

DEMYSTIFYING SECURITY CLEARANCES

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ABOUT PILIEROMAZZA

PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as a government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

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PM Legal Minute – our blog, written by all of PilieroMazza’s attorneys, provides trending insight to small and mid-sized businesses.

Legal Advisor Newsletter – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decisions, legislative and regulatory rule-making, as well as other newsworthy events.

Weekly Update – an email sent every Friday that provides an up-to-the-minute recap of legislative and regulatory issues affecting small businesses.

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OVERVIEW

- ❖ Introduction to security clearances
- ❖ National Industrial Security Program
 - Clearance levels
- ❖ Personal security clearances
 - Eligibility
 - Application process & appeals
- ❖ Facility security clearances
 - How to acquire
 - Foreign ownership, control, or influence considerations
- ❖ Q&A



INTRODUCTION TO SECURITY CLEARANCES



INTRODUCTION TO SECURITY CLEARANCES

- ❖ As of October 1, 2014, there were 4.5 million cleared persons
 - 1.4 million holding Top Secret clearances
 - 939,885 clearance holders are government contractors
- ❖ Approximately 13,000 contractor facilities are cleared
 - In 2014, the Defense Security Services (“DSS”) issued 1,301 new facility clearances
- ❖ The Department of Defense issues 80 percent of all clearances
 - Defense Intelligence Agency (DIA), Federal Bureau of Investigation (FBI), National Geospatial-Intelligence Agency (NGA), National Reconnaissance Office (NRO), National Security Agency (NSA), Department of State (DOS), and Central Intelligence Agency (CIA) also issue clearances



NATIONAL INDUSTRIAL SECURITY PROGRAM (NISP)

- ❖ Established in 1993
- ❖ A partnership between the federal government and private industry to safeguard classified information
- ❖ Four tenets:
 - Achieving uniformity in security procedures
 - Implementing the reciprocity principle in security procedures, particularly with regard to facility and personnel clearances
 - Eliminating duplicative or unnecessary requirements, particularly agency inspections
 - Achieving reductions in security costs
- ❖ A major component of the NISP is the NISP Operating Manual (NISPOM)



CLEARANCE LEVELS

Top Secret

Secret

Confidential

❖ Additional designations:

- Sensitive Compartmented Information
- Special Access Program

❖ Levels in Practice

- The level of clearance sought depends on the duties and responsibilities of a position, based on contractual needs and requirements
- An individual may access classified national security information up to and including the level of clearance that they hold, so long as the person has a need to know for the information



PERSONAL SECURITY CLEARANCES (PCL)



PCL ELIGIBILITY

- ❖ **Must have sponsorship**
 - Cleared contractor may sponsor
 - PCLs are limited to the minimal number of employees needed for operational efficiency
 - Contractors are not permitted to establish “pools” of cleared employees
- ❖ **Legitimate and present need to know**
 - Job requiring access to classified information
- ❖ **Must be U.S. citizen**
 - Exception is allowed in specific situations wherein there are compelling reasons for limited access to be granted to an immigrant alien or foreign national employee



APPLYING FOR A PCL

❖ Standard Form 86 (SF-86)

- Identifying information
- Employment history (10 years); military history
- Residency information (10 years)
- Schooling
- Three non-relatives who have known applicant for 7 years
- Relatives (parents, stepparents, children, stepchildren, siblings, half-siblings, spouse, parents of spouse)
- Foreign contacts, foreign travel, foreign activities, foreign business, professional activities, foreign government contracts
- Psychological and emotional health
- Police record; illegal use of drugs; alcohol use
- Financial record
- Involvement in court actions
- Association record (terrorism, overthrow of government)



APPLYING FOR A PCL

❖ Secret & Confidential

- National agency check with local agency check
- Credit check

❖ Top Secret

- Single scope background investigation
- Polygraph (maybe)

❖ Apply to DOD, DIA, FBI, NGA, NRO, NSA, DOS, or CIA

❖ May take less than a month or over a year

- In 2014, CIA processed all of its Top Secret applications in less than eight months, and the majority in less than four months
- In 2014, DOS processed the majority of its applications in less time than the other agencies



PCL DETERMINATIONS

Grant access to individuals “...whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information.”

Executive Order 12968, Access to Classified Information, August 4, 1995.

- ❖ Determination based on:
 - Application
 - Investigation file
 - Guidelines for eligibility
- ❖ Notice of denial must include specific reasons for determination



DEFENSE OFFICE OF HEARINGS & APPEALS (DOHA) GUIDELINES

- Allegiance to the U.S.
- Foreign influence
- Foreign preference
- Sexual behavior
- Financial considerations
- Alcohol consumption
- Drug involvement
- Psychological conditions
- Criminal conduct
- Handling protected information
- Outside activities
- Use of information technology systems



APPEALING A PCL DENIAL

- ❖ Process depends on agency
 - Administrative court-like hearing: DOD & DOE
 - First level in writing, second level in person: DOJ, NSA
 - First level in person, second level in writing: CIA, NGA, DIA
- ❖ Appeal process can take six months to three years to resolve
- ❖ Process begins with Statement of Reasons (SOR)
 - Lists the issues identified
- ❖ Answer the SOR by admitting or denying
 - Mitigation is key



MITIGATING CONDITIONS

- ❖ Listed in Adjudicative Guidelines
- ❖ Vary depending on perceived risk

Allegiance to U.S.	The individual was unaware of the unlawful aims of the individual or organization and severed ties upon learning of these
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Foreign Preference	The individual has expressed a willingness to renounce dual citizenship
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Financial Considerations	The individual initiated a good faith effort to repay overdue creditors or otherwise resolve debts
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Drug Abuse	The behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment
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HEARING PROCESS

- ❖ Present evidence
 - Affidavits from friends and colleagues who can attest to trustworthiness
 - Witnesses
- ❖ Submit brief
 - Discuss DOHA guidelines and mitigating conditions
 - Utilize DOHA decisions
- ❖ Consider retaining counsel
 - Government is represented by counsel
- ❖ Within DOD, may appeal decision to the Appeal Board
 - 15 days to file notice of appeal, 45 days to file brief
 - Appeal Board decision is final
 - May not reapply for one year
- ❖ Process also applies to revocations



FACILITY SECURITY CLEARANCES (FCL)



FCL ELIGIBILITY

❖ Facility

- An operating entity consisting of a plant, laboratory, office, college, university, or commercial structure with associated warehouse, storage areas, utilities and components, which are related by function or location

❖ Sponsorship

- Government or prime contractor
- Validate need for access

❖ Administered by the Defense Security Service

❖ Must adhere to NISPOM

- Defense Security Agreement (DD Form 441)



APPLYING FOR AN FCL

- ❖ Submit SF-328, Certificate Pertaining to Foreign Interests
- ❖ Create and implement Security Clearance Program
 - Contractor is responsible for security costs associated with participation in the NISP (such as classified storage containers)
- ❖ DSS Industrial Security Representative (ISR) is the principal interface
- ❖ Clearance is effective as long as Security Agreement is in effect
 - Maintain need for access
 - Annual inspections



APPLYING FOR AN FCL – OBTAINING PCLs

- ❖ Facility Security Officer (FSO)
 - U.S. citizen with required trainings
- ❖ Clear senior managers of classified business units
 - Exclude all non-cleared senior management
- ❖ Key Management Personnel (KMP)
 - Who is included depends on the type of business structure

Privately Held Corporation

Senior Management Official (SMO), FSO, Chairman of Board, Vice Chairman (if provisions for rotating duties), corporate officials (if duties require access to classified information)

Limited Liability Company

SMO, FSO, LLC members if duties require access to classified information, managers

Sole Proprietorship

Owner, FSO, SMO



FCL VIOLATIONS

❖ Security violation

- Failure to comply with the policy and procedures established that could reasonably result in the loss or compromise or suspected compromise of classified information

❖ NISPOM non-compliance

❖ Potential consequences:

- Loss of FCL
- Termination of classified contracts
- Suspension or debarment
- Government damages for remedy
- Criminal penalties for intentional violations



FOREIGN OWNERSHIP, CONTROL, OR INFLUENCE CONSIDERATIONS (FOCI)

A Company is considered to be operating under FOCI whenever a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable, to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts

❖ SF-328, disclose, explain, and mitigate

- Foreign ownership
- Foreign revenues
- Ownership of foreign revenues
- Non-U.S. board members
- Foreign financing



FOREIGN OWNERSHIP, CONTROL, OR INFLUENCE CONSIDERATIONS (FOCI)

- ❖ DSS determines presence and extent of FOCI
- ❖ Factors:
 - Record of economic and government espionage against U.S. targets
 - Record of enforcement and/or engagement in unauthorized technology transfer
 - The type and sensitivity of the information that shall be accessed
 - The source, nature and extent of FOCI
 - Record of compliance with pertinent U.S. laws, regulations and contracts
 - The nature of any bilateral and multilateral security and information exchange agreements that may pertain
 - Ownership or control, in whole or in part, by a foreign government



FOCI MITIGATION

❖ Board resolution

- Appropriate when foreign interest is not entitled to board representation
- Resolution stating that foreign interest will not have, and can be effectively precluded from access to all classified and export-controlled information

❖ Voting trust/proxy agreement

- Foreign owners relinquish most rights to cleared U.S. citizens

❖ Special Security Agreement (SSA)/Security Control Agreement (SCA)

- SCA used when a company is not effectively owned or controlled by a foreign interest and the foreign interest is entitled to representation on the company's board of directors. There are no access limitations
- SSA required when company is effectively owned or controlled by a foreign interest. Access to proscribed information may require that the Government Contracting Activity complete a National Interest Determination



FOCI MITIGATION IMPLEMENTATION

- ❖ Affiliated Operations Plan
- ❖ Technology Control Plan
- ❖ Electronic Communications Plan
- ❖ Visitation Plan
- ❖ Facilities Location Plan



Any Questions?

Thank you for joining us today.

If you would like to speak with Megan or Michelle about security clearances, please contact them at:

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