



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 11-02650
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

January 27, 2012

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. The evidence shows that Applicant is a dual citizen of the United States and Poland. He left Poland in 1981, and was subsequently granted political asylum and allowed to immigrate to the United States. He became a naturalized U.S. citizen in 1992. He has been continuously employed since at least 1983, and he has worked for the same company since 1986. He obtained a Polish passport in 2000, and he used it to facilitate a purchase of a house in Poland in 2003. He made the purchase to provide rent-free housing for his unemployed brother, although Applicant stays in the house when he travels to Poland to visit his elderly mother. His Polish passport was destroyed in October 2010, he does not intend to obtain another, and he has expressed a willingness to renounce dual citizenship. He also has a bank account in Poland with a modest balance that he uses when he is in Poland. There is sufficient evidence to explain, extenuate, or mitigate foreign preference security concerns. For the reasons discussed below, this case is decided for Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on or about July 28, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) explaining it was unable to find that it was clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the reasons for the action under the security guideline known as Guideline C for foreign preference.

Applicant timely answered the SOR, and he requested a hearing. The case was assigned to another judge October 5, 2011, before it was reassigned to me October 14, 2011. The hearing took place November 3, 2011. The hearing transcript (Tr.) was received November 14, 2011.

Findings of Fact

The SOR alleged two matters as follows: (1) Applicant owns a home in Poland with a market value of about U.S. \$80,000, which he bought in 2003 by using a Polish passport obtained in about 2000, despite becoming a naturalized U.S. citizen in 1992; and (2) Applicant has a bank account in Poland with a balance of about U.S. \$9,000. He admitted both allegations in his reply to the SOR. His admissions are accepted and adopted and incorporated herein as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 57-year-old employee of a federal contractor. He is a dual citizen of the United States and Poland. He is seeking to obtain a security clearance for the first time.² He has been continuously employed since at least 1983; he has worked for the same company since 1986; and he has lived at the same address since 1998. He currently works as an associate engineer in the field of electronics engineering. He has a good employment record as verified by highly favorable letters of recommendation and cash awards from his employer.³

Applicant has been married and divorced twice. He has two adult daughters and eight grandchildren who live in the United States; one daughter is a naturalized U.S. citizen; another daughter is a permanent resident alien; and his grandchildren are

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Exhibit 1.

³ Exhibits 2, A, C, and D.

native-born U.S. citizens.⁴ His mother, brother, and one sister are resident citizens of Poland. Another sister is a naturalized U.S. citizen who lives near Applicant.

Applicant was born in Poland and left that country in 1981, when it was a communist state under the control of the then Soviet Union.⁵ Poland is now a stable parliamentary and free-market democracy; it is a member of the European Union and NATO; and it has deployed soldiers to both Iraq and Afghanistan in support of the United States and NATO.

After leaving Poland, Applicant traveled to a European country, where he lived in a refugee camp for several months until granted political asylum and allowed to immigrate to the United States. He became a naturalized U.S. citizen in 1992. He did not return to Poland until 1997, which was several years after the fall of the Berlin Wall in 1989. He used a U.S. passport for that trip and all subsequent trips to Poland. His current U.S. passport was issued in 2003.⁶ He traveled to Poland in 2009, 2008, 2007, 2005, 2004, and 2003.⁷ His primary purpose in making the trips was to visit his elderly mother; his father is deceased.

In about 2000, Applicant learned that he continued to have Polish citizenship. He obtained a Polish passport with a view toward buying a house in Poland in which his chronically unemployed brother could live rent-free. He also intended to stay there during his trips to Poland. He made the purchase in about 2003, and he was required to display a Polish passport as part of the transaction. It was a cash transaction; the purchase price was about U.S. \$60,000; and the property now has an estimated market value of \$80,000. Applicant wants to sell the house, but a sale has been delayed due to a conflict with his brother who lives in the house. Applicant is attempting to reason with his brother, and Applicant has hired an attorney in Poland to assist in this process. The existence of the bank account, which has a balance of about U.S. \$9,000, is tied to the house, as Applicant intends to maintain it until the house is sold. He also uses the bank account when in Poland because he prefers not to carry a lot of cash.

Applicant obtained the Polish passport and bought the Polish property several years ago when he did not have a security clearance. He disclosed his Polish family members, passport, property, and bank account in his June 2010 security clearance application.⁸ He had his Polish passport destroyed in the presence of a facility security

⁴ Exhibits 1, G, and H.

⁵ The facts about Poland in the paragraph are based on Exhibit 4, a U.S. State Department report, or are matters of common knowledge within the Defense Department.

⁶ Exhibit E.

⁷ Exhibit 1.

⁸ Exhibit 1.

officer in October 2010.⁹ He does not intend to obtain a Polish passport in the future; he uses his U.S. passport to travel to Poland; and he understands a Polish passport is not required to sell the house. He expressed a willingness to renounce his dual citizenship, as he views himself as a U.S. citizen, who has no intention to live anywhere else.

Applicant's financial interests are in the United States except for the Polish house and bank account. He has owned his current home since 1998. He estimated his net worth at about \$1 million, which includes his home, 401(k) account, and other accounts.¹⁰ He expressed a willingness to walk away from the Polish house and bank account, as they do not constitute a substantial part of his financial interests. In addition, a recent credit report presented by Applicant shows he is in good standing with his creditors and has no negative accounts.¹¹

Law and Policies

It is well-established law that no one has a right to a security clearance.¹² As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹³ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹⁴ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁵

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁶ The Government has the burden of presenting

⁹ Exhibit 3.

¹⁰ Tr. 44–45; Exhibit F.

¹¹ Exhibit J.

¹² *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

¹³ 484 U.S. at 531.

¹⁴ Directive, ¶ 3.2.

¹⁵ Directive, ¶ 3.2.

¹⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

evidence to establish facts alleged in the SOR that have been controverted.¹⁷ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁰ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²¹

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.²² Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

Under Guideline C for foreign preference,²³ the suitability of an applicant may be questioned or put into doubt when that applicant acts in manner to evidence a preference for a foreign country over the United States. The overall concern is:

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.²⁴

¹⁷ Directive, Enclosure 3, ¶ E3.1.14.

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

¹⁹ Directive, Enclosure 3, ¶ E3.1.15.

²⁰ *Egan*, 484 U.S. at 531.

²¹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²² Executive Order 10865, § 7.

²³ AG ¶¶ 9, 10, and 11 (setting forth the security concern and the disqualifying and mitigating conditions).

²⁴ AG ¶ 9.

The guideline contains several disqualifying conditions, of which the most pertinent here is ¶ 10(a).²⁵ It applies because Applicant actively exercised a right or privilege of Polish citizenship after becoming a U.S. citizen by obtaining, possessing, and using a Polish passport to facilitate the purchase of a house in Poland and established a bank account in the process. These actions may indicate a foreign preference.

The guideline also contains six conditions that may mitigate security concerns.²⁶ The most pertinent here are ¶ 11(b)²⁷ and (e).²⁸ The former mitigating condition applies because Applicant has expressed a willingness to renounce dual citizenship. And based on my opportunity to listen to his testimony and observe his demeanor, I found his expressed willingness, along with the rest of his testimony, to be credible and worthy of belief. The latter mitigating condition applies because Applicant had the Polish passport destroyed in the presence of a facility security officer once he was aware it was an issue.

The facts and circumstances surrounding Applicant's exercise of dual citizenship do not justify current doubts about his judgment, reliability, and trustworthiness. I reach this conclusion based on (1) his fleeing of communist Poland in 1981, and his immigration to the United States via political asylum; (2) his affirmative actions in ridding himself of the Polish passport in 2010 several months before the SOR was issued; (3) his good-faith intention to sell the Polish property and close the Polish bank account (which are things he acquired years before applying for a security clearance); (4) his longtime residence and citizenship in the United States; (5) his record of good employment in the United States; (6) his Polish property and bank account constitute less than 10 percent of his net worth, the balance of which is located in the United States; and (7) his strong family ties to the United States via his two daughters and eight grandchildren. Taken together, these facts and circumstances are sufficient to mitigate foreign preference security concerns. They show his true preference is for the United States, and he is not prone to act in a manner that might be harmful to U.S. interests.

Following *Egan* and the clearly-consistent standard, I have no doubts or concerns about Applicant's fitness or suitability for a security clearance. In reaching this conclusion, I gave due consideration to the whole-person concept.²⁹ Applicant met his

²⁵ AG ¶ 10(a) provides, in part, as follows: "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."

²⁶ AG ¶ 11(a)–(f).

²⁷ AG ¶ 11(b) provides as follows: "the individual has expressed a willingness to renounce dual citizenship."

²⁸ AG ¶ 11(e) provides as follows: "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated."

²⁹ AG ¶ 2(a)(1)–(9).

ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline C: For Applicant

Subparagraphs 1.a–1.b: For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge