

DATE: July 27, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03122

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR GOVERNMENT

Arthur A. Elkins, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Obtaining German citizenship and passport by a native-born U.S. citizen, who finds the murder of many of his Jewish maternal relatives during the Holocaust repugnant and who would therefore never move to Germany, is mitigated by his recent surrender of the passport for destruction by the German consulate and his willingness to renounce German citizenship if necessary to continue his security clearance. Clearance is granted.

STATEMENT OF THE CASE

On February 13, 2001, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding 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 granted, continued, denied, or revoked. In a sworn written statement, dated March 9, 2001, the Applicant responded to the allegations set forth in the SOR and requested a hearing.

The undersigned Administrative Judge received the case assignment on May 14, 2001, and a notice of hearing was issued on June 4, 2001. The undersigned held a hearing on June 27, 2001. The Department Counsel presented four exhibits ("exhs"), but no witnesses. The Applicant's case consisted of the presentation of one exhibit and the testimony of a witness besides his own testimony. Two additional documents were submitted by the Applicant and were admitted without objection on July 11, 2001. The record in this case closed on July 11, 2001. The undersigned Administrative Judge received the transcript ("tr") of the hearing on July 6, 2001.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following two guidelines: paragraph 1, Guideline C (foreign preference), and paragraph 2, Guideline B (foreign influence). The undersigned Administrative

Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 31-year-old software engineer employed by a U.S. Government contractor since July 1998. Tr page 99. The Applicant seeks to retain a Secret personnel security clearance.

The Applicant's father was born in the United States in July 1933 of American parents and grandparents;⁽¹⁾ the Applicant's father volunteered to serve in the U.S. Navy in the Korean War. Tr page 40. The Applicant's mother was born in Germany in February 1939. Because she was a Jew, she was denied German citizenship under then-existing German law and was forced to flee for her life to the United States as an infant with her mother. Her father (the Applicant's maternal grandfather) had already fled to the United States. Exh. 2. Many of the Applicant's enate relatives were killed by the German government in the Holocaust. Tr page 37; SOR answer. The Applicant's mother and his maternal grandfather became U.S. citizens. The Applicant's parents each did their Ph.D. work in London. Exh. 3. The Applicant himself was born in the United States in November 1969 and is a U.S. citizen.

In February 1973, the Applicant's family moved to Australia. His parents were employed as university professors (psychology and mechanical engineering) in Australia, but are now retired. Tr page 64. They have never done any research or other work for the Australian Defence Department or for any other foreign government. Exh. B; exh. 3; tr pages 50, 66. The Applicant's parents are dual U.S.-Australian citizens, while his maternal grandfather, now 92 years old and living in an Australian nursing home, has remained solely a U.S. citizen. Tr pages 62, 65; exh. 3. The Applicant has one brother, born in Australia in 1973, who was educated and lives in the United States and is a U.S. citizen. Tr pages 38, 51, 67. The Applicant's father spends about six months annually in the United States where he has many American family connections. Tr pages 39, 51-52, 61, 65-66.

The Applicant himself was raised in Australia from the age of three (1973) through the end of high school in December 1987. He visited the United States with his parents on sabbatical in 1978 and again in 1982. He never served in Australian military service nor has he ever been an Australian national, and has no obligations in those regards. Exh. 2. In August 1988 at age 18 the Applicant moved to the United States. He attended college and graduate school in the United States, graduating with a master's degree in electrical engineering in May 1994. He worked for a major U.S. firm in 1994-98, holding a security clearance, before accepting his present position. Tr pages 91, 102-103. He has not lived in any country other than Australia and the United States--although he has traveled extensively.⁽²⁾ He has never married; his girl friend lives in the United States as well as his agnate relatives and several friends from college and graduate school. Tr pages 29, 39, 52, 62-67, 84-85; exh. 2. He currently mentors a child as a "big brother" in the United States. Tr page 67. He has no significant direct financial interests abroad except shares in a large Japanese corporation traded on the New York Stock Exchange. Tr pages 39-40; exh. 2; SOR answer.

When the Applicant's mother visited a relative in Israel in 1996, she learned that Germany had amended its naturalization laws to permit persons who had been denied or stripped of their German nationality under Nazi rule to have their nationality "reinstated" upon application as some sort of reparations or compensation gesture. The amendment also allowed children of such persons to similarly apply for German citizenship. The application process did not require any oath or other allegiance to Germany nor did it entail travel to or residence in Germany or any other civic obligations with or to Germany. Although his mother did not want to live in Germany for obvious reasons,⁽³⁾ she thought she might want to live sometime in England where she and her husband had done their Ph.D. work and have fond memories. Citizenship in any European Union (EU) country, *e.g.* Germany, would facilitate English residence in that event. She applied for and obtained German citizenship in 1998 and encouraged her sons to do likewise. Exhs. 2 and 3; SOR answer.

However, the Applicant in 1998 held a Secret personnel security clearance and was just transferring from his former position to his present job. Tr pages 102-103. He did the prudent thing and asked the Facility Security Officer (FSO) of the latter firm whether there could be any objection--from the point of view of his continuing security clearance--to an application for German citizenship. He was told in August 1998 by the FSO, who himself first checked with the employer's Defense Security Service (DSS) lead investigator, that a number of dual nationals have security clearances and that there should be no problem for the Applicant. The FSO said that he would have to file a routine adverse information report with the DSS if and when German citizenship had been formally conferred upon the Applicant. SOR

answer; exh. 2; tr pages 35-36, 56, 90-92, 94-96. The Applicant would not have applied for German citizenship "if [he] had not first been told that it would pose no problems with retaining [his] security clearance." SOR answer, page 3; exh. 2. The FSO testified credibly that the Applicant "was very aware of his Government security clearance. And the reason he had come to me was that he did not want to pursue this if it in any way this affected his ability to retain his Government clearance." Tr page 91.

The Applicant applied in person for German citizenship by completing the necessary forms at a German consulate in the United States in October 1998, and it was granted in December 1998. Exh. 2; tr pages 47, 55. In January 1999 the Applicant gave the FSO a copy of the formal document recognizing the Applicant's German citizenship, and the FSO told him that he would file the adverse information report with DSS promptly, which in turn could result in an interview with a DSS agent. In fact, the Applicant was twice interviewed later that year by the same DSS lead investigator who had provided advice⁽⁴⁾ to the FSO in August 1998. Tr pages 92, 101-102. The adverse information report, together with a copy of the December 1998 German document, was filed with DSS in January 1999. Exh. 1. The Applicant then applied for a German passport valid for ten years "figuring that there are some countries that allow you in without a visa if you're from Germany, but not from the U.S., it might be useful at some time."⁽⁵⁾ Tr pages 38, 58. He has no plans to move to Europe. SOR answer, tr pages 37, 80-82. The passport was issued in April 1999, was never used, and was cancelled⁽⁶⁾ in the spring of 2001 by the Applicant after he had received the SOR and the Assistant Secretary of Defense (C³I) memorandum of August 2000 and had consulted with the FSO. Exh. A; tr pages 30-31, 96-97. The Applicant responded to the SOR and the ASD (C³I) memorandum by informing DOHA--

Now that the guidelines regarding dual citizenship have apparently changed, I am willing to change my earlier decision in order to retain my security clearance. I am in the process of voiding and relinquishing my German passport and am investigating the process for denouncing German citizenship. If it were deemed absolutely necessary, I would be willing to renounce the German citizenship.

The Applicant recognizes that a conditional willingness to renounce dual citizenship is much less persuasive of an absence of foreign preference than is a declared intent to pursue renunciation forthwith. He has never been told that renunciation is "absolutely necessary in order to keep [his] clearance." Tr pages 49-50, 60-61, 75-84.

The Applicant applied for German citizenship, as his mother did, in order to have the opportunity to live in England, where he has friends from Australia, or elsewhere in European Union countries other than Germany, such as France or Spain, though the prospects for moving to the EU are purely speculative. Tr pages 37, 79-80, 86. However, he would never live in Germany because that country's murder of many of his Jewish relatives and its history of pogroms are clearly repugnant to him. The transcript is replete with expression of his repugnance. *See* tr pages 29, 69-70, 85-88. The Government's professed concern that this Applicant has a preference for Germany is unfounded on the record.⁽⁷⁾ The Applicant has no financial accounts in Germany, never served in its military, has no military or civic obligations with or to Germany, has never voted in any foreign election, has never sought political office in a foreign country, and has never been unduly detained or incarcerated by any customs or immigration officers in his travels. Exh. 2.

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The guidelines, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

GUIDELINE C - FOREIGN PREFERENCE

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:

[1st] The exercise of dual citizenship;

[2nd] Possession and/or use of a foreign passport;

Conditions that could mitigate security concerns include:

[4th] Individual has expressed a willingness to renounce dual citizenship.

GUIDELINE B - FOREIGN INFLUENCE

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.

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

[1st] 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:

[1st] 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;

[5th] Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section 6.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledge-able participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

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 upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

"It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations."

Dept. of the Navy v. Egan, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence--rather than as an indication of the Court's tolerance for error below. ⁽⁸⁾

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. ⁽⁹⁾

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, the undersigned concludes that the Applicant successfully rebutted and overcame the Government's case with regard to Guidelines C and B.

DC #1 (guideline C), identified on page 6 *supra*, does not provide that dual citizenship *ipso facto* could raise a security concern and may be disqualifying. Rather, it is the **exercise** of dual citizenship that could raise such a concern. Here, the Applicant exercised a right under German law to obtain German citizenship and passport. ⁽¹⁰⁾ Although he did not use

the latter, his possession alone of such a foreign passport falls within the scope of DC #2, which is also identified on page 6 *supra*. In mitigation, he checked with and followed the advice of his FSO, an authorized personnel security official: (a) before he applied for German citizenship, (b) when he had obtained it, and (c) after he received the ASD (C³I) memorandum of August 2000. This falls within the scope of the guidance in the Directive (E2.2.5) that the adjudicator should consider whether the person: voluntarily reported the information, was truthful and complete in responding to questions, and sought assistance and followed professional guidance, where appropriate. He changed his decision to get a German passport when he read the ASD (C³I) memorandum⁽¹¹⁾ and took prompt steps to surrender the passport. Since he is not required by any written or oral guidance from any authoritative source to renounce his German citizenship itself, he has not done so, but is conditionally prepared to do so. This falls within the scope of MC #4, which is set forth on page 6 *supra*. As a factual matter, the Applicant does not have a foreign preference for Germany, but an active dislike of Germany. His plans to move or travel to another EU country are presently speculative. He loves America--where he was born and where he chose to live, work, and form social and financial ties--and is proud of America's strength and protective role in the world. SOR ¶ 1 (foreign preference) is concluded favorably to the Applicant.

The Applicant has immediate family members and other persons to whom he has close ties of affection who are citizens of, or resident in, foreign countries. This falls within the scope of DC #1 under Guideline B, which is identified on page 6 *supra*. However, based on all the evidence in the record, the Applicant's father, mother, and brother are neither agents of any foreign power nor are they in a position to be exploited by a foreign power in a way that could force the Applicant to choose between loyalty to the persons involved and the United States. Corroborating evidence to that effect is not in all circumstances required in order to find admissible evidence persuasive. *See also* tr pages 109, 116-120. SOR ¶ 2 (foreign influence) is concluded favorably to the Applicant.

Each clearance decision is required to take into consideration pertinent factors set forth in Section 6.3 of the Directive and in the adjudicative process discussion at enclosure 2 to the Directive. These factors are identified on page 7 *supra*. Obtaining foreign citizenship and a foreign passport by a native-born American is serious, but is mitigated by the surrounding circumstances, surrender of the passport, and the Applicant's motivation that negatives foreign preference.

FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline C: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Paragraph 2. Guideline B: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

DECISION

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

Jerome H. Silber

Administrative Judge

1. One of the Applicant's great-grandfathers was an American Indian. SOR answer.
2. The Applicant's travels included England, France Italy, Egypt, Singapore, Malaysia, Hong Kong, China, Belgium, Spain, Greece, South Africa, and Cameroon. Exh. 2.
3. Three of the Applicant's maternal great grandparents and seven other close relatives were killed by Germany in World War II concentration camps. SOR answer.
4. The DSS agent had told the FSO in August 1998 that "he didn't see that this would affect the clearance of [the Applicant]." Tr page 92. Two years later, the Assistant Secretary of Defense (C³I) issued a memorandum retroactively (and strictly) interpreting the aspect of Guideline C (foreign preference) that deals with "the possession and/or use of a foreign passport." Tr page 98; exh. 4.
5. The Applicant assumed that if dual citizenship would not adversely affect his eligibility for a security clearance, then obtaining a foreign passport implementing the foreign citizenship *a fortiori* would not be adverse. Tr pages 58-59. His assumption was proven erroneous when the ASD (C³I) memorandum was ultimately issued.
6. The Applicant received the cancelled passport back from the German consulate by mail and retained it solely in order to introduce it in evidence at the hearing. Tr pages 49, 74-75. Based on a technical reading of the Assistant Secretary of Defense (C³I) memorandum, the Applicant "surrendered" the cancelled passport after the hearing to the German consulate for destruction in July 2001. Exh. C; tr pages 110-111.
7. See the opening and closing statements for the theory of the case at tr pages 16, 29-30, 113, 126-127.
8. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DOHA Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DOHA] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).
9. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).
10. Had the FSO and the Applicant been aware of the ASD (C³I) memorandum of August 2000 in January 1999 when the adverse information report was filed, this would be a far different case if the Applicant had subsequently applied for a German passport. *Cf.* ISCR Case No.99-0629 (Decision of March 21, 2000) at 10.
11. "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 States Government."