



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



In the matter of:

ADP Case No. 15-05418

Applicant for Public Trust Position

Appearances

For Government: Andrew Henderson, Esquire, Department Counsel

For Applicant: *Pro se*

July 19, 2016

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

On March 8, 2016, in accordance with Department of Defense (DoD) Directive 5220.6, the DoD issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline C for Applicant. The action was taken under Executive Order 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) effective within the Department of Defense after September 1, 2006.

Applicant replied to the SOR in writing (Response) on March 24, 2016, and she requested that her case be decided on the written record in lieu of a hearing. However, she later requested a hearing before an administrative judge. (Tr. 5-6.) The case was assigned me on May 3, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 3, 2016, scheduling the hearing for May 17, 2016.¹ The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 and 2, which were admitted without objection. (Tr. 14-19.) Applicant offered Exhibit (AE) A,

¹Applicant waived her right to 15 days notice of hearing. (Tr. 11.)

which was admitted without objection. Applicant testified. DOHA received the transcript of the hearing (Tr.) on June 3, 2016. The record was left open for Applicant to submit additional exhibits. On May 18, 2016; May 24, 2016; and June 5, 2016², Applicant presented three submissions via email, marked AE B through AE D. Department Counsel filed no objections to AE B through AE D, and they were admitted. The record then closed.

Findings of Fact

Applicant is 46 years old, and divorced. (GE 1; AE A; AE C.) She is employed by a healthcare provider, and she seeks access to sensitive information in connection with her employment. (GE 1.)

Paragraph 1 - Guideline C, Foreign Preference

The Government alleges in this paragraph that Applicant is ineligible for access because she obtained Australian citizenship in approximately 2000; she possesses a valid Australian passport; and she has voted in Australian elections. Applicant admitted all of the allegation in the SOR.

Applicant was born and raised in the United States. She graduated from a U.S. college in 1993 and decided to do a semester abroad in Australia upon her graduation. (GE 1. Tr. 23.) While there, she met her first husband. After her return to the United States, they corresponded for approximately a year. He then came to the United States to visit her. He proposed to her on that trip. Eight months later, they married in the United States and did a repeat ceremony in Australia. Their marriage lasted until 1998. She chose to reside in Australia for a year while awaiting the termination of their marriage. Their divorce was decreed in approximately 1999. She returned to the United States at that time. (Tr. 23-27.)

In 2000 Applicant acquired Australian citizenship. She returned to Australia to attend the naturalization ceremony. She obtained Australian citizenship for two reasons: health care and education. Applicant wants the option to avail herself of the medical coverage offered to Australian citizens. She also is enrolled in a Master's degree program through an Australian University. If she is not an Australian citizen, she is not eligible for that educational program. She requested time to contemplate whether she would be willing to renounce her Australian citizenship, due to her participation in her Master's degree program. (GE 1; GE 2; AE C; Tr. 33-41.)

Applicant possesses a valid Australian passport. She was issued an Australian passport after her naturalization and elected to renew it in 2010. It is valid until 2020. She testified that she would be willing to forfeit her Australian passport. (GE 1; GE 2; Tr. 33-36.) The record was left open to allow Applicant further time to consider her options and present additional evidence on this matter. (Tr. 43.)

²The record closed on May 24, 2016, at close of business. However, as Department Counsel did not file an objection to Applicant's June 6, 2016 email, it is admitted into evidence even though it was untimely.

On June 5, 2016, Applicant submitted an email stating: “just to let you know I tried to surrender my Australian Passport, the Australian Consulate would take it, but would not issue a letter that they did so. [Employer] will not take it and secure it either.” I find this submission to be ambiguous. Her statement that she “tried” to surrender it but the consulate “would take it” does not mean that they, in fact, did take it. As a result, I find that Applicant is still in possession of her valid Australian passport. (AE D.)

Policies

Positions designated as ADP I, ADP II, and ADP III are classified as “sensitive positions.” (See DoD Regulation 5200.2-R (Regulation) ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) “The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person’s loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security.” (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to the DoD and DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an applicant’s suitability to occupy a sensitive position, 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 and mitigating conditions, which are useful in evaluating an applicant’s eligibility for access to sensitive information.

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(a) describing the adjudicative process. The administrative judge’s over-arching 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. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of 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, 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 as to obtaining a favorable access decision.

A person who seeks to occupy a sensitive position 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 sensitive information. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order 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).

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 several conditions that could raise security concerns under AG ¶ 10. One is potentially applicable in this case:

(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;
- (3) accepting educational, medical . . . benefits from a foreign country; and
- (7) voting in a foreign election.

Applicant is a natural-born citizen of the United States. However, in 2000, she applied for and became a naturalized citizen of Australia. She obtained her Australian

passport and chose to renew it in 2010. It is valid until 2020. She stated that she wants to remain an Australian citizen due to certain educational and medical benefits only available to such citizens. She also admitted to voting in Australian elections. AG ¶ 10 is disqualifying.

Conditions that could mitigate Foreign Preference security concerns are provided under AG ¶ 11. Four are potentially applicable:

- (a) dual citizenship is based solely on parent's 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; and
- (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Applicant's Australian citizenship is the result of her application for Australian naturalization. It is not based on her parent's citizenship or her birth there. AG ¶ 11(c) inapplicable.

Applicant has not explicitly expressed a willingness to renounce her Australian citizenship. She was reluctant to renounce it because she wished to avail herself of both educational and medical benefits, which her Australian citizenship guaranteed. There is no persuasive evidence to support the application of AG ¶ 11(b).

Applicant has exercised her Australian citizenship by obtaining an Australian passport; utilizing educational benefits only available to Australian citizens; and voting in Australian elections. She was an adult U.S. citizen when she elected to exercise those privileges of Australian citizenship. AG ¶ 11(c) inapplicable.

Applicant failed to present convincing evidence that her Australian passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated. Her email was vague and did not actually indicate it had been surrendered. Further, even if it had been surrendered, the concern related to her intent to continue to avail herself of other privileges of Australian citizenship would not be fully mitigated. AG ¶ 11(e) inapplicable.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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 to occupy a sensitive position 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 the facts and circumstances surrounding this case. As an adult, Applicant acquired Australian citizenship, although she was a U.S. citizen by birth. She desires to retain her Australian citizenship because she wants to avail herself of certain educational and medical benefits offered by Australia. As a result, she places herself in a position where she could be subject to coercion, exploitation, or duress. I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for access to sensitive information, under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns under the whole-person concept.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b(1)	Against Applicant
Subparagraph 1.b(2)	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 to occupy a designated ADP I/II/III sensitive position. Eligibility for access to sensitive information is denied.

Jennifer I. Goldstein
Administrative Judge