

DATE: February 13, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-06223

DECISION OF ADMINISTRATIVE JUDGE

BURT SMITH

APPEARANCES

FOR GOVERNMENT

Henry Lazzaro, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant overcomes the Government's evidence in support of allegations under Guideline C that Applicant demonstrates a preference for the interests of a foreign nation over the interests of the United States. Clearance is granted.

STATEMENT OF THE CASE

On August 9, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR details 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 Applicant. It recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

The Applicant responded to the SOR in a written answer dated August 28, 2002, in which he requested a hearing. The case was assigned to me on October 24, 2002. On November 4, 2002, a Notice of Hearing was issued scheduling the hearing on November 22, 2002. At the hearing the Government submitted two documentary exhibits. (Gov. Exs.) Applicant presented his testimony, and he submitted three documentary exhibits (App. Exs.) The transcript was received by DOHA on December 4, 2002.

FINDINGS OF FACT

The Applicant is 48 years old, and he is employed by a defense contractor as a programmer analyst. He seeks a DoD security clearance in connection with his employment in the defense industry. The Government opposes the Applicant's request for a clearance on the basis of allegations set forth under Paragraph 1 of the SOR. The following findings of fact are entered as to the allegations.

Paragraph 1 (Guideline C - Foreign Preference). The Government alleges Applicant is ineligible for clearance because he indicates a preference for a foreign country over the United States.

During the period 1987 - 1996 Applicant was employed by an element of the US Navy. In April 1991 Applicant accepted an extended overseas assignment with a duty station in New Zealand (hereafter NZ). Applicant was permitted to bring his wife and children. Navy operations at Applicant's duty station were discontinued in 1996, but Applicant elected to terminate his Navy employment and remain in NZ, first as an entrepreneur and later as an employee of an NZ firm. Eventually Applicant decided to return to the US, and he accepted stateside employment with his present defense contractor in approximately January 2000. Applicant has not returned to NZ since returning to the US, nor does he plan to. (Tr. 42-43.)

In its SOR, the Government alleges Applicant created very substantial associations and connections with the nation of NZ during his nine years' residence there, and these ties are evidence of Applicant's preference for the interests of NZ over the United States. The SOR presents fourteen factual areas (SOR, subparas. 1.a. - 1.g.) in which Applicant availed himself of favorable NZ permanent resident benefits while at the same time engaging in semi-citizenship activities such as holding an NZ security clearance and voting in NZ elections. In his response, Applicant concedes the truth of the Government's factual allegations, but he denies that these facts support a conclusion that he favors NZ over the United States.

In 1996, when Applicant ended his federal employment with the Navy in NZ, he and his family had lived there for five years. During that time Applicant purchased a home in NZ, his children attended NZ public schools, and his wife was employed in the local economy. Nevertheless, during 1991-1996 Applicant was a US Navy employee living and working abroad under official government sanction, and his ties of US loyalty and affiliation during this period are not at issue. Security consideration of Applicant's ties to NZ can only begin in 1996 when Applicant elected to terminate his federal employment and thereafter to live in NZ as a private citizen. As a consequence, this decision is limited to Applicant's activities, choices and decisions for a four-year period between 1996 and his return to the US in 2000.

Applicant elected to terminate his federal employment and remain in NZ for several reasons. The primary motivation for this decision was Applicant's desire to go into business for himself. (Tr. 45.) Additionally, Applicant's five years in NZ had been pleasant and rewarding for his family, and he wished to remain until his young children reached the ages of advanced schooling. I find as a fact that Applicant always intended to retain his US citizenship and to return to the US when his children were older.

After his US employment ended in 1996, Applicant bought a 50 percent interest in a small NZ business which developed web sites. Applicant could not obtain an NZ work permit because he was a company owner, not an employee. For that reason it was necessary for Applicant to apply for status as a permanent resident, near-equivalent to a green card holder in the US. The seller(s) stayed on as passive participants in the company, and Applicant was the sole operator. However, the business was not sufficiently profitable, and in 1998 Applicant sold his one-half interest. (Tr. 46 - 47.)

Upon the sale of his business, Applicant accepted employment as a network administrator with an NZ aviation maintenance firm. Because the company had a computer-related contract with the NZ government, Applicant was required to apply for a NZ security clearance. The application process was perfunctory and brief, only requiring completion of a few forms, and Applicant was granted a NZ clearance. However, he never accessed any classified information. Applicant worked for the company for two years until he returned to the US in January 2000. Applicant testified he reached this decision with his family because "we had been in New Zealand long enough." (Tr. 48.)

During Applicant's four years as a permanent resident of NZ he accepted government benefits which were usual and necessary to maintain a normal lifestyle. These included home ownership, checking and saving accounts, and public schools for his children. Unlike permanent residents in the US, Applicant was permitted to vote and he did so as a conscientious member of the community. Applicant paid NZ taxes where required, but he also filed US tax returns, and he voted in US national elections. He maintained US state residency in Florida.

As stated above, Applicant returned to the US in January 2000, and since that time he has been continuously employed by a defense contractor in a health-related firm which supports the military medical school operated by DoD. Applicant

has cancelled his permanent resident visa issued by NZ (App. Ex. B.) and he has terminated all previous business and investment contacts with NZ. (App. Ex. C and Tr. 51-52.)

Based upon all the evidence it is found that Applicant's ties with NZ were never intended to be permanent, nor did Applicant ever have any plans for NZ citizenship. Applicant's loyalty and allegiance have always been with the United States, and he can be counted upon to safeguard and protect American interests above those of any other nation, to include New Zealand.

POLICIES

Enclosure 2 of the Directive, as amended, sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an Applicant's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant access to classified information (Mitigating Conditions).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in 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. (Directive, para. E2.A3.1.1.)

Disqualifying Conditions applicable:

4. Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country.
8. Voting in foreign elections.

Mitigating Conditions applicable:

(None have specific application.)

The whole person concept. In addition to the above guidelines, the Directive provides in Para. E.2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable 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.

CONCLUSIONS

In the defense industry, the security of classified information 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 reliable information indicates an Applicant for clearance may have a preference, loyalty or close attachment to a foreign country which could compromise his duty to protect US classified information. On a commonsense basis, this unfavorable personal characteristic might easily lead to a disclosure of defense secrets to foreign nations in a manner not authorized by US laws, rules, or regulations.

With regard to burden of proof in DOHA cases, the Government must prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case, if he or she is to prevail, by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate and overall burden of proving that it is clearly consistent with the national interest to grant him or her a security clearance. Furthermore, the Directive provides that "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the

national security." (Directive, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

In this case, the Government has met its burden of proving Applicant established strong ties, associations and connections with a foreign nation during the period April 1991 to January 2000. However, in approximately the first half of this period, from 1991 to 1996, Applicant was a US civil servant working and living in NZ under official US sanction. Applicant conducted himself in all ways as a US citizen stationed in a foreign country, providing no cause for concern as to a possible foreign preference.

In the last four years of this period, from about 1996 to 2000, Applicant terminated his US employment and became a private resident of NZ. He acquired permanent resident status and established a business which he operated for two years until 1998. He sold the business and then accepted employment with a NZ firm which required him to apply for a NZ security clearance. In January 2000 Applicant returned to the US to accept employment with a DoD defense contractor. Applicant severed his business and commercial ties with NZ, and he has no desire to return to NZ in the future, except possibly someday as a tourist.

During Applicant's four years as a permanent resident in NZ he owned a private residence, his children attended public schools, his wife worked in the local economy, he used public health facilities, and he paid NZ taxes. Unlike permanent residents in other countries, NZ permitted Applicant the privilege of voting, and he exercised this privilege. However, these activities do not indicate Applicant's preference for NZ over the United States, when other evidence to the contrary is considered.

Applicant never intended to make NZ his permanent home as it was always his intention to return to the US when his children reached the age of advanced schooling. Applicant maintained a state residency status in Florida, he filed US income tax returns each year, he voted in US national elections, and he never applied for NZ citizenship. Upon his return to the US he severed all commercial and business ties with NZ, he is employed in a permanent, full-time position with a US defense contractor, and he declares his full allegiance to this country, to include bearing arms against NZ if necessary.

On balance, after considering the entire record and applying DoD policies, guidance, and regulations, it is concluded that Applicant has overcome the Government's evidence in support of allegations that Applicant has a foreign preference for another nation over the interests of the United States.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline C: FOR THE APPLICANT.

Subparas. 1.a.-1.g.: 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 Applicant's request for a security clearance.

Burt Smith

Administrative Judge