

DATE: November 27, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-18725

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's dual citizenship, including possession of a foreign passport and foreign financial interests such as an IRA, investments, social security benefits and real property, in addition to substantial foreign contacts that include immediate family members and strong emotional ties, have not been mitigated. Clearance is denied.

STATEMENT OF THE CASE

On May 20, 2002, 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 the 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 June 20, 2002, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on October 16, 2002. A notice of hearing was issued on October 29, 2002. The hearing was held on November 7, 2002, at which the Government presented four exhibits. The Applicant presented no exhibits, and testified on his own behalf. The official transcript (Tr.) was received on November 22, 2002.

On August 16, 2000, a memorandum was issued by Mr. Arthur Money, Assistant Secretary of Defense for Command, Control, Communications and Intelligence, clarifying "the application of Guideline C to cases involving an Applicant's possession or use of a foreign passport." The Applicant received a copy of this memorandum. (See, Government Exhibit 1).

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, his testimony, and the Government's documents. The Applicant is 59 years of age, married and has a Ph.D in Physics. He is an Engineer for a defense contractor. He seeks a security clearance in connection with his employment in the defense industry.

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 1942 to Canadian parents and raised in that country. He moved to the United States in 1989. Ten years later, in February 1999, he obtained his United States citizenship. In March 1999, he was issued a United States passport that is valid until 2009. In July 1999, he renewed his Canadian passport which is valid until July 2004. He has maintained a Canadian passport since 1965.

The Applicant was employed in Canada from 1974 through 1989. He is entitled to a retirement benefit from social security in Canada, and he has investments available to him when he turns sixty-five.

In November 1999, the Applicant provided a statement to the Defense Security Service wherein he indicated that he was not willing to renounce his foreign citizenship or relinquish his foreign passport as a condition for access to classified information because of his family ties, retirement benefits, and his Individual Retirement Account (IRA) in Canada. (See, Government Exhibit 2).

The Applicant received a copy of the "Money Memorandum" and stated that his intentions are to comply with it. He has not checked with the Canadian Consulate to see how to surrender his passport. (Tr. p. 26). He stated that he is unwilling to renounce his dual citizenship and that he has not as yet surrendered his foreign passport. (Tr. pp.15-16).

Paragraph 2 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has foreign contacts that could create the potential for foreign influence that could result in the compromise of classified information.

The Applicant has a father, a son, and a daughter who are all long standing citizens of Canada and who reside there. The Applicant maintains contact with his family in Canada by telephone or letters on a weekly to monthly basis. His wife and another son are dual citizens of Canada and the United States, and presently reside in the United States. His sister is a citizen of Canada and she resides in the United States.

The Applicant built a condominium in Canada, where his daughter presently resides. He pays Canadian property taxes for the property. The Applicant also maintains a Canadian bank account, other Canadian investments and an IRA. Regarding his IRA, the Applicant testified that, ". . . My IRA I would lose significantly if I withdrew it. I cannot withdraw it. It is in a bank and I cannot really touch it until I'm 65 and so I would have some significant hardship I think if I had to withdraw it just to meet the requirement of this." (Tr. p. 16).

The Applicant indicates that his IRA account in Canada has approximately \$120,000 Canadian money in it. He also has another Canadian bank account that is used strictly to pay the costs and the upkeep on the condominium.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; 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 conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on her own common sense. 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:

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:

1. The exercise of dual citizenship;
2. Possession and/or use of a foreign passport;

Conditions that could mitigate security concerns:

None.

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: (1) not citizens of the United States or (2) 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:

1. An immediate family member, or 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:

None.

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 general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- 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, posed in Section 2 of Executive Order 10865, of whether it is "clearly

consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination. The Administrative Judge can draw only those inferences or conclusions that have 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."

The Government must make out a case under Guideline C (foreign preference) and Guideline B (foreign influence) that establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between Applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

An individual who demonstrates a foreign preference and has foreign connections may be prone to provide information or make decisions that are harmful to the interests of the United States. The mere possession of a foreign passport raises legitimate questions as to whether the Applicant can be counted upon to place the interests of the United States paramount to that of another nation. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal standards and factors, and having assessed the Applicant's credibility based on the record, this Administrative Judge concludes that the Government has established its case as to all allegations in the SOR, and that Applicant's foreign contacts have a direct and negative impact on his suitability for access to classified information.

The Applicant is a dual citizen of Canada and the United States. Since becoming a citizen of the United States in 1999, he has lived and worked in the United States, but has maintained his dual citizenship status. He has exercised dual citizenship by obtaining and using a Canadian passport after having become an American citizen. He has been notified of the provisions of the Money Memorandum and has not surrendered his Canadian passport. Furthermore, he has made it clear that he is not willing to renounce his Canadian citizenship. These facts do not demonstrate an unequivocal preference for the United States. Under the circumstances of this case, I find against the Applicant under Guideline C.

With respect to Guideline B, the Applicant has substantial financial interests and substantial emotional and family ties to Canada. His wife is a dual citizen of Canada and the United States. A son, a daughter and his sister are all citizens of Canada. Another son is a dual citizen of Canada and the United States. They are all Canadian citizens of long standing. There remains the possibility of pressure being placed on them, and through them, on the Applicant. The Applicant maintains a bank account and has an IRA worth about \$120,000 in Canada. He has built a condominium in Canada, and is obligated to pay Canadian property taxes. When he is sixty-five he will be eligible to receive social security from Canada. It is Applicant's burden to show that these ties are not of a nature that could create the potential for influence that could result in the compromise of classified information. He has not done so. Accordingly, I cannot say that he would not be vulnerable to foreign influence. The risk is considerable, and is of present security significance. Accordingly, the Applicant's request for a security clearance must be denied under Guideline B.

Considering all the evidence, the Applicant has not met the mitigating conditions of Guideline C or Guideline B of the adjudicative guidelines set forth in Enclosure 2 of the Directive. Accordingly, he has not met his ultimate burden of

persuasion under Guidelines C or B.

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.

Subparas. 1.a.: Against the Applicant

1.b.: Against the Applicant

1.c.: Against the Applicant

Paragraph 2: Against the Applicant.

Subparas. 2.a.: Against the Applicant

2.b.: Against the Applicant

2.c.: Against the Applicant

2.d.: Against the Applicant

2.e.: Against the Applicant

2.f.: Against the Applicant

2.g.: Against the Applicant

2.h.: Against the Applicant

DECISION

In light of the circumstances presented by the record in this case, it is not clearly consistent with the national interests to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson

Administrative Judge