

DATE: July 24, 2003

In Re:

SSN:-----

Applicant for Security Clearance

ISCR Case No. 02-09766

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire,

Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a Project Manager for a defense contractor. He was born in the United Kingdom (U.K.) in 1947. He graduated from college and worked there, and in another country until moving to the U.S. in 1979. He has raised his family here and has worked for the same defense contractor since 1988. After becoming a U.S. citizen in 2000 and obtaining a U.S. passport, he used his U.K. passport one more time. He has now surrendered the passport to a U.K. consulate and is willing to renounce his U.K. citizenship. He has close family ties with the U.K., but expresses a strong commitment to protect U.S. security interests. litigation has been shown. Clearance is granted.

STATEMENT OF THE CASE

On February 27, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On March 17, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The matter was first assigned to another Administrative Judge but was transferred to me on April 15, 2003, because of caseload considerations. A Notice of hearing was issued on April 15, 2003, setting the hearing for May 2, 2003. The Government did not call any witnesses, but introduced 6 exhibits (Government Exhibits (GX) 1 - 6). Applicant testified on his own behalf and timely submitted two post-hearing exhibits (Applicant's Exhibits (AX) A and B). The transcript was received on May 19, 2003.

FINDINGS OF FACT

Applicant is a 56-year-old Project Manager for a defense contractor. The SOR contains two allegations under Guideline C (Foreign Preference) 1.a. and 1.b., and six allegations under Guideline C (Foreign Influence), 2.a. - 2.f. Applicant admits the factual allegations in SOR 1.a., 1.b., 2.b., 2.d., and 2.a. He denies the remaining allegations. The admissions are adopted as findings of fact.

As to all SOR allegations, Applicant's response to the SOR (GX 1) explains why he believes that none of the allegations, including those he admits, disqualify him from holding a security clearance. After considering the totality of the evidence derived from the contents of the FORM, I make the following additional FINDINGS OF FACT as to each SOR allegation:

Guideline C (Foreign preference)

1.a. - As of February 8, 2002, Applicant possessed a passport issued by the U.K., that expired on July 2010. Applicant surrendered his U.K. passport on May 7, 2003, as acknowledged by a U.K. consulate official (AX A and B).

1.b. - Applicant used his U.K. passport in August 2001, after becoming a U.S. citizen in November 2000, for the sake of convenience, in traveling to the U.K. from another European country.

Guideline B (Foreign Influence)

2.a. - Applicant's mother was a resident and citizen of the United Kingdom (U.K.), but died in February 2002. This allegation was deleted from the SOR at the request of the parties.

2.b. - Applicant's sister is a resident and citizen of the U.K.

2.c. - Applicant's brother is a citizen of and resident in the U.K. This allegation originally incorrectly cited the sibling as a sister. The correction was made with the agreement of both parties.

2.d. - One of Applicant's sons is a dual citizen of the U.S. and the U.K.

2.e. - Applicant's other son is a citizen of the U.K.

2.f. - Applicant's mother-in-law is a citizen of and resident in the U.K. The allegation originally also cited a father-in-law, but he died in 1998.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion 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 emotionally unstable behavior.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to 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.

Conditions that could raise security concerns and may be disqualifying:

1. the exercise of dual citizenship⁽¹⁾;
2. possession and/or use of a foreign passport;

Conditions that could mitigate security concerns include:

1. dual citizenship is based solely on parents' citizenship or birth in a foreign country;
4. Individual has expressed a willingness to renounce dual citizenship (AX A)

GUIDELINE B (Foreign Influence)

The Concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual vulnerable to coercion, exploitation, or pressure.

Condition that could raise security concerns and may be disqualifying:

1. an immediate family member, or a person to whom the individual; has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.

Condition that could mitigate security concerns include:

1. a determination that the immediate family members(s), . . . in a foreign country are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States.

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the Directive's "whole person" concept, I am not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

If the Government meets its initial burden of proof and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

A DOHA decision must ultimately be based on whether Applicant's conduct comes within any of the disqualifying

conditions under Guideline C and whether his relationships come within any of the disqualifying conditions under Guideline B. If so, I must then decide whether he has established adequate mitigation and/or extenuation under any or all of the parallel mitigating conditions.

While the legality of dual citizenship is recognized by the U.S. Supreme Court, dual citizenship is nonetheless a valid concern in determining whether an individual is eligible to hold a security clearance. Access to the nation's secrets has long been recognized as a privilege and not a right. (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)). 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" (*Id.*, at 527). The President has restricted eligibility for access to classified information to U.S. citizens 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 to abide by regulations governing the use, handling, and protection of classified information.*" (Executive Order 12968 § 3.1(b) (August 4, 1995) (Emphasis added). Eligibility for a security clearance is predicated upon an applicant meeting the security guidelines contained in the Directive.

CONCLUSIONS

Foreign Preference

Applicant became a U.K. citizen by birth to U.K. parents in that country in 1947. He graduated from a U.K. Technical College in 1968, and worked for a U.S. firm in the U.K. from 1969 to 1976, and then for a firm in Israel from 1976 to 1978. He came to the U.S. in 1979 and began working for his present employer in 1988 (GX 1). He became a U.S. citizen in 2000 and his U.K.-born wife became a U.S. citizen in 2001. He renewed his U.K. passport in July 2000 (GX 4), four months before he became a U.S. citizen, because otherwise he would not have been able to travel abroad. After becoming a U.S. citizen and obtaining a U.S. passport in December 2000 (GX 3), he used the U.K. passport on one more occasion, in 2001, when it saved him time and paperwork in getting into another European country.

He had no specific reason for retaining his U.K. citizenship. He did not think it was a security issue and he expressed his willingness to renounce U.K. citizenship. When interviewed by the Defense Security Service (DSS) agent (GX 2), he was asked about the two passports but was not advised about the consequences of retaining the U.K. passport (Tr at 24). He did surrender his U.K. passport after the hearing, when he realized the significance of his retaining it (AX A and Tr at 17, 27-29). At the hearing, Applicant indicated his willingness to renounce his U.K. citizenship (Tr at 27). In fact, it was his intention to "go and surrender [his] U.K. passport and surrender or renounce rather his U.K. citizenship" (Tr at 29, 30). While he has again expressed his willingness to renounce his U.K. citizenship "if this is required to serve my country" (AX A), he has not yet done so.

Applicant has mitigated Disqualifying Condition (DC) 1, since he has expressed a willingness to renounce his U.K. citizenship, under Mitigating Condition (MC) 4. He has also mitigated DC 2, since he has surrendered his U.K. passport, once he understood the security significance involved. His use of the U.K. passport on one occasion after becoming a U.S. citizen is a negative factor, but was a one time occurrence based on convenience at the time. This is not a valid excuse but, viewed in context, does not indicate a preference for the U.K. over the U.S. No other Disqualifying Conditions are alleged or have been established by the record.

Foreign Influence

The DOHA Appeal Board has provided guidance on how to evaluate evidence on this issue. The identity of the other country does make a difference in how to evaluate the evidence. In a recent case, the Appeal Board recognized that relatives living in a country hostile to the U.S. may constitute more of a risk than relatives living in a country traditionally friendly to the U.S., such as the U.K. (Appeal Board Decision and Reversal Order, ISCR Case No. 02-04786 (June 27, 2003) at 4, 5).

Applicant has close ties with immediate family members who are citizens and residents of the U.K.; and with a wife and child who are dual citizens and who live with him in the U.S. Under the totality of the record, I conclude that DC 1 and 2 are applicable but I also conclude that MC 1 is applicable. Applicant's credible testimony as to the unlikelihood that

his relatives would be asked to pressure him and, even more importantly, his response that he "would not jeopardize the security of the U.S. for anyone" is persuasive that there is no unacceptable risk. In summary, I find the evidence in mitigation to outweigh the speculative nature of the disqualifying conditions. Based on the overall record, I conclude that the evidence does support all of the SOR allegations, as amended, and establishes a nexus or connection with Applicant's eligibility to hold a security clearance. However, I also conclude that Applicant has demonstrated adequate mitigation or extenuation. While the ultimate burden in establishing eligibility is always with the person seeking a clearance, in this case Applicant has resolved all relevant issues in his favor.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline C (Foreign Preference)

SOR 1.a. For the Applicant

SOR 1.b. For the Applicant

Guideline B (Foreign Influence)

SOR 2.a. Deleted from SOR

SOR 2.b. For the Applicant

SOR 2.c. For the Applicant

SOR 2.d. For the Applicant

SOR 2.e. For the Applicant

SOR 2.f. For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

BARRY M. SAX

Administrative Judge

1. Not alleged in the SOR, but admitted to in his security clearance application (GX 1).