DATE: November 18, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-21753

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esquire, Department Counsel

FOR APPLICANT

Michael M. Hadeed, Jr., Esquire

SYNOPSIS

Applicant's retention of her foreign passport after her naturalization as a U.S. citizen--an act demonstrating potential foreign preference--was mitigated where Applicant had retained the passport only because she had never been given any instructions that she should surrender it, had used the passport only twice since coming to the U.S. (and only once to go to her birth country), had not used the passport after becoming a U.S. citizen, and had surrendered it in accordance with the "Money Memo" once she became aware of its provisions. Applicant mitigated foreign influence concerns where all her close ties of affection were legal permanent residents of the U.S., and where record evidence demonstrated that family members had no connection with the foreign government and were not in a position to be exploited by the foreign government. Clearance granted.

STATEMENT OF THE CASE

On 31 May 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding[(1)] that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 14 June 2002, Applicant answered the SOR and requested a hearing. The case was assigned to me on 22 August 2002, and I received and set the case the same day. I issued a notice of hearing on 11 October 2002 for a hearing on 6 November 2002.

At the hearing, the Government presented two exhibits--admitted without objection--and no witnesses; Applicant presented four exhibits--also admitted without objection--and the testimony of three witnesses, including herself. DOHA received the transcript on 15 November 2002.

PROCEDURAL ISSUES

During the hearing, I utilized the services of Applicant's brother, who had already testified (Tr. 57-70), as an interpreter, subject to the provisions of 18 U.S.C. §1001 (Tr. 73-74), to get the clearest possible record of the father's testimony.

Neither party recorded an objection to this procedure (Tr. 72-73).

FINDINGS OF FACT

Applicant admitted the allegations of the SOR; accordingly I incorporate those admissions as findings of fact.

Applicant--a 28-year-old employee of a defense contractor--seeks access to classified information. She has not previously held a clearance. She graduated from a local high school in 1994 and has taken some college courses at the local community college (Tr. 23).

Applicant's father, a native El Salvadoran, emigrated to the U.S. approximately 21 years ago.(2) He left a job as an administrative assistant in a bank and found work in the U.S. as a construction worker. He has resided continually in the U.S. since 1981, although he has traveled back to El Salvador 8-10 times in the last ten years to visit his now-94-year-old father. He sends his father about $100.00 per month financial support. He had no connections to the government of El Salvador when he lived there, and has none now that he lives in the U.S. He does not participate in any El Salvadoran community groups. He asserts that he has no friends who are not U.S. citizens.(3) He is a legal permanent resident of the U.S.; he would like to become a citizen, but his English is not good enough for him to pass the citizenship test, which is given only in English (G.E. 1; Tr. 30, 75-82).(4)

In approximately 1984, Applicant's mother followed her husband to the U.S. In El Salvador, she was a cook in a restaurant; in the U.S. she is employed as a cook (government contractor) in a government building housing a federal agency. She has resided continually in the U.S. after emigrating here, although she has traveled back to El Salvador a few times to visit relatives there. She had no connections to the government of El Salvador when he lived there, and has none now that she lives in the U.S. She does not participate in El Salvadoran community groups. Applicant and her brother testified that their mother has no friends who are not U.S. citizens.(5) She is a legal permanent resident of the U.S. Like her husband, she would like to become a U.S. citizen, but although her English is better than her husband's, the citizenship test is a formidable hurdle for her (G.E. 1; Tr. 25, 29, 64).

In approximately 1986--when she was 12 years old--Applicant and her brother (who is five and a half years younger than Applicant) emigrated to the U.S. from El Salvador, where they resided with relatives while their parents got established in the U.S. (Tr. 52). Applicant completed her schooling in the U.S. graduating from high school in 1994. She has since taken some college courses at the local community college (G.E. 1; Tr.23). She has resided continually with her parents in the U.S. after emigrating here, although she took a post-high school pleasure trip to Canada in 1994(6), and traveled to El Salvador once in 1999 to visit her grandfather. She had no connections to the government of El Salvador when she lived there, and has none now that she lives in the U.S. She had no financial interests or assets in El Salvador (Tr. 41). She does not participate in El Salvadoran community groups. She has no friends who are not legal permanent residents of the U.S. (Tr. 33-36).(7) She applied for U.S. citizenship before making her one trip to El Salvador. While in El Salvador visiting her grandfather in 1999, Applicant received notification to return to the U.S. to take the citizenship test (Tr. 47-48). She became a naturalized U.S. citizen on 16 August 1999 (G.E. 1). She has a U.S. passport issued in July 2002 (G.E. 1; Tr. 44).

Applicant's brother lives in another state, where he is employed in an airline credit union. He has resided continually in the U.S. since emigrating in approximately 1986. He has not been back to El Salvador except for a trip in July 1989 to obtain his "green card" (Tr. 59). He speaks English more fluently than his sister, with virtually no accent. He had no connections to the government of El Salvador when he lived there (he was seven or so when he left), and none now that he lives in the U.S. He has no financial interests in El Salvador. He does not participate in El Salvadoran community groups. He is a legal permanent resident of the U.S. He intends to apply for U.S. citizenship, but is waiting until he has the answers to the citizenship test down cold and $5,000.00 in savings in case he encounters hurdles which require legal representation. He has frequent telephone contact with Applicant, and sees her--and his parents--often because his job comes with an inexpensive airfare benefit (Tr. 57-70).

Applicant has a boyfriend who is a citizen of El Salvador and a legal permanent resident of the U.S. (Tr. 31). He works as a sprinkler installer. He want to become a U.S. citizen, and Applicant is pushing him toward this goal (Tr. 32)

When Applicant became a U.S. citizen, she possessed an El Salvadoran passport issued on 21 June 1999 (when Applicant was not yet a U.S. citizen). This passport would not expire until 21 June 2004. Applicant used this passport to travel to El Salvador in June 1999.[(8)] She did not use it after becoming a U.S. citizen. When Applicant received the SOR, she contacted the El Salvador Embassy to surrender the passport, but was told she would have to keep it until it expired (Tr. 25-26. However, once she retained counsel, she took steps to surrender the passport (A.E. A.-D.; Tr. 25-26, 50).

On 25 June 2001, Applicant executed a Security Clearance Application (SCA)(SF 86) (G.E. 1) on which truthfully disclosed her foreign connections and travel. She indicated that she did not consider herself a dual citizen of another country (question 3).

Applicant has lived at the same address with her parents since November 1988 (G.E. 1; Tr. 22-23, 36). The record contains no evidence of Applicant's work performance or character references.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions

raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc*.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

FOREIGN PREFERENCE (GUIDELINE C)

E2.A3.1.1 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.

E2.A3.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A3.1.2.2. Possession and/or use of a foreign passport;

E2.A.1.3. Conditions that could mitigate security concerns include:

None.

FOREIGN INFLUENCE (CRITERION B)

E2.A2.1.1. 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 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.

E2.A2.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A2.1.2.1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident in, a foreign country;

E2.A2.1.3. Conditions that could mitigate security concerns include:

E2.A2.1.3.1. A determination that the immediate family member(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.

On 16 August 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD, C^3I) issued a memorandum(the "Money emo") to clarify the application of Guideline C., Foreign Preference, to cases involving possession and/or use of a foreign passport. In pertinent part, the ASD, C^3I 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."**(Emphasis added).

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

Although Applicant possessed an El Salvadoran passport after her naturalization in 1999, she has not exercised dual citizenship with El Salvador. Applicant indicated on her SCA that she did not consider herself a dual citizen. While her U.S. citizenship oath may not operate to terminate her El Salvadoran citizenship under El Salvadoran law, her foreign citizenship possesses little security significance if based solely on her birth in a foreign country. For Applicant's conduct to fall within the security concerns of Guideline C, Foreign Preference, she must have acted in a way to indicate a preference for a foreign nation over the United States. However, inimical intent or detrimental impact on the interests of the United States is not required before the Government can seek to deny access under Guideline C. The Government has a compelling interest in ensuring those entrusted with this Nation's secrets will make decisions free of concerns for the foreign country of which they may also be a citizen. Under this assessment, I conclude the Government has established its case under Guideline C. Nevertheless, I conclude that Applicant has mitigated the security concerns.

Applicant convincingly demonstrates that she prefers her U.S. citizenship. The single instance of conduct to the contrary--retaining her El Salvadoran passport after becoming a U.S. citizen--is mitigated by a number of factors. First, there is no record evidence to indicate she had any reason to know that she should dispose of it. Second, she appears to have used her El Salvdoran passport only twice since coming to the U.S.: once on a pleasure trip to Canada and once to travel back to El Salvador. In both instances, she was required to use her El Salvadoran passport because she was not yet eligible for a U.S. passport. Third, she never used the passport after her naturalization. Finally, when she became aware of the requirements of the "Money Memo,"she first tried to surrender the passport herself, but was rebuffed by embassy staff. She later surrendered the passport to the El Salvador Embassy through counsel.

Applicant has resided in the U.S. since she was 12 years old and completed significant portions of her education in the U.S. Her entire family, except for her 94-year-old grandfather, lives in the U.S. She has no ties to El Salvador. Her national preference seems overwhelmingly for the U.S. Accordingly, I resolve Guideline C. for Applicant.

In a similar fashion, the Government has perhaps established its case under Guideline B.,[(9)] but I consider the security concerns mitigated. Applicant's family story is the paradigm of the latter 20th century immigrant tale. Applicant's father fled his homeland, a country torn by civil war, and brought his family with him when he was able. Whether he and his wife ever become citizens of the U.S., it is clear that they are never going back to El Salvador. Their legal permanent resident status ensures that they will never have to go back to El Salvador, barring some severe criminal activity. They had no connection to the El Salvador government then, none now. Applicant has lived with her parents since emigrating to the U.S., like every major immigrant group of the last two centuries, and especially the Hispanic immigrants from Latin America during the latter part of the 20th century. There is no inherent security significance in these living arrangements. Her younger brother was the first to leave home for a greater economic opportunity in a different state. It is difficult to even articulate how Applicant could be subject to foreign influence under these circumstances, when the parents are clearly not agents of El Salvador nor positioned to be exploited by the government of El Salvador. In a similar fashion, Applicant's brother and boyfriend are most unlikely pressure points. Both safely, and permanently, resident in the U.S., it is nearly impossible to imagine a situation where Applicant would be forced to chose between her duty to her brother and her boyfriend (if any) and her duty to the U.S. Accordingly, I resolve Guideline B. for Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline B: FOR THE APPLICANT

Subparagraph a: For the Applicant

Paragraph 2. Criterion C: FOR THE APPLICANT

Subparagraph a: 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.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated 2 January 1992--amended by Change 3 dated 16 February 1996 and by Change 4 dated 20 April 1999 (Directive).

2. Or about 1981. I take official notice, *sua sponte*, that civil war was waged from 1979 until 1991 in El Salvador as the country struggled to transition from military to civilian rule (*See,* www.state.gov).

3. An assertion which is not likely to be strictly true given his ethnic background and the construction industry he is employed in. More likely, he has no friends who are not legal aliens residing in the U.S.

4. During the hearing, I utilized the services of Applicant's brother, who had already testified (Tr. 57-70) as an interpreter, subject to the provisions of 18 U.S.C. §1001 (Tr. 73-74), to get the clearest possible record of the father's testimony. Neither party recorded an objection to this procedure (Tr. 72-73).

5. Again, an assertion which is not likely to be strictly true given her ethnic background. More likely, she has no friends who are not legal aliens residing in the U.S.

6. For which she used an earlier El Salvadoran passport (Tr. 27, 44-46)

7. Department Counsel put the question to Applicant as friends who are not U.S. citizens. However, the SOR clearly states, and Applicant admits, family contacts and a boyfriend who are legal permanent residents of the U.S., and thus obviously not citizens.

8. There is a discrepancy in dates between Applicant's testimony and record copies of her passport (G.E. 2, A.E. B). Applicant testified (Tr. 27, 41) that she went to El Salvador in 1999 for two weeks to see her grandfather. The record copies of the passport clearly shows that it was issued on 21 June 1999, although they do not show where the passport was issued. The passport copies contain only two entries: one is a completely illegible stamp that is presumably her entry into El Salvador. The other, clearly legible, entry is her return to the U.S. on 26 June 1999 through U.S. Immigration in Washington, DC. Consequently, either her trip was only for five days in June 1999, or she had to renew her passport while in El Salvador. In any event, her return to the U.S. in June 1999--before her naturalization--is clearly established, and there is no evidence of foreign passport use after her naturalization.

9. A literal reading of the disqualifying factors establishes that the foreign citizenship of Applicant's family members and boyfriend, standing alone, raises a security concern. However, the entire guideline is qualified with language which states that these conditions *may* raise a security risk or be disqualifying. A common sense analysis of this case could easily support a conclusion that the foreign influence case against Applicant has not been established.