



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



In the matter of:)
)
 [NAME REDACTED]) ISCR Case No. 15-02587
)
 Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*

04/21/2017

Decision

BORGSTROM, Eric H., Administrative Judge:

Applicant mitigated the foreign preference security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On November 20, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline C, foreign preference. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on January 25, 2016, and he elected to have his case decided on the written record in lieu of a hearing. On March 30, 2016, the Government submitted its file of relevant material (FORM) and provided a complete copy to Applicant. Applicant received the FORM on April 11, 2016. He was afforded an opportunity to respond to the FORM within 30 days of its receipt and to file objections

and submit material to refute, extenuate, or mitigate the security concerns. On May 11, 2016, Applicant responded to the FORM. The case was assigned to me on February 17, 2017. On March 16, 2017, I re-opened the record to allow the parties to submit additional documents. On March 27, 2017, Applicant submitted additional documents and the record closed.¹

Procedural Issues

Department Counsel offers FORM Items 2-4, which are admitted into evidence as Government Exhibits (GE) 2-4, without objection. FORM Item 5 is Department Counsel's request for administrative notice and the supporting reference materials. Because the SOR allegations are limited to Applicant's possession and use of his Colombia passport and not any foreign contacts, I will take administrative notice of only those portions of the reference materials pertaining to the use of Colombian passports. FORM Item 5 is admitted for administrative notice as Administrative Notice (AN) I. Applicant's supplemental response to the FORM includes three attachments, which are admitted into evidence as Applicant Exhibits (AE) A-C, without objection.

Findings of Fact

The SOR alleges that Applicant possessed a valid foreign passport (SOR ¶ 1.a.) and used that foreign passport to travel to Colombia and to Brazil (SOR ¶ 1.b.). Applicant admitted both allegations. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact:

Applicant is 40 years old. He received a master's degree in August 2007. He is not married and does not have any children.² He was born in Colombia, and he entered the United States in November 1998. He became a naturalized U.S. citizen in April 2004. He has been employed as an engineer for a DOD contractor since May 2004, and he has lived in Mexico since October 2013.³

A Colombian citizen by birth, Applicant renewed his Colombia passport in January 2008. This passport was valid until January 2018. He used this passport to travel to Colombia in December 2013 and to Brazil in June 2014. Colombian law requires Colombia citizens to use their Colombian passports to enter and exit Colombia. On March 23, 2017, he destroyed his Colombian passport, as verified by his facility security officer. He has expressed a willingness to renounce his Colombian citizenship; however, he has not taken any action to do so.⁴

¹ My order and the relevant email exchange are admitted into the record as Administrative Exhibit (AX) I.

² GE 2.

³ GE 2.

⁴ GE 2-4; AN I; AE A-C.

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 to be 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, administrative judges apply the 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. 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."⁵ Under *Egan*, EO 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.

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 the applicant or proven by Department Counsel." The applicant 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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).

⁵ *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988). See *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

Analysis

Guideline C, Foreign Preference

The concern under this guideline 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.” Under AG ¶ 10, the following disqualifying conditions potentially apply:

(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; and

(3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country.

Dual citizenship standing alone is not sufficient to warrant an adverse trustworthiness decision. Under Guideline C, “the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions.”⁶

After becoming a naturalized U.S. citizen in 2004, Applicant renewed his Colombian passport in January 2008. This passport was valid until January 2018. AG ¶ 10(a)(1) applies.

Applicant used his Colombian passport to travel to Colombia in 2013 and to Brazil in 2014. Although his use of his Colombian passport was permitted under U.S. law, it is well-settled that a lawful course of action may still be significant conduct:⁷

Nothing in Executive Order 12968, Executive Order 10865, or the Directive requires that DOD policies, practices, and procedures in security clearance adjudications must be consistent with State Department policies, practices, and procedures, explicitly ones that on their face do not deal with security clearance adjudications.⁸

Applicant’s legal use of his Colombian passport still constitutes “an exercise of foreign citizenship” within the context of ¶ 10(a). Whether he used his Colombian passport for personal convenience or as required by Colombian law, such actions

⁶ ISCR Case No. 98-0252 at 5 (App. Bd. Sep. 15, 1999).

⁷ See ISCR Case No. 14-06440 at 4 (App. Bd. Jan. 8, 2016).

⁸ ISCR Case No. 99-0424 at 6 (App. Bd. Feb. 8, 2001).

constituted significant conduct.⁹ Applicant's use of his Colombian passport to travel to and from Colombia and Brazil is a benefit based on the exercise of his Colombian citizenship. AG ¶ 10(a)(3) applies.

The following mitigating conditions are potentially relevant:

AG ¶ 11(a): dual citizenship is based solely on parents' citizenship or birth in a foreign country;

AG ¶ 11(b): the individual has expressed a willingness to renounce dual citizenship;

AG ¶ 11(d) use of a foreign passport is approved by the cognizant security authority; and

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

Applicant was a Colombian citizen by birth. Although he repeatedly used his Colombian passport, even after becoming a U.S. citizen in 2004, AG ¶ 11(a) applies.¹⁰ Applicant repeatedly expressed his willingness to renounce his Colombian citizenship. AG ¶ 11(b) applies. In March 2017, Applicant destroyed his Colombian passport. AG ¶ 11(e) applies.

Although Applicant's use of his Colombian passport was permitted by U.S. law, the Appeal Board has held that merely because conduct is legal does not mean that the federal government has affirmatively authorized or approved such conduct.¹¹ The State Department's dual nationality notice does not constitute approval by a "cognizant security authority" in the context of AG ¶ 11(d). AG ¶ 11(d) does not apply.

There is no evidence that Applicant has used his Colombian passport since submitting his security clearance application and completing his security interview in 2014. He has destroyed his Colombian passport and expressed a willingness to renounce his Colombian citizenship. I find that he has mitigated the foreign preference security concerns.

⁹ See *id.* at 13.

¹⁰ See ISCR Case No. 12-06885 at 6 (App. Bd. Sep. 12, 2013) ("The Board has concluded that AG 11(a) can be applied when an applicant's dual citizenship falls within the literal language of that mitigating condition, regardless of whether the applicant exercised the rights or privileges of foreign citizenship."). See also ISCR Case No. 03-23806 at 5-6 (App. Bd. Apr. 28, 2005).

¹¹ See ISCR Case No. 98-0252 at 4 (App. Bd. Sep. 15, 1999).

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. In light of all the facts, I have considered the potentially disqualifying and mitigating conditions, and I have incorporated my comments under Guideline C and the factors in AG ¶ 2(c) in this whole-person analysis.

Prior to submitting his security clearance application, Applicant renewed and used his Colombian passport. He has destroyed this foreign passport and expressed a willingness to renounce his Colombian citizenship. I conclude Applicant mitigated the foreign preference security concerns.

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: FOR APPLICANT

Subparagraphs 1.a.-1.b.: 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.

Eric H. Borgstrom
Administrative Judge