DATE: February 28, 2002

In Re:

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

Applicant for Security Clearance

CR Case No. 01-06278

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On October 9, 2001, August 22, 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 October 23, 2001, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the basis of the written record, without a hearing. Department Counsel submitted a File a Relevant Material (FORM) on December 14, 2001. The FORM includes seven Government Exhibits (GX) 1- 7. Instructions accompanying the FORM informed Applicant that any response to the FORM had to be submitted within 30 days of receipt of the FORM. Applicant timely submitted a cover letter, a copy of a cut up passport from his country of birth (FC), and a letter stating the mutilated passport had been mailed to a FC consulate. These documents have been marked collectively and admitted as Applicant's Exhibit (AX) A. The case was assigned to me for decision on February 7, 2002.

Along with the procedural guidance in the Directive, this matter is also governed by the provisions of an August 16, 2000 memorandum from Arthur L. Money, the Assistant Secretary of Defense (Command, Communications, Control, and Intelligence) (the Money Memorandum) (GX 4). The Money Memorandum clarifies "the application of Guideline C [of the Directive's Additional Procedural Guidance] to cases involving an applicant's possession or use of a foreign passport," specifically that failure to surrender a foreign passport mandates denial or revocation of an applicant's security clearance.

FINDINGS OF FACT

Applicant is a 46-year-old employee of a defense contractor. The company is seeking a security clearance for Applicant so that he will qualify for a classified position.

Applicant was born in FC in 1955, and has been a FC citizen ever since. For some years, he has held a FC passport, and last renewed it in July 1992 (GX 5 and 7). It is valid until July 2002. Applicant became a naturalized United States citizen in September 1999 and obtained a U.S. passport in October 1999 (GX 5 and 6). Since September 1999, he has been a dual citizen of FC and the U.S. and, from October 1999 to recently, has possessed passports from both countries. Applicant used his FC passport to leave and enter the U.S., FC, and other countries until he became a U.S. citizen in 1999 and obtained his U.S. passport. Since that time, he has used only his U.S. passport for all purposes (GX 6 and 7).

As part of the transmittal of the FORM in October 2001, Applicant received the Money Memorandum (GX 2). By memorandum dated January 8, 2002, Applicant acknowledged receipt from Department Counsel of "material relating to the physical destruction and putting-beyond-use of my [FC] passport. The fragments have been forwarded to the British consulate in L.A." (AX A, last page).

Based on the totality of the record evidence, I also make the following findings of fact under each of the allegations in the SOR:

Guideline C (Foreign Preference)

SOR 1.a. - Since September 1999, Applicant has possessed/exercised dual citizenship of both the United States and FC. He is willing to surrender his FC citizenship (GX 3 and 5).

SOR 1.b. - Applicant no longer possesses a FC passport. As an attachment to a letter dated January 2, 2002, Applicant has provided a photograph of his FC passport, showing the passport cut in half, and a letter stating that he had forwarded the fragments of the original passport to the FC consulate in Los Angeles (AX A). Based on this evidence, and in the absence of any objection by Department Counsel, I find that Applicant no longer retains his FC passport.

Guideline B (Foreign Influence)

2.a. - Applicant's father is a citizen of FC and resides in FC.

2.b. - Applicant's two brothers are citizens of FC and reside in FC.

POLICIES

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 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 foreign countries or financial interests in other countries are also relevant to security determinations if they make the individual potentially vulnerable to coercion, exploitation, or pressure.

Condition 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;

Condition that could mitigate security concerns include:

1. A determination that the immediate family member(s) 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 U.S.;

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.

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 - true only in the past tense;

Condition that could mitigate security concerns:

1. Dual citizenship is based solely on parents citizenship in a foreign country.

4. Individual has expressed a willingness to renounce his FC citizenship (GX 3).

The record evidence shows that Applicant was born a citizen of, and grew up in, FC. He resided there for most of his 46 years, until he moved to the U.S. He has close ties to FC, mostly involving his immediate family and friends, and travels there periodically. He kept his FC passport, until recently, for sentimental reasons, as has been the case with his FC citizenship. However, as he told the DSS agent in October 2000 (GX 5), he is now "willing to renounce his [FC] passport [subsequently done] and [FC] citizenship because [he has] now irrevocably made [his] home in the U.S."

Other than his family and friends in FC, he has minimal ties to FC. Any pension rights are "minimal" and not affected by his becoming a U.S. citizen (GX 5). No evidence suggests the applicability of any of the other Disqualifying Conditions found under Guideline C.

The presence of his father and brothers is correct as alleged in the SOR. From Applicant's age, it appears his father is in his 60s or 70s. His father is a retired railroad conductor. One brother works for a home improvement company, and the other is an insurance broker negotiator. None has any connection with the FC government and Applicant is not aware of any contact with his family in FC by FC government sources.

An applicant's family ties to a foreign country "raise a security concern under Guideline B

and it is Applicant's burden to show that his family ties are not of a nature that could make him vulnerable to coercion or influence" (Appeal Board Decision, ISCR Case No. 01-03120 (February 20, 2002), at 3. How such a burden can be met is not clear by any objective standards. In a non-hearing case, the evidence is necessarily limited to the contents of the FORM and, in this case, to the contents of Applicant's response to the FORM, and Applicant's Sworn Statement to DSS (GX 5),

The allegations obviously reflect the questions asked Applicant by the DSS agent. From the contents of the Sworn Statement, it appears those questions are derived from the Disqualifying and Mitigating Conditions stated under Guideline B and C. To the extent that the questions asked do not go deeply enough into detail, an applicant is unlikely to know he or she should volunteer additional information.

In the end, however, my decision must be based on the contents of the record evidence, and not on speculation as to questions not asked and information not obtained. The record in this case is relatively sparse in establishing Disqualifying and Mitigating Conditions (DC and MC). Under Guideline C (Foreign Preference), Applicant does exercise dual citizenship to the extent that he remains a citizen of both countries (DC 1), but he has done nothing with his FC citizenship beyond simply having it. At the same time, his dual citizenship is based solely on his parents' citizenship (MC 1), and he has expressed a willingness to renounce his FC citizenship.

Applicant retained his FC passport after becoming a U.S. citizen (DC 2), but he did not use it for any purpose after becoming a U.S. citizen and obtaining a U.S. passport in 1999. As the Money Memorandum notes, there is no parallel

Mitigating Condition stated in the Guidelines, so that possession of a foreign passport cannot be deemed mitigated except by surrendering the foreign passport to the other country or by obtaining approval from an authorized U.S. Government agency.

I find that Applicant has surrendered his FC passport, by letter to the FC consulate. The evidence of that surrender consists of proof that Applicant cut up the FC passport and his statement that he then mailed the pieces to the nearest FC consulate (AX A). While Applicant has not documented the mailing, in context his statement that he has done so is credible evidence and has not been challenged by the Government in its response stipulating to the admissibility of Applicant's documents that dealt with this issue (AX A).

I have scanned the entire record for any evidence that Applicant has actually used his FC citizenship and/or passport for any reason (e.g., voting), or obtained, sought to obtain, or sought to protect, FC benefits, current, future, or potential, since becoming a U.S. citizen, and I find none. Rather, I find that Applicant has rebutted any concern that he prefers FC to the United States through (1) his willingness to renounce his FC citizenship; (2) invalidating and returning his FC passport; (3) conduct/actions consistent with U.S. citizenship; and (4) conduct/actions neutral or inconsistent with FC citizenship. Based on the totality of the evidence, I conclude that while SOR 1.a and 1.c. *may* be disqualifying in the abstract, in this case Applicant has mitigated each of the two Guideline C allegations to the extent that the Government has failed to establish its case as to possible foreign preference.

Guideline B (Foreign Influence)

The Government's evidence in support of SOR. 2.a and 2.b is basically that his father and two brothers are citizens of, and reside in, FC. Of the eight possible Disqualifying Conditions expressed in Guideline B, only the first, dealing with three immediate family members being citizens of and residing in FC, is supported by the record. Since DC 1 is established, the burden of mitigation falls upon Applicant. As I understand Appeal Board precedent, the burden is on the Applicant to show his relatives do not create an unacceptable risk, rather than for the government to show that they do.

Proving a negative is usually difficult. It is particularly difficult in cases decided without a hearing since, as suggested by the contents of the Sworn Statement, the questions asked by DSS are substantially based on the language of the Guideline B and C Disqualifying Conditions. In the present case, the questions and answers appear not to gone beyond the literal facts and into the circumstances.

Appeal Board precedent establishes that the relatives need not have had any contacts or connections with the FC government or intelligence agencies (ISCR Case No. 99-0051 (December 19, 2000) at p 10). In other words, the fact the relatives are elderly, retired, farmers, etc., and have never been contacted by their government do not provide automatic protection. Rather, the facts and circumstances of the relatives' positions in FC society, and their contacts with Applicant, must be considered in the context of the totality of the record.

It does not appear from the Directive that the presence of relatives in a foreign country (DC 1) is, by itself, a bar against holding a security clearance, as is the possession of a foreign passport. I note the presence of a parallel mitigating condition (MC 1), in which a "determination that the immediate family members . . . are not agents of a foreign power or are in a position to be exploited by a foreign power in a way that could force an individual to choose between loyalty to the person(s) involved and the United States." This determination appears to be one to be made by an Administrative Judge, as the final decision maker, barring appeal. Our decisions are required to be based on the entire record, to be based on a reasonable interpretation of the record, rather than speculation, and basically to follow the controlling guidelines and precedent.

In the present case, all of the evidence on which the SOR is based comes from Applicant, as does all of the possibly mitigating evidence. I note, among other factors, Applicant's age and evident maturity, the lack of any evidence that Applicant's father and brothers have ever contacted him to do anything against the interest of the U.S., and that he has committed himself, "irrevocably" to the United States (DC 5). To be sure, there is not a great deal of evidence, but in the context of the total record, I find it convincing that (1) Applicant is not likely to be contacted by family or friends and (2) if he were so contacted, he would respond appropriately to protect U.S. interests. Based on the totality of the record, I find Applicant is not at risk for mishandling classified information. I also find that Applicant possesses the good judgment, reliability, and trustworthiness required of anyone 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 C (Foreign Preference) For the Applicant

Subparagraphs 1.a. and 1.b. For the Applicant

GUIDELINE B (Foreign Influence) For the Applicant

Subparagraphs 2.a. and 2.b. 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 or continue a security clearance for Applicant.

BARRY M. SAX

ADMINISTRATIVE JUDGE