



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 15-02774
)	
Applicant for Security Clearance)	

Appearances

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

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant, who was born, raised and lived her entire life in the United States, mitigated the foreign preference security concerns raised by her exercise of foreign citizenship. Specifically, Applicant exercised her Nigerian citizenship, which she derived through her parents who were originally from Nigeria, by renewing and using a Nigerian passport that she first obtained as a teenager at her parents' direction in order to travel to Nigeria for a wedding and to meet her extended family in Nigeria. Applicant surrendered her foreign passport to her facility security officer and refuted concerns that her preferences lie with Nigeria or any other foreign country. Clearance is granted.

History of the Case

On February 16, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that her exercise of foreign citizenship raised security concerns under the foreign preference

guideline.¹ Applicant answered the SOR and requested a hearing to establish her eligibility for access to classified information.

On September 29, 2016, a date that was mutually agreed upon by the parties, I convened the hearing. Department Counsel offered Exhibit 1, Applicant's security clearance application (SCA), which was admitted into evidence without objection. Applicant chose to testify and post-hearing submitted Exhibit A, a letter from her facility security officer (FSO), which states that: (a) Applicant surrendered her Nigerian passport to his office and it would be retained by the company in a secure, out-of-state corporate facility; (b) the Applicant was advised that if she requested the return of the foreign passport, the FSO would immediately report the matter to the Government; and (c) after being provided such advice, Applicant "fully accepts and understands that any security clearance issued by the Department of Defense may adversely be impacted if the foreign passport is returned to her." Without objection, Exhibit A was admitted into evidence. The transcript of the hearing (Tr.) was received on October 11, 2016, and the record closed on October 31, 2016.

Procedural Issue

The record was kept open for over a month after the adjournment of the hearing to provide Applicant the opportunity to consider whether she wanted to surrender, relinquish, or otherwise invalidate her Nigerian passport. Applicant timely submitted Exhibit A, which shows that she surrendered her foreign passport to her FSO.

The record was also kept open until October 31, 2016, to allow Department Counsel the opportunity to amend the SOR to address Applicant's disclosure at hearing that her fiancé and his family were all foreign citizens and residents of Nigeria. I sustained Applicant's objection to Department Counsel's attempt to expand the hearing to consider the security concern that these new foreign connections and contacts potentially raised under Guideline B. I found that Applicant, who was not represented by counsel, was not on notice and clearly not prepared to address this potential new matter. At the same time, recognizing the potential security significance of this newly revealed information and the Government's legitimate concerns, I provided Department Counsel over 30 days within which to decide whether to amend the SOR and provide the proposed amendment to Applicant, which would comply with the Directive's notice requirement, provide Applicant the opportunity to address the concern, and avail herself of the procedural safeguards afforded to her by the Directive, notably, the right to counsel. (Tr. 14-20, 34-39, 49-53)² Department Counsel did not amend the SOR.

¹ This action was taken under Executive Order (E.O.) 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) implemented by the Department of Defense on September 1, 2006.

² ISCR Case No. 12-11375 (App. Bd. Jun. 17, 2016) (judge erred in relying on non-alleged matters, which applicant was not provided notice of nor had an opportunity to respond to, as basis for denial). *See also*, ISCR Case No. 12-10933 at 4-5 (App. Bd. Jun. 29, 2016) (Administrative Judge Ra'anan's concurring opinion discussing potential due process concerns regarding a *pro se* applicant and waiver is instructive).

Accordingly, this decision only addresses the foreign preference security concern alleged in the SOR.

Findings of Fact

Applicant, who is in her twenties, was born and raised in the United States. She attended a U.S. college on a full academic scholarship, and graduated early with honors. She received a degree in finance. While attending college, Applicant completed several different internships and worked part-time at U.S. companies and a state government agency. Upon graduating from college, Applicant received multiple job offers, including from two large U.S. defense contractors. She accepted the offer from her current employer because she wanted to remain close to where her family resides in the United States. She has been living with her mother in State A since graduating from college. She is saving her money to purchase a home in the United States with her fiancé after they marry. During her free time, Applicant is engaged in volunteer activities through the Red Cross and the DOD. (Tr. 8, 24, 41-43; Answer)

Applicant has been with her current employer for over four years. She has been steadily promoted and received performance-based awards and salary raises, including a recent five percent increase in compensation. Currently, Applicant serves as a financial analyst, directly reporting to directors of the company who are one step below the chief financial officer. She has been granted access to and properly handled and safeguarded highly sensitive corporate information. (Tr. 8, 24, 43-48)

In 2014, Applicant submitted a security clearance application (SCA) in connection with her job. She disclosed that she had dual citizenship with Nigeria through her parents who were originally from Nigeria. Applicant's parents are U.S. citizens, having resided in the United States since the early 1980s. Applicant also disclosed on the SCA that she had renewed, possessed, and used a Nigerian passport, which she originally obtained when she was in the ninth grade, at the direction of her parents who wanted to travel to Nigeria for a family wedding and to have her meet their extended family members in Nigeria. Applicant also revealed on the SCA that she traveled to Nigeria to visit extended family members and friends in Nigeria on a number of occasions. After submitting the SCA, Applicant became engaged. Her fiancé and his family are resident-citizens of Nigeria. He was recently granted a K-1 fiancé visa and, as of the hearing, was traveling to the United States. Applicant planned to marry her fiancé within 90 days of his arrival in the United States. Applicant testified that she no longer needs the Nigerian passport because her fiancé will no longer be living in Nigeria.

Here, Applicant, a *pro se* applicant, was not provided notice of a potential security concern under a different adjudicative guideline until being cross-examined by *highly* skilled counsel at hearing. At a minimum, fairness requires that Applicant be provided adequate notice of the new concern and have an opportunity to adequately prepare to address this new concern. *Contrast with*, ISCR Case No. 14-03112 at 3 (App. Bd. Nov. 3, 2015) (judge properly allowed Department Counsel to amend SOR to allege additional foreign familial connections and contacts that were only uncovered at hearing, because the SOR in that case put applicant adequately on notice that his foreign connections and contacts were a security concern.))

Applicant's Nigerian passport will expire in December 2016. (Tr. 27-28, 32-38; Exhibit 1; Answer)

After submitting the SCA, Applicant underwent a standard security clearance background interview. She was (improperly) advised by the agent conducting the interview that she could retain her Nigerian passport and still receive a security clearance. She subsequently followed up with her employer and was advised if she relinquished or surrendered the foreign passport that her chances of being granted a clearance would be enhanced. She was told by her employer it was unclear whether if she decided to retain the foreign passport whether she would still be eligible for a security clearance. At hearing, Applicant was informed that if she decided to keep the foreign passport that her request for a security clearance would be denied. She was also told that even if she decided to surrender or relinquish her Nigerian passport that in and of itself would not necessarily or automatically mitigate the security concerns at issue. Nevertheless, after the hearing, Applicant surrendered her foreign passport to her FSO. (Tr. 14-20, 28-31, 49-53; Exhibit A)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

Administrative judges are responsible for ensuring that an applicant receives fair notice of the security concerns at issue, has a reasonable opportunity to address those concerns, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has

held that “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9, the concern involving foreign preference arises “[w]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States.” Such an individual “may be prone to provide information or make decisions that are harmful to the interests of the United States.”

Applicant’s possession and use of a Nigerian passport after becoming an adult raises this concern and also establishes the disqualifying condition at AG ¶ 10(a), “exercise of any right, privilege or obligation of foreign citizenship,” to include “possession of a current foreign passport.”

Applicant mitigated the foreign preference security concern. She surrendered the foreign passport to her FSO. Furthermore, she originally obtained the passport when she was a teenager at her parents’ direction; renewed it before being hired by her current employer and submitting an SCA; retained it because she was improperly advised (or, did not fully understand the advice provided) regarding the security significance of a prospective clearance holder possessing a valid foreign passport; and she no longer needs the passport, as her fiancé has immigrated to the United States. After a thorough review of the record evidence, I find that the mitigating condition listed at AG ¶ 11(e), “the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated” applies.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).³ I hereby incorporate my above comments and highlight some additional whole-person factors. Applicant has been candid about her foreign passport and connections from the start of her security clearance background investigation. Furthermore, Applicant has a demonstrated track record of properly handling and safeguarding highly sensitive information entrusted to her care by her current employer, a large U.S. defense contractor. These favorable whole-person factors, coupled with the other matters noted under Guideline C, mitigate the foreign preference security concern.⁴

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 (Foreign Preference): FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

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

Francisco Mendez
Administrative Judge

³ The non-exhaustive list of adjudicative factors are: (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.

⁴ This favorable conclusion does not prevent the Government from re-reviewing Applicant's eligibility in light of her changed circumstances, notably, her new foreign connections and contacts in Nigeria.