DATE: December 17, 2002

In re:

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

Applicant for Security Clearance

CR Case No. 01-16098

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Henry Lazzaro, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 51-year-old married woman and a dual citizen employed as an ordinary seaman for a shipping company involved in defense industry. Her significant connections to Mexico (exercise of dual citizenship, possession and/or use of a Mexican passport, owning real property, etc.) raise foreign preference and foreign influence security concerns, which Applicant is unable to successfully mitigate or extenuate. Clearance is denied.

STATEMENT OF THE CASE

On March 26, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant. The SOR advised Applicant that DOHA was unable to find--as required under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended--that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On April 15, 2002, Applicant answered the SOR and she requested a clearance decision based on a hearing record.

On June 21, 2002, DOHA assigned this case to another administrative judge in the Western Hearing Office in Woodland Hills, California, based on Applicant's location. On July 1, 2002, DOHA issued a notice of hearing scheduling the hearing for July 29th at a west coast location. Thereafter, it was learned that Applicant was located on the east coast for with her employment. The initial hearing was cancelled, and the case was reassigned to me on July 18th. Thereafter, a notice of hearing was issued to the parties scheduling the hearing for August 23, 2002, at an east coast location near Applicant.

At the hearing, Department Counsel presented three documentary exhibits that were admitted without objections; no witnesses were called. Applicant presented no documentary exhibits, but she testified on her own behalf as did her spouse. I received the hearing transcript on September 4, 2002.

On or about November 13, 2002, I received a letter from Applicant advising that she would be away from her residence

"for several weeks" and would be unavailable to receive or respond to any documents.

PROCEDURAL MATTERS

Shortly after the hearing started, I was concerned whether Applicant was able to understand and participate in the hearing without a Spanish-language translator. I decided to proceed without a translator. During the hearing I took extra time and effort to ensure Applicant understood the proceeding and the questions put to her. By the time the hearing adjourned, I was satisfied Applicant understood the proceeding and was able to participate although she has a less-than-perfect command of the English language. Nevertheless, I have given due consideration to the fact that English is Applicant's second language and some allowances have been made for potential communication problems.[(1)]

After the parties had rested their cases, on my own motion, I moved to amend the SOR by moving subparagraphs 1.c. and 1.d. from SOR ¶ 1 to SOR ¶ 2. Doing so will allow Applicant's foreign financial interests to be considered under the Foreign Influence Guideline alleged in SOR ¶ 2, as opposed to the Foreign Preference Guideline alleged in SOR ¶ 1. No additional factual matters were included or alleged. The parties having no objections, the SOR was amended resulting in SOR ¶ 2 now containing subparagraphs 2.b. and 2.c., respectively.[(2)]

FINDINGS OF FACT

The SOR alleges security concerns under Guidelines B and C for foreign influence and preference. In her Answer, Applicant admitted all the SOR allegations. Accordingly, I incorporate her admissions into the findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following findings of fact:

1. Applicant is a 51-year-old married woman and a dual citizen employed as an ordinary seaman for a shipping company involved in the defense industry. She is seeking access to classified information in conjunction with her employment, which she has held since August or September 2000.

2. Applicant was born, raised, and educated in Mexico. She was trained as an accounting or auditing technician and worked in that capacity, as well as other jobs, in Mexico.

3. Applicant married a U.S. citizen in 1991 during a trip to the U.S. Her husband, a native of Sweden, obtained U.S. citizenship in 1971. He works for the same shipping company as Applicant.

4. Applicant, based on her marriage to a U.S. citizen, immigrated to the U.S. in April 1992. After successfully completing the various requirements, Applicant was granted U.S. citizenship in July 2000. Applicant obtained a U.S. passport approximately ten days thereafter on July 27th.

5. In July 2000, Applicant possessed a Mexican passport, which was due to expire on April 23, 2002. Since becoming an American citizen, Applicant continued to possess her Mexican passport. As alleged by the Government and testified to by Applicant, the passport's validity expired this past April. Applicant did not have the Mexican passport in her possession at the hearing as it was at her home on the west coast. Applicant has not renewed her Mexican passport since it expired, nor does she intend to do so.

6. Since becoming an American citizen in July 2000, Applicant used her Mexican passport twice. The first time was when she traveled to Costa Rica to visit her husband who was in port at that location.[(3)] The second time was when she traveled to Mexico in December 2001, returning in January 2002. Although she did not present the Mexican passport to either Mexican or U.S. immigration officials during the trip, Applicant carried both Mexican and U.S. passports during the trip.[(4)] I can only presume or take for granted that she carried her Mexican passport so she had it if needed.

7. Applicant owns real property (land and things attach to it) in Mexico. A home was purchased in 1991 for about U.S. $13,000. Current value of the house is approximately $18,000.[(5)]

Applicant also owns 47-acres of undeveloped ranch land purchased in 1986. The purchase price was about $8,000, and the current market value is approximately $10,000.[(6)] Both properties are subject to property taxes. The total value of her Mexican real property is approximately $25,000, more or less.

8. Although it appears Applicant's husband has contributed money to buy the house in Mexico, both real properties are in Applicant's name. According to both Applicant and her husband, this is a requirement of Mexican law; namely, only Mexican citizens can own real property in Mexico.

9. In addition to the real property, Applicant has a checking account in Mexico. The account typically maintains a minimum balance of U.S. $2,000. The last deposit was for $3,000 during her trip to Mexico in 2001. She uses the account to pay the Mexican property taxes and other expenses

associated with maintaining the house. In addition, Applicant uses the money when in Mexico.

10. Applicant and her spouse also own a home in the U.S. The estimated market value of that house is about $85,000. In addition, Applicant and her spouse have about $75,000 in a credit union savings account.[(7)]

11. Before immigrating to the U.S., Applicant worked in accounting or auditing; she also worked as an officer manager and a Spanish-language teacher. From 1974 to 1985, Applicant worked as a traveling inspector or auditor for a Mexican supermarket chain. The supermarket store was "government sponsored," although Applicant was not an employee of the Mexican federal government. For the next two years (1985-1987), Applicant worked for another government-sponsored entity that sold real estate. Her duties again involved accounting or auditing.

12. Applicant has six brothers who are citizens of and residents in Mexico. Their ages are approximately 62, 60, 58, 53, 49, and 47-years-old. Their occupations include working for a matador, owner of a shoe products store (the family business), bug exterminator, and rancher. None of the brothers served in the Mexican military, nor are they connected to Mexican law enforcement or a governmental agency. The record evidence also suggests the six brothers are not connected to a foreign government. Likewise, the record evidence suggests they are not involved in political, scientific, commercial, or other activities where they might benefit from obtaining U.S. national security information.

13. Applicant usually makes an annual trip to Mexico to visit family and friends.[(8)] While there, Applicant checks on her house and takes care of any necessary maintenance, repairs, and other expenses. The trips are one to two months in length, depending on available vacation time.

14. When asked if she was willing to renounce her Mexican citizenship, Applicant was equivocal or unclear.[(9)] The best evidence of her willingness or intent on this point is Applicant's answer to a question from Department Counsel where she stated "Yes. If my husband wants to continue work[ing] in this job and it is necessary, I will."[(10)] Given these circumstances, I find Applicant has expressed a conditional willingness to renounce her Mexican citizenship.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility. Chief among them is the disqualifying and mitigating conditions for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, the following adjudication policy factors are most relevant here:

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 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; and

(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 members(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 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; and

(6) Using foreign citizenship to protect financial or business interests in another country.

Conditions that could mitigate security concerns include:

(1) Dual citizenship is based solely on parents' citizenship or birth in a foreign country; and

(2) Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship.

Additional Policy Guidance

On August 16, 2000, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I), issued a memorandum to clarify the application of Guideline C, foreign preference, for cases involving possession and/or use of a foreign passport. In pertinent part, the memorandum "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."[(11)]

BURDEN OF PROOF

The only purpose of a clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[(12)] The Government has the burden of proving controverted facts.[(13)] The U.S. Supreme Court has said the burden of proof in security clearance cases is less than the preponderance of the evidence.[(14)] The DOHA Appeal Board has followed the Court's reasoning on this issue[(15)] establishing a substantial-evidence standard. Once the Government meets its burden, Applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.[(16)] In addition, Applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[(17)]

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[(18)] Under *Egan,* Executive Order 10865, and the Directive, any reasonable doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline B (Foreign Influence), a security concern may exist when certain situations create the potential for foreign influence that could result in the compromise of classified information. A potential security concern exists whenever a cleared person is bound by ties of affection, influence, or obligation to immediate family, close friends, or business associates in a foreign country, or to persons residing in the U.S. who may be loyal to a foreign country. In addition, financial interests in other countries are relevant to security determinations if they make a person potentially vulnerable to coercion, exploitation, or pressure.

Here, based on the record as a whole, the Government has established its case under Guideline B. Disqualifying Condition (DC) 1 applies given that Applicant has six brothers who are citizens of and residents in Mexico. DC 8 applies based on Applicant's real property, which is worth about $25,000, roughly 23% of the total real property holdings of Applicant and her spouse.[(19)] Financial interests more than 20% of Applicant's real property holdings are substantial, in my view. Moreover, the foreign real property has potential to make Applicant vulnerable to coercion, exploitation, or pressure when she makes her trips to Mexico to visit family and friends, inspect the home and property, and take care of any necessary expenses, including paying the Mexican tax authorities. These circumstances create the potential to put Applicant in contact with various governmental, intelligence, or security officials.

In mitigation, Applicant's six brothers present an insignificant security concern given their ages and occupations. None of them are employed by or connected with the Mexican military, law enforcement, or a governmental agency involved in security or intelligence. Likewise, there is no indication they are involved in political, scientific, commercial, or other activities where they might benefit from obtaining U.S. national security

information. Under these circumstances, mitigating condition (MC) 1 applies in Applicant's favor. I have reviewed the other mitigating conditions under Guideline B, however, and conclude that none apply. In particular, MC 8[(20)] does not apply because Applicant's foreign financial interests--her real property in Mexico--are not minimal. Accordingly, the record evidence is insufficient, at this time, to mitigate or extenuate the security concern raised by Applicant's foreign financial interests. Guideline B is resolved against Applicant.

Under Guideline C (Foreign Preference), a security concern may exist when a person acts in such a way as to indicate a preference for a foreign country over the U.S. In particular, the exercise of dual citizenship raises a security concern because the active exercise of foreign citizenship may indicate a preference for that foreign country over the U.S. Dual citizenship by itself, however, is not automatically a security concern. Naturalized citizens have all the rights of native-born American citizens even though they may, technically, also still be citizens of another country. Absent the exercise of dual citizenship or indicia of some affirmative action demonstrating foreign preference, the mere possession of foreign citizenship by virtue of birth does not fall within the scope of Guideline C.

Here, based on the record as a whole, the Government has established its case under Guideline C. Applicant has actively exercised her dual citizenship. She exercised dual citizenship by possessing and using a Mexican passport after becoming a U.S. citizen. In my view, she actively possessed and used the Mexican passport twice since her naturalization, once when she traveled to Costa Rica and the second time on her recent trip to Mexico. And she continues to exercise dual citizenship by using Mexican law to allow her and her husband to own real property in Mexico, a privilege or right extended only to Mexican citizens. Under these circumstances, DC 1, 2, and 6 apply.

Turning to the mitigating conditions under Guideline C, Applicant receives the benefit of MC 1 as her dual citizenship is based on her birth in Mexico.[(21)] I have given this little weight, however, based on Applicant's exercise of her Mexican citizenship after becoming a U.S. citizen. Second, MC 2 applies because Applicant's employment by a "government sponsored" supermarket chain in Mexico took place years before her immigration and naturalization. Moreover, her employment in that job, and the subsequent job, does not amount to much of a security concern as such government sponsorship of companies was, at that time, apparently the norm in Mexico. The situation might be different if Applicant had been employed directly by the Mexican federal government. Third, MC 3[(22)] does not apply because there's no evidence to suggest the U.S. Government has approved Applicant's activities. Fourth, Applicant has not expressed a willingness to renounce her dual citizenship. At best, she indicates a conditional willingness or intent to do so. Given these circumstances, MC 4[(23)] does not apply. Finally, the ASDC3I Memorandum does not apply because Applicant's Mexican passport is no longer valid making it useless for unverifiable foreign travel. In addition, Applicant does not intend to renew the passport.

To sum up under Guideline C, although Applicant immigrated to the U.S. in 1992 and obtained U.S. citizenship in 2000, she still has significant connections to exico as described below:

- Born, raised, and educated in Mexico; she lived there until the age of 41 or so.
- Six brothers who are citizens of and residents in Mexico.
- Traveling to Mexico to visit family and friends and check on her property.
- Owning real property in Mexico valued at about $25,000.
- Paying property taxes in Mexico.
- Maintaining a checking account in Mexico.
- Possessing and/or using a Mexican passport after becoming a U.S. citizen.

These significant connections to Mexico demonstrate an ongoing preference for Mexico, or in other words, demonstrate a divided preference between Mexico and the U.S. This preference, or divided preference, creates a genuine security concern that Applicant is unable to mitigate or extenuate. Guideline C is resolved against Applicant.

Of course, Applicant's significant connections to Mexico are perfectly legal, ethical, and moral. This does not mean, however, that Applicant's circumstances and actions cannot be evaluated to determine if it is clearly consistent with the national interest to allow her access to classified information. And that is all that has taken place here.

FORMAL FINDINGS

SOR ¶ 1-Guideline C: Against the Applicant

Subparagraph a : Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph e: For the Applicant

SOR ¶ 2-Guideline B: Against the Applicant

Subparagraph a: For the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

DECISION

In light of all the circumstances presented by the record evidence, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Michael H. Leonard

Administrative Judge

1. *See* ISCR 97-0356 (April 21, 1998) at p. 3. I encourage Department Counsel in future cases to determine in advance of hearing whether a translator is necessary for an applicant.

2. Transcript at pp. 127-130.

3. Transcript at pp. 69-70.

4. Transcript at pp. 72-75.

5. Exhibit 2 at p. 2.

6. Transcript at p. 114.

7. Transcript at p. 119.

8. Transcript at p. 57.

9. Transcript at pp. 43, 45, 49, 53, and 55.

10. Transcript at p. 55.

11. Exhibit 3 (During the proceeding this document was sometimes referred to as the Money Memorandum because it is signed by Assistant Secretary Arthur L. Money).

12. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

13. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

14. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

15. *See, e.g.,* DOHA Case No. 94-0966 (July 21, 1995) at p. 4 n.4. *See also* ISCR Case No. 95-0818 (January 31, 1997) at p. 6 (Department Counsel not required to prove its case by "conclusive evidence"); DISCR Case No. 93-0386 (April 21, 1994) at p. 4 ("All that is required . . . is proof based on substantial evidence.").

16. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4.

17. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

18. *Egan*, 484 U.S. at 528, 531.

19. I calculated this figure as follows: Mexican real property $25,000 + U.S. real property $85,000 = $110,000; 25,000 ÷ 110,00 = .227 or roughly 23%.

20. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."

21. *See* ISCR Case No. 99-0452 (March 21, 2000) at pp. 2-3 (Modifying its earlier rulings, the DOHA Appeal Board, in an expansive reading of MC 1, concluded the literal language of MC 1 allows it to be applied even when an applicant exercises their foreign citizenship after becoming a U.S. citizen).

22. "Activity is sanctioned by the United States."

23. "Individual has expressed a willingness to renounce dual citizenship."