

On May 29, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended), and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on June 12, 2007, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on July 31, 2007. A notice of hearing was issued on August 6, 2007, scheduling the hearing for September 12, 2007. At the hearing the Government presented three exhibits. The Applicant presented no exhibits but testified on his own behalf. The record remained open until September 25, 2007 to allow the Applicant the opportunity to submit additional documentation. The Applicant submitted one Post-Hearing Exhibit consisting of 5 pages. The official transcript (Tr.) was received on September 20, 2007.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the exhibits and the testimony. The Applicant is 61 years of age, married and holds a Ph.D. in Mathematics. He is employed as a Senior Software Engineer or Architect for a defense contractor. He seeks a security clearance in connection with his employment in the defense industry.

Paragraph 1 (Guideline C - Foreign Preference). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has acted in such a way as to show a preference for another country over the United States.

The Applicant is a dual citizen of Switzerland and the United States. He was born in Rome, Italy in 1946. When he was ten years old, his family moved to Switzerland. At the age of eighteen he had to choose to either to keep his Italian citizenship or his Swiss citizenship. Since his family was in Switzerland and had decided to stay in Switzerland, the Applicant chose to become a Swiss citizen. He attended his lower grade education in the Italian speaking part of Switzerland, and his higher education was in the German-speaking part of Switzerland. He attended the Swiss Federal Institute of Technology. He lived in Switzerland from 1956 until 1981, when he moved to the United States. The Applicant decided to come to the United States mostly for his career in Computer Science, focusing on the architecture and development of Computer software. In 1988, he and his wife, who is also a dual citizen of Switzerland and the United States, became naturalized United States citizens.

The Applicant presently possesses a passport from Switzerland, issued in October 2005, that will not expire until 2015. He continues to use his foreign passport to travel to Switzerland, Italy, Taiwan, Indonesia and other countries in Europe. He most recently used it to travel to Indonesia in January 2007. The Applicant is not willing to renounce his citizenship with Switzerland and he does not intend to give up his foreign passport. The Applicant uses the Swiss passport as a matter of convenience when he is traveling through out the European Union.

The Applicant served in the military service in Switzerland from 1969 through 1981. He explained that it was not his choice but mandatory by the Swiss government. He testified that he is a perfect, good standing citizen of Switzerland. The Swiss government renewed his passport because of it. He explained that Switzerland does not renew your passport if you for any reason have a problem with their government. For example, if you have not paid your taxes. The Applicant stated, "I am perfectly free to go back to Switzerland whenever I want. I did not leave because I hated the country. What happened is that my wife and myself in '81, we decided to come for five years in the United States to see - - mostly was over my career. At the time, I came to teach at the University of Minnesota computer science and so on. Then we started to like the lifestyle of the United States, and that's why we finally decided to stay. We become citizen, and we are still here." (Tr. pp 21-22).

The Applicant does not remember taking an oath of allegiance when he became a United States citizen. (Tr. p. 27).

The Applicant worked for a few years in Switzerland before coming the United States and is entitled to a minimal amount of social security from Switzerland. As a Swiss citizen in good standing he can at any time go back and work and also vote if he chooses to. The Applicant has a banking account in Switzerland with a few thousand dollars in it. He also has a banking account in Indonesia and one in Italy. He stated that he and his wife like to go on vacation to Indonesia and its simple to have an account there to transfer money to rather than travel with a traveler check. The Applicant also owns property in Italy that he inherited from his father. He is presently is trying to donate the property to a church. (Tr. pp. 29-31).

The Applicant states that he is not a security concern and that he is honest and trustworthy. In his Post-Hearing Exhibit the Applicant states that -

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on her own common sense. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Foreign Preference

9. The 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 be prone to provide information or make decisions that are harmful to the interests of the United States.

Conditions that could raise a security concern:

10(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.

10 (a)1 possession of a current foreign passport;

10 (a)5 using foreign citizenship to protect financial or business interests in another country;

10(d) any statement or action that shows allegiance to a country other than the United States.

Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, “The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is eligible for a security clearance. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination. The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, “Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned.”

The Government must make out a case under Guideline C (foreign preference) that establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between Applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

An individual who demonstrates a foreign preference and has foreign connections may be prone to provide information or make decisions that are harmful to the interests of the United States. The mere possession of a foreign passport raises legitimate questions as to whether the Applicant can be counted upon to place the interests of the United States paramount to that of another nation. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places.

CONCLUSIONS

Having considered the evidence in light of the appropriate legal standards and factors, and having assessed the Applicant's credibility based on the record, this Administrative Judge concludes that the Government has established its case as to all allegations in the SOR, and that Applicant's foreign contacts have a direct and negative impact on his suitability for access to classified information.

The Applicant is a dual citizen of Switzerland and the United States who possesses a Swiss passport. He uses his Swiss passport to travel to Switzerland and other countries in Europe and Asia. He maintains a Swiss, Indonesian and Italian banking account and he owns property in Italy. He enjoys traveling to countries in Europe and Asia without difficulty by using his Swiss passport. He has chosen not to surrender his foreign passport to the Swiss authorities and/or relinquished his foreign citizenship. Under Guideline C, Foreign Preference, *Disqualifying Conditions, 10(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, 10(a)1 possession of a current foreign passport, 10 a(5)*

using foreign citizenship to protect financial or business interests in another country, and 10(d) any statement or action that shows allegiance to a country other than the United States applies. None of the mitigating conditions apply. Accordingly, he has not clearly demonstrated an unequivocal preference for the United States. Under the circumstances of this case, I find against the Applicant under Guideline C.

In addition to the Disqualifying and Mitigating Conditions, I have also considered the “whole person” concept. The Applicant moved to the United States in 1981, with the original intent to stay for only five years. He decided to stay longer for career purposes. He plans to return to Switzerland in the future, where he is eligible to work, vote and collect social security. He obviously has some loyalty to the Swiss government. The Applicant also served in the Swiss military service. He has not surrendered his foreign passport and relinquished his foreign citizenship.

Considering all the evidence, the Applicant has not met the mitigating conditions of Guideline C of the adjudicative guidelines set forth in Enclosure 2 of the Directive. Accordingly, he has failed to meet his ultimate burden of persuasion under Guideline C.

FORMAL FINDINGS

Formal Findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subparas. 1.a.: Against the Applicant

1.b.: Against the Applicant

DECISION

In light of the circumstances presented by the record in this case, it is not clearly consistent with the national interests to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge