DATE: August 8, 2001

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 01-00130

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On April 24, 2001, 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 May 9, 2001, Applicant responded to the allegations set forth in the SOR, and elected to have a hearing before a DOHA Administrative Judge. The case was assigned to me on May 21, 2001. A Notice of Hearing was issued on June 5, 2001 and the hearing was conducted on July 11, 2001. By stipulation between the parties (in case file), I admitted three exhibits submitted by the Government (Government Exhibits (GX) 1 - 3). Applicant testified but did not offer any exhibits. The transcript (Tr) was received at DOHA on July 19, 2001.

FINDINGS OF FACT

Applicant is 47 years old. He is a Senior Engineer/Scientist for a major DoD contractor. His employer is seeking to retain a Secret security clearance for Applicant in connection with his employment.

Based on the contents of the case file, including testimony and exhibits, I make the following findings of facts as to each SOR allegation:

1. Guideline C (Foreign Preference)

a. Applicant was born in a foreign country (FC) in 1954 and is a citizen of that country by birth. He retained his FC citizenship after emigrating to the United States in 1983 and becoming a naturalized U.S. citizen in 1990 (GX 1). He has thus had dual U.S. - FC citizenship since 1990. In 1991; i.e., after becoming a U.S. citizen, he returned to FC for about

nine months as a Doctor of Research at a major FC university, after which he again took up residence in the U.S.;

b. Applicant received his first FC passport in 1974, when he was 19. He last renewed the FC passport in May 1993, about three years after becoming a U.S. citizen in 1990. The FC passport expires in 2003 (Tr at 21). Applicant also holds a valid U.S. passport (Tr at 20);

c. Applicant used his FC passport to visit FC, in lieu of his U.S. passport, in 1994, 1995, 1996, 1998, and 1999. He intends to continue using his FC passport for this purpose in the future;

d. In April 1999, while visiting FC, Applicant used his FC passport, in lieu of his U.S. passport, to visit a third country, which shares a land border with FC. He did so because of its "convenience." He was able to obtain travel discounts available to citizens of FC. His wife and daughter used their U.S. passports (Tr at 22);

e. Applicant served as pilot in the FC Air Force from 1972 to 1980, in an active status, and was then in the reserves from 1980 until 1991, the year after he became a U.S. citizen;

f. Applicant voted in a FC election in 1991 or 1992, during the nine months he was in residence at a FC university, again after he became a U.S. citizen. Other than that occasion, he has not voted in FC elections.

2. Guideline B (Foreign Influence)

a. Applicant's father is a citizen of FC and resides there;

b. Applicant's two brothers are citizens of FC and reside in that country. One is a few years older than Applicant. The other is a few years younger. The two brothers are married and have seven children between them. Their wives and children are all FC citizens and reside in FC (Tr at 30);

c. In the mid-1960s, Applicant's father was a cabinet minister in the FC government (Tr at 32) and is/was a university board member. His uncle was also a FC government official;

d. Applicant's older brother is a senior officer in the FC Air Force.

3. Guideline E (Personal Conduct)

a. Applicant incorrectly omitted material facts on his November 3, 1999 Security Clearance Application (SF 86) when, in response to Question "11. Your ilitary History - Have you ever served in the military [including] foreign military service." Applicant answered No, when in fact, he had served in the FC Air Force, both active and reserved, from 1972 to 1991. At the same time, in responding to Question "Question 43 General Remarks, Applicant did state that he had served in the FC Air Force. This supports his claim that he misread Question 11 and thought it referred only to U.S. military service. Additional corroboration of Applicant's claim comes from his candor when he spoke with the Defense Security Service (DSS) agent on June 8, 2000 (GX 2). I have also considered his hearing testimony (Tr at 35 - 37). I find he did misread the question and did not intentionally seek to deceive DSS in his answer to Question 11.

b. Applicant also provided incorrect material facts on the same November 3, 1999 SF 86 when, in response to Question "14. Your Foreign Activities - Contact with Foreign Government [including] its representatives, whether inside or outside the U.S., other than on official U.S. Government business." He answered No, when in fact, he knew he had been in contact with FC government representatives, as cited in SOR 2.c. and 2.d., above, specifically his older brother, and possibly his father. Applicant testified that he was not thinking of his father and brother as government officials when answering the question. When he was interviewed by DSS, he did mention his father and brother (Tr at 38, 39 and GX 2). I find his explanations to be credible by itself and, more importantly, in the context of the total record. I find Applicant's answer was not a deliberate act intended to mislead the government.

Additional Findings of Fact;

Applicant told the DSS agent that: (1) Applicant's loyalties lie with both the U.S. and FC; and that his "loyalties are dual

because the two countries are not in a state of war" (GX 2 and Tr at 40). In case of a conflict between the U.S. and FC, Applicant's feeling is that: "I live here, my family is here, my kids are American citizens. My loyalty is obviously to the United States of America. That's what it is. That's why I'm living here. That's why I'm here" (Tr at 41).

As of the hearing, "to the best of [his] knowledge," Applicant believed there was nothing he could do about his dual citizenship (Tr at 20). He also believes that FC requires that persons with FC citizenship to use the FC passport to enter and leave that country, regardless of dual citizenship in another country, such as the U.S. (Tr at 21).

Applicant does not view his use of the FC passport to enter FC as indicative of a preference for FC, but only as an act required by FC law (Tr at 46). He views himself as a person with allegiance to the United States (Tr at 47).

Applicant is aware of the so-called Money Memorandum (GX 1) and the provision therein requiring denial or revocation of a DoD security clearance unless the Applicant surrenders the foreign passport or obtains official approval from the appropriate agency of the U.S. government (Tr at 23, 24).

Applicant's response to Department Counsel's question about this issue was conditional. He stated that "If I knew that I could put the passport in an envelope and send it to the Government, send it to the [closest FC] consulate and they [DoD] give me a clearance, I'll do it." In the absence of such a guarantee, he does not intend to surrender his FC passport. His primary concern is with his ability to visit his family in FC, if that country's officials to refuse to allow him entry using his U.S. passport (Tr at 26). In addition, he is unaware of any FC law allowing him to renounce his FC citizenship (Tr at 26). I advised Applicant that I had learned in a previous case involving dual U.S./FC citizenship that FC did have a procedure for renouncing FC citizenship. Applicant indicated he would "check it out" (Tr at 48).

After Department Counsel completed his questioning of Applicant, I repeated the provision from the Money Memorandum requiring denial or revocation of a clearance unless the foreign passport is surrendered to FC officials. Applicant indicated he understood what the Memorandum said (Tr at 43, 44).

POLICIES

The DoD Directive, 5220.6, at Enclosure 2, sets forth policy factors that must be considered in making security clearance determinations. However, because each security clearance determination presents a unique combination of facts and circumstances, it cannot be assumed that these factors are the only ones that apply, or that they always equally in all cases. Based on the Findings of Fact, asset forth above, and considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

Guideline B (Foreign Influence)

Conditions that could raise a security concern and may be disqualifying include:

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.

Conditions that could mitigate security concerns include:

1. A determination that the immediate family member(s) (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question 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;

Guideline C (Foreign Preference)

Conditions that could raise a security concern and may be disqualifying include:

1. The exercise of dual citizenship;

2. Possession and/or use of a foreign passport;

3. Military service or a willingness to bear arms for a foreign country;

8. Voting in a foreign country

Conditions that could mitigate security concerns include:

1. Dual citizenship is based solely on parents' citizenship or birth in a foreign country;

2. Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining U.S. citizenship;

4. Individual has expressed a willingness to renounce dual citizenship.

I have also considered the totality of the evidence under all of the Directive's general guidelines, as set forth in Section E2.2.1. of Enclosure 2. "Each adjudication is to be an overall commonsense determination based upon consideration of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency and motivation for the individual's conduct, the extent to which the conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences that have a reasonable and logical basis in the evidence of record." DOHA Administrative Judges may not draw inferences that are 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."

CONCLUSIONS

The major concern under Guideline B is that 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 potentially vulnerable to coercion, exploitation, or pressure.

There is certainly no surprise in Applicant's having close relatives in his country of birth. Most ISCR cases involving Guideline B also allege precisely that. What is unusual in the present case is not the existence and nature of the relationships but the status of the relatives in FC society. The status, present and past, of Applicant's older brother and father is far different, and of substantially greater security significance, than the more common situation with parents retired from private businesses and siblings who work in nonsensitive jobs in the private sector. I conclude that

such status does make a difference.

It is basic to the DOHA process that proof of the relationship satisfies the Government's burden under Disqualifying Condition (DC) (1), after which the burden of proof, establishing mitigation or extenuation, is on the Applicant. Mitigating Condition (MC) (1) requires a "determination that the immediate family members . . . in question would not constitute an unacceptable security risk." In other cases, the common claim in most cases is that the relatives in question lead quiet lives, and have had no connection with the other country's military or government, let alone being in or having been in positions of high sensitivity and importance themselves. Whatever the actual status and relationship may be in the present case, the record simply does not permit a determination that no risk exists. Accordingly, I conclude that DC (1) has not been mitigated or extenuated.

The major concern under Guideline C is that 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 Unites States.

Guideline C provides that "possession and/or use of a foreign passport "may be a disqualifying condition. The Money

Memorandum clarifies that Guideline C contains no parallel mitigating condition based on the "applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country." The Memorandum thereafter states that "consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States government."

Since Applicant has possessed a valid FC passport for many years and, as of the closing of the record, had not surrendered the passport to FC authorities, the oney Memorandum requires a denial or revocation of Applicant's clearance.

To complete the record in this case, I will also consider the remaining factors under Guideline C. Disqualifying Conditions (1) the exercise of dual (U.S. - FC) citizenship and (2) the possession and/or use of the FC passport are clearly established and admitted by Applicant. Applicant's membership in the FC military reserves for about a years after he became a U.S. citizen meets the requirements of DC (3) is significant, although not determinative. Likewise, Applicant's decision to vote in a FC election in 1991/1992, after he had become a U.S. citizen, is significant, although not determinative (DC 8). All of the above factors must be considered in the context of the entire record.

At the same time, MC (1) applies, in that Applicant obtained his FC citizenship by reason of his birth in that country. Mitigating Condition (2) is not established because Applicant remained a member of the FC military reserves for about a year after he became a naturalized U.S. citizen. There is no indication that any of Applicant's conduct was authorized by the U.S. (MC 3) and Applicant's statement about his willingness to renounce FC citizenship is both conditional and equivocal.

Although the term "loyalty" is used in the transcript by both parties, DOHA decisions are not loyalty determinations (See, e.g., Executive Order 10865). What we attempt to do is more precisely risk analysis, making findings of fact based on the entire record, and then applying those facts to standards, found in the Directive, which are based on long DoD experience with the specific guidelines in this case.

Dual citizenship becomes particularly problematic when the individual's statements and conduct toward the other country suggest less than the unequivocal allegiance to the United States Doubts are created when the totality of the evidence as to Applicant's statements and conduct does not establish such an unequivocal preference for the interest of the United States. When an individual takes the oath of allegiance to the United States when becoming a naturalized citizen, he or she swears to renounce all past foreign allegiances. In practice, under court guidance, holding U.S. citizenship does not actually require such renunciation. This does not mean, however, that eligibility for security clearance cannot properly take this factor into account. In fact, it is taken into consideration along with all other relevant evidence.

Without meaning to be critical of Applicant's loyalty, the evidence contains a variety of conduct and relationships that raise questions and doubts. Based on his ties and relationships with FC, I cannot conclude that Applicant has established an unequivocal preference for the United States and its interests. Applicant's interest in retaining his ties to FC and his family there is both understandable and appropriate in his private life. However, the same interests can adversely affect Applicant's request for access to the nation's secrets. Unlike citizenship, which is guaranteed by our Constitution, holding a security clearance is a privilege, with more restrictive standards for eligibility.

Based on the totality of the evidence, I conclude that while the Government's evidence clearly supports each allegation. Applicant has successfully mitigated the Guideline E allegations, but not those under Guidelines B and C. Accordingly, I find for Applicant's favor as to Guideline E, and against him as to Guidelines B and C. My conclusion as to Guideline C is adverse because of both the Money Memorandum and the totality of the record evidence. Overall, I conclude that Applicant has not demonstrated currently has the requisite judgment, reliability, and trustworthiness required of someone seeking access to the nation's secrets.

FORMAL FINDINGS

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

GUIDELINE B (Foreign Influence) Against the Applicant

Subparagraphs 1.a. - 1.f . Against the Applicant

GUIDELINE C (Foreign Preference) Against the Applicant

Subparagraph 1.a.- 1.d. Against the Applicant

GUIDELINE E (Personal Conduct) For the Applicant

DECISION

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

BARRY M. SAX

ADMINISTRATIVE JUDGE