

DoD Implements Revised Adjudicative Guidelines for Security Clearance Eligibility

On August 30, 2006, the Department of Defense (DoD) published an Interim Final Rule amending the DoD Personnel Security Program Regulation's Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (the Guidelines). The Guidelines apply to all government personnel (civilian and military) as well as contractors and their employees who require access to classified information.

The Rule's implementation comes after harsh industry and Congressional criticism over the staggering security clearance backlog, now estimated to be well over 300,000 applications, and the astonishing estimated average security clearance processing period of 274 days. These concerns reached their boiling point this past May when the Defense Security Service (DSS) announced a temporary moratorium on its processing of new applications due to funding constraints.

DoD stated that the Rule, effective September 1, 2006, streamlines existing procedures, and "will simplify security processing and allow the deserving public to obtain a security clearance in a more efficient manner." Written comments will be accepted until October 30, 2006.

Revised Guidelines Clarify and Soften Foreign Preference and Influence Rules

The Rule enacts the Revised Guidelines approved by President Bush on December 29, 2005, and constitutes the first major revision to the Guidelines in over 13 years. These revisions provide increased guidance on the Guideline's disqualifying and mitigating conditions for determining security clearance eligibility, and in particular, clarify and soften the criteria for evaluating foreign preference and influence.

Since 9/11, security clearance adjudicators have substantially increased their focus on applying the foreign preference and influence disqualifying criteria found under Guidelines B and C. This has resulted in a significant increase in the number of negative initial determinations for applicants with foreign backgrounds. Further, since the terrorist attacks of 9/11, the number of decisions rendered by the Defense Office of Hearing and Appeals (DOHA) in Guideline B and C cases has increased over five times (from an average of approximately 30 a year to in excess of 150 a year). A brief review of the most pertinent revisions to Guidelines B and C follows.

Guideline C: Foreign Preference

Applicants and contractors alike were plagued with the little known and seldom communicated technicalities found in Guideline C. Under the prior Guidelines, and as expounded upon in 2000 by the "Money Memorandum," an applicant's clearance was required to be denied or revoked if he possessed a foreign passport (regardless if it had expired). Further, the only way for an applicant to mitigate his possession of a foreign passport was to surrender the passport to the issuing authority (a challenging and in some instances impossible task given the diverse citizenship laws and strained relations with certain countries). An applicant could not mitigate by destroying his passport, losing his passport, and/or possessing an expired passport.

The revised Guideline C criteria soften the old rules. The disqualifying condition has been limited to the possession of a *current* foreign passport. Further, the mitigating conditions have been expanded to allow an applicant to show mitigation of the concerns from a foreign passport if it has been destroyed, surrendered or otherwise invalidated.

UPCOMING EVENTS

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An Insider's View of Colorado State and Local Procurement

CONTACTS

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Guideline B: Foreign Influence

Causing similar issues was the disqualifying criteria under the prior Guideline B, which imputed the potential for foreign influence merely from an applicant's immediate family member's possession of a foreign citizenship. The old criteria further assumed disqualification without regards to the identity and reputation of the foreign country; and allowed mitigation only if an applicant could demonstrate that they could *never* be forced into a position of choosing between their affection for a foreign family member and their loyalty to the United States.

The revised Guideline B slightly expands the old disqualifying criteria to include consideration of an applicant's "foreign contacts" instead of an applicant's "immediate family." However, the revised criteria implements a new requirement that the applicant's foreign contacts must "create a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion" softening the former presumption that a foreign family member created the potential for foreign influence simply due to their foreign citizenship. In addition, the revised criteria finally includes direction to consider "the identity of the foreign country in which the foreign contact" is located and that country's reputation for espionage and terrorism, and allows an applicant to mitigate if he can show he is *unlikely* to be forced into a position of choosing between his affection for a foreign family member and his loyalty to the United States.

The Government Contracts practice of McKenna Long & Aldridge LLP (MLA) has eagerly awaited the above enactment of the revised Adjudicative Guidelines as they will hopefully reduce biased treatment of contractor's foreign-born personnel and increase their potential to gain and maintain security clearance eligibility. If you would like more information about this article, or MLA's experience and capabilities in assisting contractors and individuals in the security clearance process, please [contact us](#).

The recently published *Chambers Directory USA: America's Leading Lawyers for Business 2006* awards McKenna Long & Aldridge's Government Contracts practice the highest ranking as compared to all firms across the nation, as well as recognizing the outstanding efforts of James Gallagher and Stanley Dees. *Chambers* noted that in addition to being recognized as the nation's first government contract practice, McKenna Long & Aldridge is also the largest national practice with more than 50 attorneys and senior specialists in the department.

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