

KEYWORD: Foreign Preference; Foreign Influence

DIGEST: Applicant is 57 years old, married with five adult children, and works as a foreign claims processor for a defense contractor in the health care services business. He fled Kosovo in Serbia in 1999 during fighting there. He became a U.S. citizen in 2004, but retains a Yugoslavian passport for his own convenience. He has not mitigated the foreign preference and foreign influence trustworthiness concerns. Eligibility for an ADP I/II/III position is denied.

CASENO: 06-15373.h1

DATE: 06/26/2007

DATE: June 26, 2007

In re:	)	
	)	
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SSN: -----	)	ADP Case No. 06-15373
	)	
Applicant for ADP I/II/III Position	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
PHILIP S. HOWE**

**APPEARANCES**

**FOR GOVERNMENT**

D. Michael Lyles, Esq., Department Counsel

**FOR APPLICANT**

Pro Se

**SYNOPSIS**

Applicant is 57 years old, married with five adult children, and works as a foreign claims processor for a defense contractor in the health care services business. He fled Kosovo in Serbia in

1999 during fighting there. He became a U.S. citizen in 2004, but retains a Yugoslavian passport for his own convenience. He has not mitigated the foreign preference and foreign influence trustworthiness concerns. Eligibility for an ADP I/II/III position is denied.

## STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a position of trust for Applicant<sup>1</sup>. On September 25, 2006, DOHA issued a Statement of Reasons<sup>2</sup> (SOR) detailing the basis for its decision—trustworthiness concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of the revised Adjudicative Guidelines issued on December 29, 2005, and implemented by the Department of Defense, effective September 1, 2006. Applicant answered the SOR in writing on October 14, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on March 12, 2007. On April 18, 2007, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a trustworthiness determination for Applicant. The Government and the Applicant submitted exhibits that were admitted into evidence. DOHA received the hearing transcript (Tr.) on April 27, 2007.

## FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 57 years old, married, and has five adult children. He was born and raised in Kosovo, a province of Serbia, in the Balkan area of eastern Europe. He worked for the Serbian government in the Kosovo Province in a judicial position until being dismissed in 1990. He fled Kosovo in April, 1999, with his family and came to the United States on May 27, 1999. Applicant works as a foreign claims processor for a defense contractor in the health care industry, and has done so since February 12, 2001. He got a permanent residency card in 2002 and became a U.S. citizen in December 2004. His children became U.S. citizens, but his wife has not obtained citizenship because of her difficulty with English. Applicant listed the citizenship of his children as Yugoslavian on his Standard Form 85P, the Questionnaire for Public Trust Positions, signed May 27, 2003, and reaffirmed on February 17, 2005. (Tr. 20-29, 33, 34, 37; Exhibit 1, Answer)

Applicant got a passport from Yugoslavia, of which Serbia and Kosovo were formerly constituent republics. He obtained the passport to make his travel back to Kosovo easier and maintains it for that purpose. He obtained that passport on February 2, 2004, and it expires in 2014. That passport lists his address as a residence in Pristina, Serbia (a city physically in Kosovo). He obtained his U.S. passport on January 3, 2005, and claims he used the U.S. passport after he obtained it, but he admits he may also have used the Yugoslavian passport. The Yugoslavian passport shows a stamp dated May 1, 2004. The U.S. passport shows travel between December 2005 and January 2006 to Yugoslavia by way of an airport in Germany. Both passports have not expired, and

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<sup>1</sup>Adjudication of trustworthiness cases for ADP I, II, and III positions are resolved using the provisions of DoD Directive 5220.6 (Directive), pursuant to the memorandum from Carol A. Haave, Deputy Under Secretary of Defense for Counterintelligence and Security to DOHA Director, *Adjudication of Trustworthiness Cases* (Nov. 19, 2004).

<sup>2</sup>Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and the Directive.

Applicant keeps them at his home. Applicant is uncertain if the Yugoslavian passport continues to be valid because Yugoslavia no longer exists as a country, having broken into at least five separate countries. (Tr. 35, 36, 47-49; Exhibits 1, 2, 4)

Applicant traveled to Yugoslavia and Kosovo in 2000, 2004, 2005, and during Thanksgiving in 2006. He will decide in August 2007 when to go to Kosovo again. While there, he visits his daughter who teaches for a U.S. university in Kosovo. She is a U.S. citizen who resides in Pristina. He visits his 81-year-old mother, a citizen of Serbia who resides in Pristina, Kosovo, in the Republic of Serbia. He also visits his brother and sister-in-law, who are citizens and residents of Serbia, Kosovo Province. Applicant's sister-in-law is a nurse in a government hospital. Applicant owns an apartment worth about \$60,000 and a house worth about \$100,000 in his estimation. The house is on one acre of land. His mother lives in the house because he has an obligation to take care of his parent with the help of his brother. The family also has a newer home that Applicant and his family built for his father, mother, and brother to use. Applicant also has a brother and sister in Canada. If his mother were not alive, he is uncertain as to whether he would return to visit his other relatives in Kosovo. He calls his mother weekly and his other relatives once every two weeks. (Tr. 29-32, 42, 49-59)

Applicant has dual citizenship with the former Yugoslavia, now called the Republic of Serbia. He declares he would never consider himself a Serbian citizen, a constituent republic of the former Yugoslavia, because of the attacks on Kosovo and its people by Serbia in the 1990s. Applicant stated several times he considers himself a Kosovar. He stated, "Serbia still treat Kosovo as own territory and we try to treat ourself as independent country." (Tr. 32) Then, he stated, "The problem is we are Kosovors, we are Albanians, and right now these territories are out of Serbia." (Tr. 34) Applicant also helps his local Albanian community. (Tr. 38) He stated he would return to Kosovo if it would help his family, and that "I'm by the law still a Serbian." (Tr. 43) Applicant has not taken any steps to renounce his Serbian citizenship, "Because I'm not there and I still didn't decide about that. I'm right now a U.S. citizen and I'm going to stay here. If Kosovo get independence, and we hope all Albanians will get that in the end of June, that will be the question . . . will I be a dual citizen if . . ." (Tr. 44) Applicant does not know if he will maintain dual citizenship with Kosovo and the United States. He wants to wait to see if Kosovo allows dual citizenship if it becomes an independent country. Presently, he considers himself a U.S. citizen, but he spent 50 years in Kosovo, and therefore, he also considers himself a Kosovar. "I'm still feeling that I'm Albanian and I'm Kosovors but if I hurt my new country, ...I will first accept the U.S. again citizenship." (Tr. 45, 46) He also testified he spent all his life in Kosovo and is "so much tied with" his family there, with his "heritage there that I cannot forget . . ." (Tr. 51). He then goes on to say the U.S. will always be first, but then he states, "I'm an Albanian." (Tr. 53) (Exhibit 4)

I take administrative notice of the history of Yugoslavia, both the Socialist Federal Republic formed after World War II and led by a Communist government, and its constituent republics, including Serbia, Montenegro, Bosnia, Croatia, Slovenia, and Macedonia. As Yugoslavia fractured after the death of its long-time Communist dictator Josip Tito in 1980, Serbia and Montenegro, with Kosovo as a province of Serbia, formed the Federal Republic of Yugoslavia in 1992. In May 2006, Montenegro held a successful referendum on independence effective June 3<sup>rd</sup>. Then Yugoslavia became the Republic of Serbia. Kosovo was an autonomous province. Over the intervening years Kosovo sought greater autonomy, until armed conflict broke out in 1997 between Kosovo independence seekers and the Serbian government. The United Nations (U.N.) finally intervened

under Security Council Resolution 1244 with a NATO-led force. The future status of Kosovo within Serbia or as an independent nation remains under discussion at the U.N. Serbia has some human rights problems, including but not limited to, police violence, harassment of journalists, corruption, trafficking in persons, and violence against women and children. (Exhibit 4)

## POLICIES

As Commander in Chief, the President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information with Industry* § 2 (Feb. 20, 1960). By direction of the Under Secretary of Defense for Counterintelligence and Security, adjudications of cases forwarded to DOHA by the Defense Security Service or the Office of Personnel Management (OPM) for a trustworthiness determination shall be conducted under the provisions of the Directive. Eligibility for a position of trust is predicated upon the applicant meeting the guidelines contained in the Directive and a finding it is clearly consistent with the national interest to do so. See Directive ¶ 2.3. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his trustworthiness determination.” See Directive ¶ E3.1.15

The adjudication process is based on the whole person concept. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required. The decision to deny an individual eligibility to occupy a position of trust is not necessarily a determination as to the loyalty of the applicant. See Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a such a determination.

In evaluating the trustworthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual’s age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2). Because each case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the revised Adjudicative Guidelines.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible to occupy a position of trust. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's trustworthiness suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*\*6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his trustworthiness determination. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline C: Foreign Preference: *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. - Guideline ¶ 9.

Guideline B: Foreign Influence: *The Concern*: Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with the risk of terrorism. Guideline ¶ 6.

"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." (Regulation ¶ C6.1.1.1) Appendix 8 of the Regulation sets forth the adjudicative policy, as well as the disqualifying conditions (DC) and mitigating conditions (MC) associated with each guideline. DoD contractor personnel are afforded the adjudication procedures contained in the Directive. (Regulation ¶ C8.2.1)

## CONCLUSIONS

**Foreign Preference:** The possible disqualifying conditions that may raise a security concern are the exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S.

citizen, including the possession of a current foreign passport and using foreign citizenship to protect financial or business interests in another country (Paragraph 10.a.1 and 5). The Government showed quite clearly that Applicant has a current Yugoslavian passport and he has not returned it to the issuing authority, destroyed it, or otherwise invalidated it. He used that passport to travel to Kosovo, even after he became a U.S. citizen, because he found it easier to cross European borders with it. He also uses his U.S. passport for his travel. Applicant has \$160,000 worth of real estate in Kosovo. He has not renounced his Serbian or Yugoslavian citizenship because it helps him retain his property interests in Kosovo.

The Paragraph 10 (d) disqualifying condition refers any statement or action that shows allegiance to a country other than the United States. Applicant repeatedly referred to himself as being from Kosovo and Albanian. He likes the U.S. and is grateful to it for helping stop Serbian violence in Kosovo in the 1990s, and providing him and his family with a safe haven, but he never once referred to himself as an “American.” He seems confused or conflicted about his citizenship and which takes priority. The weight of his comments quoted in Paragraph 4 of the Findings show he considers himself first a citizen of Kosovo and of Albanian heritage. His allegiance is stronger to those two entities than to the U.S., based on his statements at the hearing.

Examining the mitigating conditions in Paragraph 11, I conclude none apply to Applicant. He never expressed a willingness to renounce his dual citizenship. In fact, he waffled and appeared indecisive on that issue, preferring to wait until the situation in Kosovo and its possible independence in 2007 is clarified or resolved before he makes a final decision. Having reached his majority long before he came to the U.S., his dual citizenship is not based solely on his parents citizenship or birth in a foreign country, but rather his decision.. None of the other mitigating conditions apply even minutely.

**Foreign Influence:** Security concerns that may be disqualifying are contact with a foreign family member who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion (Paragraph 7.a.), connections to a foreign person, group, government, or country that create a potential conflict of interest between that individual’s obligation to protect sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information (Paragraph 7.b.), sharing living quarters with a person if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion (Paragraph 7.d.), and a substantial financial or property interest in a foreign country which could subject the individual to heightened risk of foreign influence or exploitation (Paragraph 7.e.). Applicant has a mother, brother, and daughter in Kosovo. He owns \$160,000 worth of property there. His wife is a Serbian citizen. Applicant exhibited very strong emotional and historical attachments to Kosovo, and Albanian national ethnic identity. He referred to himself throughout the hearing as Kosovar or Albanian, but not an American. Since 2004, he has traveled every year to Kosovo, and has planned another trip after August 2007.

I considered the mitigating conditions in Paragraph 8 under this Guideline. None apply. Applicant is merely grateful to the U.S. for helping him and his countrymen against the Serbians. He has not exhibited deep and longstanding relationships and loyalties to the U.S. His contact weekly with his mother and semi-monthly with his brother is not casual or infrequent. His family and ethnic ties are very strong, and he could be placed in a compromising situation of having to

choose between his loyalties to them and to the U.S. Applicant has not met his burden of proof that any of these mitigating conditions apply to his case.

**Whole Person Analysis:** “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” trustworthiness decision. Directive E2.2.1. “Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.” *Id.* In evaluating Applicant’s case, I have considered the adjudicative process factors listed in the Directive ¶ E2.2.1.

Considering those factors, I am persuaded by Applicant’s own descriptions of his strong attachments to Kosovo and Albanians, in addition to his family, that trustworthiness concerns are present constantly. His age and maturity, in addition to his experience, make him clearly responsible for his attitude and opinions on his attachments. The potential for pressure, coercion, exploitation, or duress are present because of Applicant’s strong attachments and self-identification as a citizen of Kosovo and of Albanian ethnic heritage. Although Kosovo and Albania are not a threat to the U.S., there are groups within Kosovo who may be able to coerce Applicant through his property interests and family members to make choices between his loyalty to his family and also to the U.S.. Finally, Applicant’s attitude and opinions will recur and continue, by his own description, due to his 50 years of attachment to Kosovo.

Applicant failed to meet his burden of proof and persuasion that any of the mitigating conditions under either of the two trustworthiness concerns should apply. Therefore, I conclude the foreign preference trustworthiness concern against Applicant. I also conclude the foreign influence trustworthiness concern against Applicant. Finally, the “whole person concept” I conclude against Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline C:                   AGAINST APPLICANT

    Subparagraph 1.a:                   Against Applicant

    Subparagraph 1.b:                   Against Applicant

    Subparagraph 1.c:                   Against Applicant

Paragraph 2. Guideline B:               AGAINST APPLICANT

    Subparagraph 2.a. to 2.h:       Against Applicant

### **DECISION**

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 for assignment to sensitive duties. His application for eligibility for an ADP I/II/III position is denied.



Philip S. Howe  
Administrative Judge