has not convinced me that his country of preference is the United States rather than Germany.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the 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 those guidelines, but some warrant additional comment. Applicant spent most of his life in Germany and continues to reside there. He was educated there and although employed by a U.S. company, there is virtually no contact with the United States. His last record visit to the United States was in 1978. He has not presented evidence that he is willing to renounce his German citizenship; on the contrary, he stated that he considers himself a German citizen. He only recently relinquished possession of his German passport and expects its return once his employment ends. Prior to giving up possession of his German passport, he used it to travel to all foreign locations. He has voted in German elections and served in the German military. Other than his birth to a United States service member located in Germany at the time, Applicant failed to establish a preference for the United States over Germany.

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 failed to mitigate the security concerns arising 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

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.

Robert E. Coacher
Administrative Judge