

DATE: April 15, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-02270

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Security concerns remain over Applicant's foreign preference based on his dual citizenship by birth, his foreign military service, and his use of his foreign passport (which he renewed) even though he had a United States (US) passport. In January 2003 he finally relinquished his Austrian passport. But his mere assertion of an exclusive preference for the US is insufficient to meet the burden of proof since he plans to maintain his dual citizenship with Austria. On the other hand he has mitigated the allegations of foreign influence. While his father is a citizen of Austria and his mother and sisters are dual citizens, there is no evidence that they have ties to the government, are agents of a foreign power, or in a position to be exploited. There is no substantial likelihood that his family ties would lead to a case of foreign influence over Applicant or the compromise of classified information or subject him to duress. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on October 10, 2002. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.⁽¹⁾ The SOR alleges specific concerns over foreign preference (Guideline C) and foreign influence (Guideline B) in paragraphs 1 and 2. Applicant replied to the SOR allegations in an Answer notarized October 28, 2002, and requested a hearing.

Department Counsel attested the case was ready to proceed on December 6, 2002. Although initially assigned to another judge, the case was reassigned to me on December 16, 2002. Subsequently, a mutually convenient date for hearing was agreed to; and a Notice of Hearing issued on January 7, 2002, set the matter for January 28, 2003; on January 17, 2003, the time of the hearing was amended. At the hearing the Government introduced two exhibits which were admitted as Exhibits 1 & 2. Applicant represented himself, testified, and offered three exhibits (Exhibits A through C) which were admitted. The transcript (TR) was received on February 3, 2003.

PROCEDURAL ISSUE

Clarification of Department of Defense Policy on Foreign Preference

The Department of Defense issued a policy memorandum⁽²⁾

on August 16, 2000. It clarified the policy on Foreign Preference, Guideline C and stated, in part:

The purpose of this memorandum is to clarify the application of Guideline C to cases involving an applicant's possession or use of a foreign passport. The Guideline specifically provides that "possession and/or use of a foreign passport" may be a disqualifying condition. It contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country. The only applicable mitigation factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline are that possession and use of a foreign passport in preference to a U.S. passport raises doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. Therefore, 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 State Government. Modification of the Guideline is not required.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, a 27-year-old employee, began working for a defense contractor #1 as an engineer in February 2001. As his position required a security clearance, in July 2001 he completed a Security Clearance Application (Standard Form 86) and requested a security clearance. His work would be hindered if he does not receive a security clearance. He worked for defense contractor #2 from 1998 to February 2001 and had applied for a security clearance with them in 1998 and was subsequently interviewed by the Defense Security Service (DSS). (Exhibits 1 & 2; TR 36-38)

Applicant initially came to the US in 1994 to study; he received a MS degree from a US university. (Exhibit 1; TR 28) He is single. (Exhibit 1)

Foreign Preference and Influence

Born in Austria, Applicant lived there for the first 19 years of his life. As his mother is a citizen of the United States (US) and Austria, his mother registered Applicant as a US Citizen after his birth. He was issued a US passport in July 1975. He renewed his US passport in 1995 which is valid until 2005. He was also issued an Austrian passport shortly after his birth which he renewed in July 2000 while visiting his parents in Austria which is valid for ten years. In October 2000 Applicant stated to DSS that he intended to maintain both his US and Austrian passports and to use his Austrian passport when traveling to Europe to avoid waiting in long lines. Also, he intended to maintain his Austrian citizenship as he had "contributed" to his Austrian citizenship through military service, attending Austrian university, and maintaining his Austrian passport. (Exhibits 1 & 2; TR 19, 23, 25-27, 30, 32)

As part of his Austrian citizenship, he was required to complete an eight month military service requirement from January to August 1994; he could be re-called by the Austrian military in the event of war. However, he filed a document with the American embassy in 1994 that he was serving in the Austrian military against his will. As an Austrian citizen, he was entitled to free medical care and free education, including college; he took college courses part-time in Austria in 1993. He has not voted in an Austrian election. He has never served in the US armed services, but registered for the US draft. (Exhibits 1, 2; TR 21-24, 32-33, 34; Exhibit C)

Applicant has used his Austrian passport in preference to his US passport for traveling to "countries that are unfavorable to the United States." For example in 1989 he visited Eastern Europe and used his Austrian passport to travel to Hungary, Czechoslovakia, and Slovakia. (TR 20, 31-32)

In January 2003, after reviewing DoD policy guidance, he decided to return his Austrian passport to the Austrian

Consulate on the morning of the date his hearing was held. (Exhibit A; TR 19-20, 29-30) He did not act earlier as he did not understand initially how to mitigate the security concern. However, Applicant got a letter explaining the DoD policy when he received his SOR in October 2002. (TR 38-39)

In January 2003 he stated that in the event of war he would renounce his Austrian citizenship; however, he has "worked very hard to keep" his Austrian citizenship which is why he served in the Austrian military and why he intends to keep his Austrian citizenship in case he later decides he would like to move back to Austria. (TR 24-25, 28-28, 29; 31)

Applicant stated that he now identifies with the US as he currently resides in the US and intends to do so in the future. (TR 29) He has voted in the US in 2002. (TR 34)

Applicant travels twice a year to Austria to visit his family. (TR 34) His mother who is a dual citizen resides in Austria and now works for the United Nations. His father is a citizen of Austria who resides in Austria and teaches at a university. His two sisters have dual US-Austrian citizenship: one lived in Hungary, but moved to the US to be a student; and one lived in the US but now lives in Honduras and serves with the US Peace Corps. (Exhibit 1; TR 27-28) Applicant stated that if there were any hint of coercion or pressure on himself or his family, he would immediately report such coercion to the appropriate US officials.

Award and Reference

Applicant is a highly respected professional in his field. His manager commends Applicant as an "invaluable asset to the company, a hard working and reliable employee." He has won a company recognition award. (Exhibit B)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. The mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below :

Guideline C - Foreign Preference⁽³⁾

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 and may be disqualifying include:

- (1) the exercise of dual citizenship;
- (2) possession and/or use of a foreign passport⁽⁴⁾;
- (3) military service or a willingness to bear arms for a foreign country;
- (4) accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country.

Conditions that could mitigate security concerns include:

None

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: (1) not citizens of the United States or (2) 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.

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;
- (3) Relatives, cohabitants, or associates who are connected with any foreign government;

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;
- (3) Contact and correspondence with foreign citizens are casual and infrequent;

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Guideline C - Foreign Preference

If an individual acts in such a way as to indicate a preference for a foreign country over the United States, this conduct raises a security concern under Guideline C, Foreign Preference, as the individual 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 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; (4) accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country. Further, DoD policy clarification of August 16, 2000 explains that "possession and/or use of a foreign passport" may be a disqualifying ⁽⁵⁾ condition and to mitigate an Applicant must surrender his foreign passport or obtain official approval for its use.

Security concerns over Applicant's possible foreign preference arise from his active exercise of dual citizenship: he maintained his citizenship in Austria even after he became aware of security concerns in October 2002. While dual citizenship is not prohibited *per se* (and in that sense is sanctioned by policies of the United States), any conduct indicating possible foreign preference does raise a security concern where such action would increase the risk of an individual being influenced by the needs, desires, or aims of a foreign nation.

Applicant possessed a foreign passport and used it on his trips to Eastern Europe even though he had a US passport. Applicant chose to do so for convenience, not a mitigating factor.

The DoD policy guidance furnishes an avenue for individuals to mitigate the security concern: an applicant must either surrender the foreign passport or obtain official approval for its use from the appropriate agency of the United States

Government. While advised of this policy in October 2002, Applicant did not voluntarily comply with this guidance until the day of his hearing.

Further, Applicant received educational benefits in Austria and served in the Austrian military; he has an obligation to serve in the Austrian military again in the event of war. Even though he filed a protest over the mandatory service, he chose to do so in order to maintain his Austrian citizenship and said he would not revoke that citizenship until war broke out. He considers these contributions as a basis to continue his citizenship as he has earned it.

While Applicant did comply with the DoD requirement that he return his Austrian passport, Applicant failed to demonstrate he meets the mitigating conditions (MC).⁽⁶⁾ Though he asserts that his principal preference is for the US that statement by itself does not establish the preference sufficiently under DoD security policy. Applicant's use of his foreign passport, continuing even in 1989 after he had moved to the US, casts doubt as to whether he can be counted on to make decisions without regard to Austria or his personal interests there. While he submitted a reference attesting to his good character, this supervisor did not appear personally; so there is no way to establish the extent of his knowledge of Applicant's continued use of his Austrian passport.

While Applicant has now relinquished his foreign passport, that action has to be viewed in the context of the history of all of his actions and his delay in doing so. Further, he took no action to comply with MC 4 as he did not express any willingness to renounce his dual citizenship. In this case, after reviewing all of the evidence in the record and considering all of the security policies, including the August 16, 2000, policy clarification memorandum, I conclude he has not met the DoD mitigation sufficiently to indicate his clear preference for the United States. Security clearance decisions are predictive judgments about an applicant's security eligibility in light of the applicant's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). Acts indicative of foreign preference warrant careful scrutiny. Hence, I decide SOR paragraph 1 and subparagraphs 1.a. and 1.c. through 1.h. against Applicant and 1.b. for Applicant.

Guideline B - Foreign Influence

Applicant has mitigated the Government's security concerns over foreign influence raised by Applicant's close ties of affection to citizens of a foreign country: he has siblings and a mother who are dual citizens of the US and Austria and a father who is a citizen of Austria. The security concern under Guideline B, Foreign Influence, is that a security risk may exist when an individual's immediate family. . . and other persons to whom he or she may be bound by affection, influence, or obligation are: (1) not citizens of the United States. These situations could create the potential for foreign influence that could result in the compromise of classified information. While I have considered these concerns, I conclude Applicant has presented sufficient evidence to meet the burden those circumstances presents.

While born in Austria, Applicant came to the US to study in 1994 and attended college and received received a MS degree from a US university. He has worked for two US companies since then. Further, the foreign influence security concerns are mitigated⁽⁷⁾ by the fact that he is a highly respected professional in his field. His manager commends Applicant as a "invaluable asset to the company, a hard working and reliable employee." He has won a company recognition award.

Moreover, Applicant made evident that if there were any hint of coercion or pressure on himself or his family, he would immediately report such coercion to the appropriate US officials. Also, his contact and correspondence with foreign relatives are infrequent. I find his family has no formal ties to this foreign government; there is no substantial likelihood that they would be subject to duress, and thus exercise foreign influence over Applicant or create a situation that could result in the compromise of classified information. Thus, I conclude Applicant is not vulnerable to duress merely because of these family ties overseas.

Security clearance decisions are predictive judgments about an applicant's security eligibility in light of the applicant's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). Contacts with citizens of other countries are relevant to security determinations only if they make an individual potentially vulnerable to coercion, exploitation, or pressure through threats against those foreign relatives. Acts indicative of foreign influence warrant careful scrutiny. After considering the Enclosure 2 Adjudicative Process factors and the Adjudicative

Guidelines, I conclude these ties are not of such a nature as to create any tangible risks of undue pressure on Applicant, so foreign influence security concerns are mitigated. Thus, I resolve SOR paragraph 1 and subparagraphs 1.a. through 1.d. in Applicant's favor.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline C: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Paragraph 2. Guideline B FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For 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 the Applicant.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. Applicant received a copy of this DoD policy when he received his SOR in October 2002. (TR 38-39)
3. See also the DoD August 16, 2000, Policy Clarification Memorandum, quoted above.
4. DoD policy clarification of Guideline C issued in August 2000 made clear that "any clearance [must] be denied or

revoked unless the applicant surrenders the foreign passport"

5. The policy contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country.

6. 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 United States citizenship;
3. Activity is sanctioned by the United States;
4. Individual has expressed a willingness to renounce dual citizenship.

7. 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;
2. Contacts with foreign citizens are the result of official United States Government business;
3. Contact and correspondence with foreign citizens are casual and infrequent;
4. The individual has promptly reported to proper authorities all contacts, requests, or threats from persons or organizations from a foreign country, as required;
5. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.