



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



In the matter of:)
)
) ISCR Case No. 15-08046
)
Applicant for Security Clearance)

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

08/23/2018

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense's (DoD) intent to deny her eligibility for a security clearance to work in the defense industry. Applicant surrendered her Australian passport to her company's security officers, but reacquired it without informing her security officers she had done so. She has not mitigated the foreign preference security concerns under Guideline C or the personal conduct security concerns under Guideline E due to her connections with Australia. Applicant's eligibility for access to classified information is denied.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on June 8, 2016, the DoD issued a Statement of Reasons (SOR) detailing foreign preference security

¹ 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 (Sept. 1, 2006 AG) effective within the DoD on September 1, 2006.

concerns and personal conduct concerns. On July 12, 2016, Applicant answered the SOR and elected to have the matter decided without a hearing. On August 26, 2016, Defense Office of Hearings and Appeals (DOHA) Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM). The FORM contained five attachments (Items). On September 12, 2016, Applicant received a copy of the FORM, along with notice of her opportunity to object to the Government's evidence and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. No response was received.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs.²

Findings of Fact

In Applicant's answer to the SOR, she admitted that after becoming a naturalized U.S. citizen in April 2005, she applied for and was issued Australian passports in July 2009 and December 2012. She admitted to possessing the Australian passport issued in December 2012, which expires in December 2022. (Item 5) She admitted she surrendered her Australian passport in March 2012 and was informed by her employer that obtaining another Australian passport would adversely affect her security clearance. After a thorough review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 42-year-old administrative assistant working for a defense contractor since December 2011. She seeks to retain a security clearance. She has not served in the military. The DoD moved her now ex-husband to Australia after he retired after serving 20 years on active duty.³ (Item 2) She was married from November 2000 through April 2010. (Item 2) She wanted to return to the United States permanently, he did not.

Applicant was born in Australia. In July 2000, she entered the United States and in April 2005, she became a naturalized U.S. citizen. (Item 2) She has not voted in an Australian election since 2000. (Item 2) On July 27, 2005, she was issued a U.S. passport, which expired in July 2015. (Item 2) She co-owned two homes in Australia, but has sold both of them. (Item 2, Item 3) She co-owns a home in California. (Item 3) She has no financial interests in Australia. Her parents, brother, grandmother, aunt, and two cousins are citizens and residents of Australia. Her mother is a bank manager and her father is retired from a telecommunications company. (Item 3) Her brother owns a construction

² Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

³ Applicant's husband's branch of service is not found in the record.

company. Her grandmother is a retired department store clerk. Her aunt is a retired payroll clerk. One cousin is a stay-at-home mother and the other is a wine maker. (Item 3)

Applicant has visited Australia five times since 2001: from July 2001 to August 2001, in December 2002 and January 2003, in June 2004 and July 2004, in February 2006 and March 2006, from April 2007 through July 2009, and from August 2009 through April 2010. (Items 2 and 3) She also traveled to Australia six times on U.S. Government business travel: February 2006 and March 2006, from April 2007 through April 2010, September 2010, June 2011, December 2012, and in May 2016. (Item 2, Item 4)

Although a dual citizen of the United States and Australia, her Australian citizenship requires her to enter Australia only on an Australian passport and is not allowed to enter on a visa or on a passport from any other country. (Item 3) She is willing to surrender her Australian passport to her company's security office under the condition she could obtain it for verified travel to Australia. (Item 3) She has used her Australian passport only for travel to Australia. All other travel is done on her U.S. passport. (Item 3)

On Applicant's first trip to Australia after acquiring U.S. citizenship she entered Australia on her U.S. passport, but left Australia on her Australian passport. (Item 1) On all subsequent trips to Australia, when she attempted to enter Australia on her U.S. passport, she was denied entry because she had overstayed her visit to Australia as a U.S. citizen on her U.S. passport. (Item 1) She would then present her Australian passport and would be allowed to enter Australia.

Knowing she should always use her U.S. passport, Applicant contacted Australian immigration for assistance. (Item 1) She provided a March 2014 letter from Australia's Department of Immigration and Border Protection stating Australian citizens are required to enter Australia using their Australian passport. (Item 1)

In March 2012, Applicant surrendered her then valid Australian passport to her company's security office. (Item 4) The expectation when she relinquished custody of her Australian passport was that she was not to obtain another Australian passport. (Item 3) She was advised at that time that should she receive another Australian passport, her security clearance would be adversely affected. (Item 4) Nine months later, in December 2012, she obtained another Australian passport in order to travel to Australia to visit her family for two weeks at Christmas time. (Item 4) She had already purchased a \$4,000 airplane ticket for her travel to Australia. She was aware she should have discussed the reobtaining of her Australian passport "before, if not, after her travel to Australia." (Item 3)

Applicant indicated that it was a lack of judgment to not inform her employer of her new Australian passport. In August 2013, she submitted an Electronic Questionnaires for Investigations Processing (e-QIP) when she applied for a job with another department of the U.S. government. On that e-QIP, she did list her 2012 Australian passport. (Item 1) In

February 2014, Applicant's employer learned she had reacquired her Australian passport in December 2012. (Item 4) Her company did not learn of the Applicant reobtaining her foreign passport from her. At that time, Applicant's access to classified information was precluded. In September 2016, the company returned her Australian passport to her. In May 2016, she used her Australian passport to visit her family in Australia. (Item 4)

Department Counsel did not file documents setting forth facts that indicate that Australia is known to target U.S. citizens to obtain classified information or poses a heightened risk of foreign exploitation or coercion.

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 must be considered 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, 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. According to AG ¶ 2(a), the adjudication process is an examination of a sufficient period and a careful weight of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility 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.

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 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 Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination of 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

AG ¶ 9 sets out the foreign preference concern:

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 provide information or make decisions that are harmful to the interests of the United States. Foreign involvement raises concerns about an individual's judgment, reliability, and trustworthiness when it is in conflict with U.S. national interests or when the individual acts to conceal it. *By itself*, the fact that a U.S. citizen is also a citizen of another country is not disqualifying without an objective showing of such conflict or attempt at concealment. The same is true for a U.S. citizen's exercise of any right or privilege of foreign citizenship and any action to acquire or obtain recognition of a foreign citizenship.

AG ¶ 10 lists the conditions that could raise a foreign preference security concern and may be disqualifying in this case:

- (a) applying for and/or acquiring citizenship in any other country;
- (b) failure to report, or fully disclose when required, to an appropriate security official, the possession of a passport or identity card issued by any country other than the United States;
- (c) failure to use a U.S. passport when entering or exiting the U.S.;
- (d) participation in foreign activities, including but not limited to:
 - (1) assuming or attempting to assume any type of employment, position, or political office in a foreign government or military organization; and
 - (2) otherwise acting to serve the interests of a foreign person, group, organization, or government in any way that conflicts with U.S. national security interests;

(e) using foreign citizenship to protect financial or business interests in another country in violation of U.S. law; and

(f) an act of expatriation from the United States such as declaration of intent to renounce U.S. citizenship, whether through words or actions.

Applicant failed to disclose to her company's security officials her reacquisition of her Australian passport in December 2012 after having been told in March 2012 that reacquisition of her foreign passport would negatively affect her security clearance. AG ¶ 10(b) applies. There is no evidence that she fails to use her U.S. passport when she enters or exits the United States. Her voting in Australian elections prior to becoming a naturalized U.S. citizen is not an activity that conflicts with U.S. national security interests. There is no evidence that she uses foreign citizenship to protect her financial interests in violation of U.S. law. She has not declared an intent to renounce her U.S. citizenship.

Under the current guidelines, Applicant would be allowed to have her Australian passport so long as she fully disclosed it and used her U.S. passport when entering or exiting the United States. Possession of the foreign passport is not the issue, failing to disclose her possession of the Australian passport is the issue. When she surrendered her foreign passport in 2012, the expectation was that she would not be obtaining a foreign passport in the future and doing so would adversely affect her holding a security clearance.

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

- (a) the foreign citizenship is not in conflict with U.S. national security interests;
- (b) dual citizenship is based solely on parental citizenship or birth in a foreign country, and there is no evidence of foreign preference;
- (c) the individual has expressed a willingness to renounce the foreign citizenship that is in conflict with U.S. national security interests;
- (d) the exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen;
- (e) the exercise of the entitlement or benefits of foreign citizenship do not present a national security concern;
- (f) the foreign preference, if detected, involves a foreign country, entity, or association that poses a low national security risk;
- (g) civil employment or military service was authorized under U.S. law, or the employment or service was otherwise consented to as required by U.S. law; and

(h) any potentially disqualifying activity took place after receiving the approval by the agency head or designee.

Australia is the country in issue in this case and it is a close ally of the United States. AG ¶ 11(a), (b), (e), and (f) have some applicability. However, these mitigating conditions are insufficient to overcome Applicant's failure to report or disclose her Australian passport to appropriate security officials.

In March 2012, when Applicant surrendered her Australian passport, the expectation was that she was not to obtain another Australian passport. At that time she was advised that should she receive another Australian passport, her security clearance would be adversely affected. However, nine months later, in December 2012, she obtained another Australian passport in order to travel to Australia to visit her family for two weeks at Christmas time. She acknowledged she was aware she should have discussed the reobtaining of her Australian passport "before, if not, after her travel to Australia." It was not until February 2014 that her employer became aware she had reobtained her Australian passport. The cited mitigating factors do not fully mitigate the foreign preference security concern.

Guideline E: Personal Conduct

The concerns for personal conduct are articulated in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

When Applicant surrendered her Australian passport in March 2012, she was informed that to acquire a new Australian passport would adversely affect her security clearance. She revealed possession of her Australian passport on her August 2013 e-QIP when she applied for employment with a different government agency. However, her current employer did not learn that she had obtained a new passport until February 2014. She acknowledged it was poor judgment not to immediately inform her employer of the new passport.

AG ¶ 16 describes a condition that could raise a security concern and be disqualifying in this case:

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved

in making a recommendation relevant to a national security eligibility determination, or other official government representative.

The disqualifying condition listed in AG ¶ 16(b) applies. None of the mitigating factors listed in AG ¶ 17 apply. There was no prompt, good-faith effort to correct the omission, concealment, or falsification before being confronted with the facts. Applicant obtained her new Australian passport in December 2012, but her employer did not learn she had a new foreign passport until February 2014.

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(d):

(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.

As a requirement of her Australian citizenship, she must use an Australian passport when she travels to Australia. All other travel is on her U.S. passport. I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. My comments under Guidelines C and E are incorporated into this whole-person analysis.

After weighing the disqualifying and mitigating conditions, and all facts and circumstances in the context of the whole-person, I conclude Applicant failed to meet her burden to mitigate the foreign preference and personal conduct security concerns raised by the facts of this case. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance.

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, Foreign Preference: AGAINST APPLICANT

Subparagraphs 1.a. and 1.b: Against Applicant

Paragraph 2, Guideline E, Personal Conduct: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly not consistent with the interests of national security to grant Applicant eligibility for access to classified information. National security eligibility is denied.

CLAUDE R. HEINY II
Administrative Judge