January 25, 2002

In Re:

SSN:

Applicant for Security Clearance

ISCR Case No. 01-04826

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On August 16, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive 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 denied or revoked.

The Applicant responded to the SOR in writing on September 4, 2001, and requested that the case be decided without a hearing. The Government submitted its File of Relevant Material (FORM) to the Applicant on October 3, 2001. The Applicant was given 30 days from receipt of the FORM to submit any documents in rebuttal, extenuation or mitigation. The Applicant received the FORM on October 31, 2001, and submitted a response on November 2, 2001. The Department Counsel did not object to the admissibility of the additional material. The case was received by the undersigned on December 7, 2001.

FINDINGS OF FACT

The Applicant is 39, single and has a Master of Science degree. He is employed by a defense contractor, and he seeks to obtain or retain a DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR. They are based on the Applicant's Answer to the SOR, and the exhibits.

Paragraph 1 (Guideline C - Foreign Preference). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has acted in such a way as to show a preference for another country over the United States.

The Applicant was born in (hereafter "FC1") in 1972. The Applicant became a naturalized American citizen on

February 16, 1999. (Government Exhibit 3 at 5.)

In his Security Clearance Application (Government Exhibit 4), the Applicant stated "Yes" to question 3 where it asks "Are you now or were you a dual citizen of the U.S. and another country?" The Applicant subsequently was questioned by a Special Agent of the Defense Security Service, and completed a sworn statement. In that statement the Applicant states, "I consider myself to be bi-cultural because I have learned to read, write and speak Japanese. However, that does not make me any less loyal to the United States." (Government Exhibit 5 at 1.) He further states, "When I took the oath of allegiance to the United States I renounced any allegiance to Japan, and if it was required I would formally renounce my citizenship with Japan." (Government Exhibit 5 at 2.) Finally, the Applicant discusses this situation in his Answer to the Statement of Reasons. He states:

According to the [FC1] Consulate General, my [FC1] citizenship has been nullified upon becoming a US citizen with accordance to [FC1] law. Attached is a copy of the pertinent law (in native [FC1 language]) concerning the acquisition of foreign citizenship. On August 31, 2001, I submitted to the Office of the Consulate General of [FC1] official papers for record, my willful renouncement of my [FC1] citizenship for my US citizenship. Attached is a copy of that form (in [FC1 language]) stamped with the official seal of the Office of the Consulate General of [FC1].

(Government Exhibit 3 at 1.)

The form the Applicant alleges renounced his FC1 citizenship is found at page 4 of Government Exhibit 3. The alleged FC1 law is found at page 7 of Government Exhibit 3. No translation from FC1 into English was provided by the Applicant of these documents.

On January 4, 2002, the parties were notified in writing that I proposed to take administrative notice of generally available government information which is available on the World Wide Web. That information is found at http://www.dss.mil/training/adr/forpref. The pertinent section is marked and admitted as Administrative Judge's Exhibit I. The parties were given until January 11, 2002, to submit written comments concerning the propriety of my taking administrative notice, and the tenor of the matter noticed. Neither party submitted such comments.

Administrative Judge's Exhibit I consists of a digest of information concerning foreign citizenship prepared by the Defense Security Service for use in the Adjudicator's Desk Reference. Concerning FC1, the Administrative Judge's Exhibit I states, in part:

LOSS OF CITIZENSHIP

VOLUNTARY: Voluntary renunciation of citizenship can be accomplished at any [FC1] consulate abroad. Paperwork will be completed at the Embassy at which time the citizenship will terminate immediately. Renouncements do not have to be approved by the government.

INVOLUNTARY: The following is grounds for involuntary loss of [FC1] citizenship: Person voluntarily acquires foreign nationality.

When the Applicant became a United States citizen in 1999, he still had a valid FC1 passport that was issued to him in 1996. When the Applicant's sworn statement was taken in May 2000, he stated:

I did possess a passport issued by the [FC1] Embassy located in San Francisco, California and used it prior to obtaining U.S. citizenship. I do not know if the [FC1] passport is still valid, but I do not intend to use it, because I have a valid U.S. passport. I have never used my U.S. passport. I would never use a [FC1] passport in deference to a U.S. passport.

If necessary I will relinquish my [FC1] passport if it has not already expired.

(Government Exhibit 5 at 2.)

In his Answer to the SOR, the Applicant further states:

My [FC1] passport has been invalid since the date of my US naturalization. As set forth in 1.a. above, I do not maintain a [FC1] citizenship and as a citizen of the United States, I no longer have the privilege to carry a [FC1] passport. At my request, the Office of the Consulate General of [FC1] stamped my [FC1] passport "void" for record on August 31, 2000 (*sic*). Attached is a copy of my voided [FC1] passport. Therefore, I deny maintaining a [FC1] passport after acquiring my US passport.

(Government Exhibit 3 at 1.)

The first two pages of the Applicant's allegedly voided FC1 passport is found at page 3 of Government Exhibit 3. It is in FC1 language and no translation into English was provided by the Applicant. There is no evidence that the Applicant has surrendered the passport as required by the Memorandum of the Assistant Secretary of Defense (Command, Control, Communication and Intelligence), dated August 16, 2000, "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Applicant of the Foreign Preference Adjudicative Guideline." ("Memorandum.") (Government Exhibit 6.) This Memorandum states, "[C]onsistent application of the [foreign preference] 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."

Paragraph 2 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has immediate family members or people to whom he may be bound by affection or obligation who are not citizens of the United States, or may be subject to duress.

The Applicant filled out his Security Clearance Application on October 5, 1999. (Government Exhibit 4.) The sworn statement of the Applicant was taken on ay 23, 2000. (Government Exhibit 5.) Since that time, the Applicant's mother became an American citizen on February 27, 2001. (Government Exhibit 3 at 6.)

The Applicant's father and brother remain citizens of FC1. Both of them reside in the United States and have resided here since 1979. The Applicant's paternal grandparents are citizens of FC1 and continue to reside there.

Paragraph 3 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

On October 5, 1999, the Applicant completed an official DoD questionnaire in which he stated that in the past seven years he had not had an active passport that was issued by a foreign government. (Government Exhibit 4, question 15.) This statement was not correct as the Applicant did have a current and valid FC1 passport at the time he completed the Application. In the same questionnaire, the Applicant sets forth that he was born in FC1 (Question 1); that he became a naturalized American citizen February 16, 1999 (Question 3); that he had lived in the United States from 1991 to 1996 (Question 4); that he had lived in FC1 from 1996 to 1998 (Question 4); that he had gone to school in FC1 from 1996 to 1998 (Question 5); that he had been employed in FC1 from 1997 to 1998 (Question 6); and that he had traveled outside the United States three times in the seven years preceding the date of his questionnaire (Question 16).

The Applicant was subsequently interviewed by a Special Agent of the Defense Security Service (DSS) in May 2000. In that interview the Applicant stated, "I have checked with my families' attorney about any rights I may have under my claimed Dual Citizenship, and I have been told that because I never worked in [FC1] I would have no employment or social welfare benefits. I have never applied for or accepted any privileges." (Emphasis supplied.) (Government Exhibit 5 at 2.) In fact, as the Applicant had stated in his Security Clearance Application, he had worked as a teaching assistant for several months while attending college in FC1. (Government Exhibit 4 at Question 6.)

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in

making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline C (Foreign preference)

Condition that could raise a security concern:

(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.

Guideline B (Foreign influence)

Conditions that could raise a security concern:

(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;

(8) A substantial financial interest in a country, or in any foreign-owned or -operated business that could make the individual vulnerable to foreign influence.

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 E (Personal conduct)

Conditions that could raise a security concern:

(None of the stated conditions have application in this case.)

Conditions that could mitigate security concerns:

(None of the stated conditions have application in this case.)

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

a. The nature, extent and seriousness of the conduct

b. The circumstances surrounding the conduct, to include knowledgeable participation

c. The frequency and recency of the conduct

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

e. The voluntariness of participation

f. The presence or absence of rehabilitation and other pertinent behavior changes

g. The motivation for the conduct

h. The potential for pressure, coercion, exploitation or duress

I. The likelihood of continuation or recurrence."

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may have foreign connections and be involved in acts of falsification that demonstrate poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment 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 conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is 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

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting or continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant possesses a foreign passport, that he has family members who are foreign nationals and that he entered a false answer on his questionnaire.

The Applicant, on the other hand, has not introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him, except in part.

Turning first to subparagraph 1.a. of the SOR, the evidence is clear that the Applicant is not a dual citizen of FC1. Administrative Judge's Exhibit 1 shows that the Applicant lost his FC1 citizenship by operation of law when he voluntarily became an American citizen. The Applicant no longer "maintains" that he is a dual citizen. The Applicant also alleges that he filled out a form voluntarily renouncing his FC1 citizenship. An English translation of this form was not provided. This allegation is found for the Applicant.

The Applicant alleges that his FC1 passport has been stamped "Void" by the FC1 consulate. He submitted a photocopy of the passport which allegedly shows this. However, the passport is in the FC1 language and there is no translation. Accordingly, I cannot find the Applicant's allegation that the passport has been stamped "Void" to be true. There is no other evidence that the Applicant turned his passport over to the FC1 authorities or has otherwise terminated possession of it. Under the particular circumstances of this case, I cannot find that the Applicant has "surrendered" his passport, as

required by the Memorandum. Subparagraph 1.b. and Paragraph 1 are found against the Applicant.

The Applicant's mother is now an American citizen. However, his father and brother are still FC1 citizens, even though they reside in the United States. His paternal grandparents are citizens of FC1 and reside there. Under the particular circumstances of this case, he has not mitigated the concerns of Paragraph 2 of the SOR, except with regard to his mother. Paragraph 2 and its subparagraphs are found against the Applicant.

In looking at the Applicant's Security Clearance Application (Government Exhibit 4) in toto, I find that he did not intend to falsify Question 15 about his possession of an FC1 passport. As set forth in the Findings of Fact, the Applicant readily admitted that until February 1999 he was an FC1 citizen, that he had traveled, and that he had lived for several years in the United States before becoming a citizen. Obviously, he must have possessed an FC1 passport in order to do those activities. Accordingly, I find that his failure to admit his possession of an FC1 passport in the years 1992 to 1999 was not done with the intent to deceive the government. Subparagraph 2.a. is found for the Applicant.

Subparagraph 2.b. takes part of a sentence of the Applicant's statement and attempts to make a false statement out of it. The entire statement is, "I have checked with my families' attorney about any rights I may have under my claimed Dual Citizenship, and I have been told that because I never worked in [FC1] I would have no employment or social welfare benefits. I have never applied for or accepted any privileges." (Emphasis supplied.) (Government Exhibit 5 at 2.) The SOR allegation only uses the section, ". . . I never worked in [FC1] I would have no employment or social welfare benefits." In my opinion, this contraction totally changes the tenor of the entire statement, turning it from one where the Applicant is a reporter of what he has been informed, to one where he was the actor. Not only that, but the Applicant openly stated in his Security Clearance Application, filled out before this interview, that he had worked as a teaching assistant in FC1. This is not a false statement on the part of the Applicant. Subparagraph 2.b. is found for the Applicant, as well as Paragraph 2.

On balance, it is concluded that the Applicant has failed to overcome the Government's information opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons. As set forth above, Paragraph 3 is found for the Applicant.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: Against the Applicant.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subparagraph 2.a.: Against the Applicant.

Subparagraph 2.b.: Against the Applicant.

Paragraph 3: For the Applicant.

Subparagraph 3.a.: For the Applicant.

Subparagraph 3.b.: 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 the Applicant.

Wilford H. Ross

Administrative Judge