DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
---	)	ISCR Case No. 15-01390
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel
For Applicant: *Pro se*

10/19/2016

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Decision

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GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding foreign preference. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On June 9, 2014, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.[1] On September 26, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006.

[1] Item 5 (e-QIP, dated June 9, 2014).

The SOR alleged security concerns under Guideline C (Foreign Preference), and detailed reasons why the DOD CAF was unable to make an affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant received the SOR on October 8, 2015. On October 21, 2015, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing.[2] A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant on December 21, 2015, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Guidelines applicable to his case. Applicant received the FORM on January 4, 2016. A response was due on February 3, 2016. Applicant did not submit any further documentation. The case was assigned to me on September 13, 2016.

Findings of Fact

In his Answer to the SOR, Applicant admitted with comments the factual allegations pertaining to foreign preference (¶ 1.a.). Applicant's admissions and comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 25-year-old employee of a defense contractor. He has been a consultant with his current employer since June 2014.[3] He has never served in the U.S. military.[4] He has never held a security clearance.[5] Applicant has never been married.[6] He is a June 2009 high school graduate,[7] with a May 2013 bachelor's degree in an unspecified discipline.[8]

[2] Item 4 (Applicant's Answer to the SOR, dated October 21, 2015).

[3] Item 5, *supra* note 1, at 18.

[4] Item 5, *supra* note 1, at 26.

[5] Item 5, *supra* note 1, at 103.

[6] Item 5, *supra* note 1, at 27.

[7] Item 5, *supra* note 1, at 17.

[8] Item 5, *supra* note 1, at 18.

Foreign Preference

Applicant was born in India to a native-born U.S. citizen father and a native-born Netherlands citizen mother.[9] Both parents still reside in India.[10] As a dual citizen, Applicant derived his U.S. citizenship from his father and his Netherlands citizenship from his mother.[11] When asked if he had taken any action to renounce his foreign citizenship, referring to his Netherlands citizenship, Applicant replied: "I have not had need to renounce my foreign citizenship."[12]

Applicant was issued a passport from the Netherlands in January 2007, and it was renewed in April 2012.[13] It will not expire until April 2017.[14] He was issued a U.S. passport in October 2010.[15] In the last seven years, Applicant has traveled to various foreign countries, including those in the European Union, for education or tourism reasons for varying periods up to more than 30 days.[16] While the identity of the passport used for most of the travel was not specified, Applicant acknowledged that he used the Netherlands passport to travel to Australia for efficiency and convenience. He noted that the Netherlands passport allowed him to apply for the Australian visa online, but the application using the U.S. passport required a mail-in process.[17] Applicant denied that his possession of a Netherlands passport indicates a preference for the Netherlands over the United States.[18]

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."[19] 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. The President has authorized the Secretary of Defense or his designee to

[9] Item 5, *supra* note 1, at 5, 29-30.

[10] Item 5, *supra* note 1, at 29-30.

[11] Item 5, *supra* note 1, at 6-8; Item 4, *supra* note 2, at 3.

[12] Item 5, *supra* note 1, at 7-8.

[13] Item 5, *supra* note 1, at 8-9.

[14] Item 5, *supra* note 1, at 8; Item 4, *supra* note 2, at 2.

[15] Item 5, *supra* note 1, at 6.

[16] Item 5, *supra* note 1, at 38-100.

[17] Item 4, *supra* note 2, at 3.

[18] Item 4, *supra* note 2, at 3.

[19] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[20]

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."[21] The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.[22]

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, "security clearance determinations should err, if they must, on the side of denials."[23]

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[20] Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

[21] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

[22] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

[23] *Egan*, 484 U.S. at 531.

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."[24] Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

Analysis

Guideline C, Foreign Preference

The security concern relating to the guideline for Foreign Preference is set out in AG ¶ 9:

> 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.

The guideline notes a condition that could raise security concerns. Under AG ¶ 10(a)(1), the "possession of a current foreign passport*"* is potentially disqualifying. AG ¶ 10(a)(1) has been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from foreign preference. Under AG ¶ 11(a), the disqualifying condition may be mitigated where "dual citizenship is based solely on parents' citizenship or birth in a foreign country." Also, under AG ¶ 11(b), foreign preference security concerns may be mitigated where "the individual has expressed a willingness to renounce dual citizenship." The "use of a foreign passport is approved by the cognizant security authority*"* is potentially mitigating under AG ¶ 11(d). Similarly, AG ¶ 11(e) applies where the evidence shows "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated."

AG ¶ 11(a) applies. None of the remaining mitigating conditions apply. This case focuses solely on Applicant's possession (and) use of his Netherlands passport. While his dual citizenship may be a factor, in this instance, it is not the determining one. Applicant stated that he did not see a need to renounce his Netherlands citizenship, but he did not indicate either a willingness or unwillingness to do so. A willingness to renounce dual citizenship, not the actual renunciation of the dual citizenship is important. Likewise, while the initial acquisition of the Netherlands passport is significant, once the security concerns were identified to Applicant, in order to alleviate those concerns, it would have been prudent for him to address those concerns rather than deflecting the issue to his

[24] *See* Exec. Or. 10865 § 7.

dual citizenship. In renewing and using his Netherlands passport, Applicant exercised a right of foreign citizenship. He failed to simply surrender the Netherlands passport to the cognizant security authority, such as his facility security officer. He chose not to have the passport destroyed or otherwise invalidated.

Security clearance adjudications are aimed at evaluating an applicant's judgment, reliability, and trustworthiness. Applicant has every right to maintain his dual citizenship. But by failing to relinquish his foreign passport, even on a temporary basis, Applicant has chosen to confront the Government's security concerns. Under these circumstances, while Applicant also has every right to maintain a foreign passport, he has also relinquished his eligibility for a security clearance.

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 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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.[25]

There is some evidence in favor of mitigating Applicant's conduct. He has been with his current employer since June 2014. There is no evidence of criminal conduct, security violations, or the misuse of information technology systems. His dual citizenship is based solely on his parents' citizenships.

The disqualifying evidence is more substantial. Applicant has never expressed a willingness to renounce his dual citizenship. He was issued a Netherlands passport in January 2007, and it was renewed in April 2012. It will not expire until April 2017. Although he was issued a U.S. passport in October 2010, when traveling on at least some occasions, he used his Netherlands passport rather than his U.S. one. That use of his

[25] *See U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); *See also* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

foreign passport was not approved by the cognizant security authority. The passport has not been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his foreign preference. *See* AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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 F:	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.

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ROBERT ROBINSON GALES
Administrative Judge