DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 12-00042
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Gina Marine, Esquire, Department Counsel
For Applicant: William F. Savarino, Esquire

01/24/2013

Decision

WHITE, David M., Administrative Judge:

Applicant is a dual U.S. and U.K. citizen. He used his U.K. passport solely for entry into the United Kingdom after a U.K. border agent told him in 2009 that new U.K. immigration rules required him to enter using his U.K. passport. He since determined this advice to be erroneous, surrendered his U.K. passport, and mitigated resulting security concerns. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is granted.

Statement of the Case

After a hearing before this administrative judge, the Defense Office of Hearings and Appeals (DOHA) granted Applicant a security clearance on July 25, 2008. On April 11, 2012, the Department of Defense issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline C (Foreign Preference). The action was taken 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 for Determining Eligibility for Access to Classified Information*, (AG) effective within the Department of Defense after September 1, 2006.

Applicant acknowledged receipt of the SOR on April 20, 2012. He answered the SOR in writing (AR) on May 24, 2012, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on July 3, 2012, and the case was assigned to me on July 12, 2012. I initially intended to schedule the hearing on August 16, 2012, but granted a request for a continuance until late September due to conflicting prior obligations of Applicant and his counsel. DOHA issued a Notice of Hearing on August 30, 2012, and I convened the hearing as scheduled on September 25, 2012. Department Counsel participated via video teleconference from DOHA headquarters in Arlington, VA. The Government offered exhibits (GE) 1 through 7, which were admitted without objection. Applicant offered exhibits (AE) A and B, which were also admitted without objection. Two witnesses and Applicant testified on his behalf. I granted Applicant's and Department Counsel's request to leave the record open until October 25, 2012, for submission of additional evidence and briefs on an issue at my request. DOHA received the transcript of the hearing (Tr.) on October 5, 2012. Applicant and Department Counsel timely submitted additional matters, which were marked Hearing Exhibits (HE) I through III, and admitted without objection. On January 4, 2013, Applicant's counsel submitted a supplemental post-hearing submission, which was also admitted as HE IV, without objection by Department Counsel.

Findings of Fact

Applicant is a 61-year-old president and chief executive officer of a major technology manufacturing company. The company has a facility security clearance. Although they do not presently perform any classified work or possess any classified material, a number of their employees hold security clearances so that they can attend meetings and enter facilities as necessary to maximize their products' performance in support of Government missions and functions. Applicant, by virtue of his position, is designated "Key Management Personnel" and requires a security clearance as part of his company's eligibility for a facility clearance. Applicant is a dual citizen of the United States and the United Kingdom, where he was born and raised. He and his wife moved to the United States in 1995, in a business relocation. They became naturalized U.S. citizens in 2004, and intend to permanently reside in the United States.[1]

Applicant first applied for a security clearance during March 2007. After a hearing into a DOHA SOR that alleged security concerns under Guidelines B (Foreign Influence) and C (Foreign Preference), I granted Applicant eligibility for a security clearance in a decision dated July 25, 2008.[2] The facts and analysis in that decision are, except to the extent updated or modified below, incorporated in this decision. In his answer, Applicant admitted the allegations contained in SOR ¶¶ 1.a, 1.b, and, in part, 1.c. He denied the allegations in SOR ¶ 1.d and, in part, ¶ 1.c. Applicant's admissions, including those contained in his responses to DOHA interrogatories, are also incorporated in this decision as findings of fact.

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[1]GE 1; GE 4; Tr. 50-53, 97-104.

[2]GE 2. The decision is ISCR Case No. 07-09033 (A.J. Jul. 25, 2008).

In connection with his 2008 DOHA proceedings, Applicant surrendered his U.K. passport to his company's Facility Security Officer (FSO) with the intent that the FSO retain possession of the passport for as long as Applicant needed a security clearance. The FSO, in turn, gave the passport to a paralegal employee who locked it in a safe to which she alone had the combination. Except for one incident involving his prior U.K. passport described in GE 2, Applicant exclusively used his U.S. passport during his extensive travels overseas since it was issued to him in July 2004. Applicant's company has operations around the globe, and their headquarters for European operations is in London. During a business trip to the United Kingdom in April 2009, Applicant presented his U.S. passport, and a "landing card" identifying his place of birth as Scotland, to the British border agent. The agent asked if he was also a U.K. citizen. Applicant responded that he was, but that he had regularly traveled to and from the United Kingdom using his U.S. passport without any problems for almost five years. The agent consulted with a supervisor, and then advised Applicant that the rules had recently changed and, although he would permit entry that time, Applicant would have to use his U.K. passport to enter that country in the future. Applicant informed his FSO of this change. The FSO attempted to contact authorities at the British embassy to confirm the change. He could not find anyone there who was able to definitely confirm this requirement, but found a section of the U.K. Immigration Rules on their government website that he interpreted to confirm the border agent's statement that there was a new rule.[3]

During late May 2009, Applicant's grandson, who lives in England, became seriously ill. Applicant requested that the FSO return his U.K. passport to him for use in entering the United Kingdom to visit his grandson in the hospital. The FSO consulted with their company's security consultant, who advised that he could return the passport for the limited purpose of entering the United Kingdom, but would have to file an Adverse Information Report advising the Defense Security Service (DSS) of this action. The FSO orally advised his DSS representative of the issue, and was also advised to file the Adverse Information Report, which he did. An Incident History report was also entered in the JPAS to document this activity. No one advised Applicant or the FSO that his use of the U.K. passport was prohibited, or otherwise wrongful. Applicant used the passport only to enter the United Kingdom, and used his U.S. passport to enter and leave the United States as well as to depart the United Kingdom.[4]

In response to the renewed security concerns over his use of the U.K. passport described in the SOR issued by DOHA in April 2012, and his ongoing need to travel to the United Kingdom on a regular basis which they honestly and reasonably understood to require use of that passport, Applicant's company took a number of internal measures to formalize the fact that he would not be permitted any access to classified information. He further surrendered the passport to the FSO and entered into an agreement formalizing the limited purposes under which he would be permitted to use

[3]AR; GE 3; GE 7; Tr. 58, 83-87. The FSO is also the company's General Counsel. He is very experienced in corporate law and governance, but has less experience with some nuances of public international law or immigration law.

[4]AR; GE 3; GE 7; Tr. 59-68, 71, 87-91.

the passport and the reports concerning its use that the FSO would provide to DoD. They took these measures in consultation with their DSS representative, their security consultant, and Applicant's attorney, in order to comply with security requirements to the best of their ability, to minimize any potential risk to national security, and to reaffirm Applicant's loyalty to and preference for his U.S. citizenship. He has not voted in any U.K. elections since becoming a U.S. citizen, or otherwise exercised any right of citizenship in the United Kingdom other than seeking entry as he thought he was required to do.[5]

Applicant advised during the hearing that his next need to enter the United Kingdom would be on a business trip scheduled for early December 2012. Due to an explanation by Department Counsel, with which I agreed based on many years of experience with international travel, of her understanding that the U.K. Immigration Rule on which the FSO had relied was limited to circumstances in which a potential entrant was asserting a right to enter the United Kingdom for permanent residence ("right of abode"), it was agreed that Applicant would attempt this entry using his U.S. passport. This entry was successful, and confirmed that Applicant does not need to use his U.K. passport for his non-resident business or family visits to the United Kingdom. Accordingly, Applicant's FSO has again locked up and will maintain permanent possession of the U.K. passport during the duration of Applicant's employment by the company. Applicant will resume using only his U.S. passport for all foreign travel.[6]

Applicant is highly ethical and conscientiously follows rules and regulations as he understands them. He also intends to permanently reside in, and exercise only the citizenship rights and privileges of, the United States. He did not use his U.K. passport in an effort or with the intent to exert or claim recognition of any rights or privileges of a U.K. citizen. He merely did so because he was told that it was required of him. None of his travel was hidden from U.S. authorities, since he used his U.S. passport for every border crossing except entry into the United Kingdom between May 2009 and mid-2012. He has no intent to use his U.K. passport while holding a security clearance now that he realizes that the United Kingdom does not require its use for the purposes for which he visits there.[7]

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 (DCs) and mitigating conditions (MCs), which are to be used in evaluating an applicant's eligibility for access to classified information.

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[5]AR; GE 3; AE A; AE B; Tr. 43-44, 65-66, 68-71, 83-84, 90, 95-103.

[6]Tr. 73-74, 96-97, 106-110, 117-119, 147; HE I; HE III; HE IV.

[7]HE IV; Tr. 34-43, 53-56, 88-90, 100-104.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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, "[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9 security concerns involving foreign preference arise because, "[w]hen 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 under this guideline:

(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;

(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.

The evidence in this case established only the foreign preference DC set forth in AG ¶ 10(a)(1). Applicant regained possession of his U.K. passport from his FSO in May 2009 after being informed by an apparently knowledgeable U.K. border agent that he was required to use that passport to enter the United Kingdom. With his knowledge and direction, his FSO duly reported this possession and use to DoD security authorities, who did nothing to indicate that there was a problem with the arrangement. His use of the passport was not for purposes of obtaining recognition of his U.K. citizenship, and he exercised no rights or privileges thereof other than entering the country, which he now understands that he can, and intends to, do as a U.S. citizen. He has exercised no other rights, privileges, or obligations of a U.K. citizen since choosing U.S. citizenship.

AG ¶ 11 provides conditions that could mitigate foreign preference security concerns:

(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;

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

(d) use of a foreign passport is approved by the cognizant security authority;

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

(f) the vote in a foreign election was encouraged by the United States Government.

As noted in GE 2, AG ¶¶ 11(a) and (c) apply to mitigate Applicant's dual citizenship. This case presents an issue that remains unresolved under AG ¶ 11(d). It is clear that a company FSO qualifies as a "cognizant security authority" for purposes of surrendering a passport under AG ¶ 11(e). Whether an FSO is a "cognizant security authority" for purposes of approving use of a foreign passport under AG ¶ 11(d) is not settled.

Department Counsel argued that, contrary to recognized rules of statutory construction, the use of identical language in two immediately connected provisions of the guideline required different interpretations, and only a highly placed Government security official could qualify as a "cognizant security authority" under AG ¶ 11(d). In support of her position she cited ISCR Case No. 08-11969 (App. Bd. Apr. 22, 2011), ISCR Case No. 09-07511 (App. Bd. Apr. 22, 2011), and ISCR Case No. 11-01888 (App. Bd. Jun. 1, 2012). I have carefully read and considered each of these binding precedential decisions, and find them to be distinguishable from the facts of this case. Each of them involved Guideline C concerns over use of foreign passports by dual citizens of the United States and either Estonia or Iran, but also involved substantial and apparently determinative security concerns under Guideline B (Foreign Influence).

To the extent these decisions contain language indicating that AG ¶¶ 11(d) and (e) do not contemplate or authorize a company FSO to be merely a holding repository for a foreign passport that is returned to a dual citizen for use in foreign travel whenever requested, they wisely inform the current decision. Each case involved use of the foreign passport to obtain recognition of the foreign citizenship by the foreign country, which was not Applicant's purpose in this case. Applicant neither intended to, nor did, hide his travel from U.S. authorities since he used his U.S. passport to leave and enter the United States The only reason the FSO permitted Applicant to use his U.K. passport was their mutual reasonable, but erroneous, belief that the U.K. border agent was

correct that U.K. immigration rules required it. Now that they understand that proclamation to have been erroneous under Applicant's circumstances, he has permanently surrendered possession of the passport to his FSO. I find that his use of the passport with FSO permission and submission of proper reports to DoD provides mitigation under AG ¶ 11(d), and that any future security concerns are fully mitigated under AG ¶ 11(e).

Counsel for both parties accepted my invitation to submit their positions on whether the October 2008 revision of Guideline C for Sensitive Compartmented Information (SCI) access under Intelligence Community Policy Guidance (ICPG) 704.2, as the only guideline that differed from the AG approved for basic security clearance eligibility, should inform this decision. I concur with Department Counsel that I have no authority to modify, or to fail to apply, AG Guideline C as written in 2006 since this case involves Applicant's eligibility for a security clearance, rather than eligibility for access to SCI. I would note, however, that Applicant's conduct was in total compliance with ICPG 704.2, and in that respect demonstrates further sensitivity to and concern for alleviating any reasonable potential security concerns.[8]

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 pertinent facts and circumstances surrounding this case. Security concerns in this case do not involve any personal misconduct, dishonesty, irresponsibility, or disloyal activity by Applicant. The only issue arose because a misinformed U.K. border agent, after apparent consultation with a supervisor, told Applicant that he would not be permitted to enter the United Kingdom on subsequent visits using his U.S. passport. Applicant has a

[8] *See* HE II, HE III.

regular need to temporarily visit the United Kingdom for both business and family reasons. In an attempt to comply with what he thought were the rules, he sought the return of his U.K. passport for subsequent entries into the United Kingdom, and the matter was duly reported to DoD officials. Applicant and his wife have independently and voluntarily chosen to become U.S. citizens, and have no interest in exercising any rights, privileges, or responsibilities of U.K. citizenship. He used his U.K. passport for entrance there because he reasonably thought that applicable laws required it. Now that he understands the difference between entering the United Kingdom with right of permanent abode as a citizen and entering as a visiting U.S. citizen, he has surrendered his U.K. passport to his FSO and will not use it while employed at that company.

I note here that Applicant's company has also undertaken to ensure that he has no access to classified information, in order to minimize potential security concerns. That access decision has no relevance under Guideline C, but does eliminate any potential for pressure, coercion, exploitation, or duress under AG ¶ 2(a)(8), and any potential for post-employment misuse of information to which Applicant might have access while holding a "Key Management Personnel" clearance. This is further evidence of the extent to which Applicant and his corporate colleagues are sensitive and committed to upholding the obligations of their facility and personal security clearances.

Overall, the record evidence creates no doubt as to Applicant's present eligibility and suitability for a security clearance. He fully met his burden to mitigate any security concerns arising from foreign preference considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline C: FOR APPLICANT

Subparagraphs 1.a through 1.d: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

DAVID M. WHITE
Administrative Judge