

DATE: April 21, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26323

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 44-year-old married man, is currently employed as a consultant for a defense contractor, and he has held a security clearance for the last 19 years for his work in the defense industry. By his actions--obtaining Latvian citizenship, possessing and using a Latvian passport, and voting in a Latvian election--Applicant has demonstrated a preference for Latvia. He is unwilling to renounce his Latvian citizenship, and he is unwilling to surrender his Latvian passport. His preference for Latvia raises a security concern under Guideline C, which Applicant is unable to successfully mitigate or extenuate. Clearance is denied.

STATEMENT OF THE CASE

On February 14, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline B for foreign influence and Guideline C for foreign preference. Applicant answered the SOR on April 3, 2003, and he requested a clearance decision based on the written record in lieu of a hearing. On August 27, 2003, after receiving Department Counsel's File of Relevant Material (FORM), Applicant changed his mind and requested a clearance decision based on a hearing record.

The case was initially assigned to another administrative judge on September 4, 2003. On November 13, 2003, the case was reassigned to me due to case load considerations. Thereafter, a notice of hearing was issued to the parties scheduling the hearing for December 17, 2003. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript January 14, 2004.

RULINGS ON PROCEDURE

During the hearing, I raised the issue if this case should proceed to a decision in light of Applicant's indication that he no longer needed a security clearance to perform his work duties. (2) In response, Applicant indicated he wanted the case to proceed to decision as there may be a need in the future by his employer for him to hold a security clearance. The discussion concluded when I instructed Department Counsel to make inquiries to determine the status of Applicant's security clearance.

On January 15, 2004, Department Counsel submitted a pleading styled "Supplemental Material," indicating that the DISCO had not received an administrative termination of Applicant's security clearance. Applicant's security officer indicated that although the company had previously submitted an administrative termination (which was apparently not received at the DISCO), the security officer indicated the company would not be submitting an administrative termination at the present time. Thereafter, on January 28, 2004, I held a conference call with Department Counsel and Applicant. The result of the call was Applicant indicated he wanted this case to proceed to decision in light of the potential need for a security clearance for future work assignments.

At the close of the evidence, SOR subparagraph 2.a. was amended to conform to the record evidence showing Applicant's brother now resided in Latvia as opposed to Germany as initially alleged. (3)

FINDINGS OF FACT

In his written answer to the SOR, Applicant admitted to the factual allegations in SOR subparagraphs 1.a, 1.b, 1.c, 1.d, 2.a, and 2.b. After a thorough review of the record evidence, I make the following essential findings of fact:

Applicant is a 44-year-old married man and a native-born U.S. citizen. Applicant holds bachelor degrees in physics, mathematics, and music. He has worked in the defense industry for many years and has held a security clearance for the last 19 years. He holds a patent as a result of his work for the defense industry (Exhibit C).

Applicant's parents are naturalized U.S. citizens, as his mother was born in Latvia and his father was born in Russia. Consequently, Applicant is fluent in both Latvian and English. In 1993, with changes in the geopolitical situation, Applicant applied for and obtained Latvian citizenship, which was derived from his parents. In conjunction with Latvian citizenship, Applicant obtained a Latvian passport (Exhibit D), issued December 15, 1993, with an expiration date of December 14, 2003. Applicant's motivation to obtain dual citizenship was to help promote democracy in Latvia after many years of communist control by the Soviet Union.

In April 1993, Applicant disclosed to company security officials that he had petitioned for Latvian citizenship (Exhibit 6). In July 1993, he disclosed his dual citizenship status to security officials by indicating that status on a security-clearance application (Exhibit B). In December 1993, Applicant provided a sworn statement detailing the facts and circumstances surrounding his dual citizenship (Exhibit 5). Thereafter, Applicant was apparently allowed to continue holding a security clearance.

In July 1999, Applicant completed another security-clearance application (Exhibit 4) wherein he disclosed his dual citizenship status and his possession of a foreign passport. In March 2000, Applicant provided a sworn statement detailing the facts and circumstances surrounding his dual citizenship (Exhibit 2). Of note, Applicant mentioned the following:

- He was unwilling to renounce his Latvian citizenship or relinquish his Latvian passports as a condition for access to classified information.
- His motivation in obtaining dual citizenship with Latvia was to support a pro-democratic government in Latvia.
- He maintains dual citizenship for cultural reasons and voting privileges to assist in the democratic process.

Starting in 1998, Applicant used the Latvian passport on approximately four trips to Latvia. Otherwise, Applicant has used his U.S. passport for all other foreign travel (Exhibits E and F). Although his Latvian passport expired in December 2003, Applicant has not renewed it, and he is undecided if he will do so. Applicant also indicated he is unwilling to relinquish or surrender his Latvian passport.

Applicant voted by absentee ballot in a Latvian election in 1993. Indeed, voting was one of the reasons Applicant obtained dual citizenship with Latvia, because he wanted to participate in Latvia's elections to help establish a stable, free, and democratic form of government in Latvia. Concerning voting in future Latvian elections, Applicant indicated he did not intend to do so at this time.⁽⁴⁾ Applicant also indicated he was unwilling to renounce his Latvian citizenship:

because I feel it accurately reflects, it is merely a reflection of my status, that I have this dual heritage and I would like to be able to influence events in the future there. In particular, one of the items of interest to me is the fact that Latvia is probably going to enter the European Union shortly, and then possessing such a citizenship could have advantages as far as work opportunities in Europe.⁽⁵⁾

In other words, Applicant desires to keep open the possibility of using his Latvian citizenship to live and work in the European Union.

Applicant has no financial interests in Latvia. He estimates his current net worth at approximately \$350,000, and all his financial assets are located in the U.S.

Applicant has a brother and a cousin who are resident citizens of Latvia. Like Applicant, the brother is a dual citizen of the U.S. and Latvia. Although previously living in Germany, the brother has lived and worked in Latvia for the last three years or so. He works for a Latvian bank as a marketing manager responsible for opening new offices outside of Latvia. The cousin works for a privately-owned television station.

A longtime friend testified as a character witness on Applicant's behalf. The witness has worked as a deputy district attorney for the last 20 years or so, and he has known Applicant for about 15 years. The witness, a native-born U.S. citizen, obtained dual citizen with Latvia under the same circumstances as Applicant. The witness characterized Applicant as one of the most solid people he knows; as such, he completely trusts Applicant in all important matters.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) 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 record evidence as a whole, the following security guidelines are most pertinent here: Guideline B for foreign influence⁽⁶⁾ and Guideline C for foreign influence.⁽⁷⁾

In August 2000, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I), issued a memorandum clarifying the application of the foreign preference security guideline for cases involving possession and/or use of a foreign passport (Exhibit 1--the so-called Money memorandum, because it is signed by Assistant Secretary Arthur L. Money). In pertinent part, the Money Memorandum "requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains approval for its use from the appropriate agency of the United States Government."

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁸⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁹⁾ The government has the burden of proving controverted facts.⁽¹⁰⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than a preponderance of the evidence.⁽¹¹⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a
⁽¹²⁾

substantial-evidence standard. "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹³⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽¹⁴⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁵⁾

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."⁽¹⁶⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Guideline B-Foreign Influence

Under Guideline B, a security concern 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 U.S. 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 if they make an individual potentially vulnerable to coercion, exploitation, or pressure. Common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service. Concerning family ties, the language of Guideline B does not require a conclusion that an unacceptable security concern exists based solely on an applicant's family ties in a foreign country.⁽¹⁷⁾ An administrative judge must consider the record evidence as a whole in deciding if the facts and circumstances of an applicant's family ties pose an unacceptable security concern under Guideline B.⁽¹⁸⁾

Here, based on the record evidence as a whole, the government has established its case under Guideline B. Applicant's brother is a citizen of and resident in Latvia. The brother is an immediate family member, and so it is presumed Applicant is bound to him by close ties of affection or obligation. Accordingly, DC 1⁽¹⁹⁾ applies against Applicant. The same cannot be said for Applicant's cousin, who is not an immediate family member, because the record evidence fails to show Applicant is bound to the cousin by close ties of affection or obligation. I have reviewed the remaining DC under the guideline and conclude none apply.

I have reviewed the MC under the guideline and conclude that MC 1⁽²⁰⁾ applies for Applicant. It's clear Applicant's brother is not an agent of the Latvian government or any other foreign power. And I am persuaded the brother's residence in Latvia does not put him in a position that could force Applicant to choose between loyalty to his brother and the U.S., as the brother is employed in the private sector and is not otherwise connected with the Latvian government. I have reviewed the remaining MC under the guideline and conclude none apply.

To sum up, it is my predictive judgment that Applicant has the willingness to resist and report any potential foreign influence by either coercive or non coercive means. Likewise, it is my commonsense determination that the presence of Applicant's brother in Latvia does not pose an unacceptable security concern or risk of foreign influence. In reaching this decision, I have given substantial weight to the fact that Applicant has held a security clearance for many years without an adverse incident or problem, and he has been quite willing to divulge information about his connections to Latvia. Accordingly, Guideline B is decided for Applicant.

2. Guideline C-Foreign Preference

Under Guideline C, 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. Absent the exercise of dual citizenship or indicia of some affirmative action demonstrating foreign preference, mere possession of foreign citizenship by

virtue of birth does not fall within the scope of Guideline C.

Here, based on the record evidence as a whole, the government has established its case under Guideline C. By his actions--obtaining Latvian citizenship, possessing and using a Latvian passport, and voting in a Latvian election--Applicant has demonstrated a preference for Latvia. Under these circumstances, DC 1, ⁽²¹⁾ DC 2, ⁽²²⁾ and DC 8 ⁽²³⁾ apply against Applicant. In addition to these matters, Applicant continues to possess a Latvian passport, which expired in December 2003, and he is unwilling to relinquish or surrender the passport. His current possession of the expired Latvian passport invokes the *per se* rule created by the oney Memorandum, which requires a clearance be denied or revoked under these circumstances. ⁽²⁴⁾

Turning to the mitigating conditions under Guideline C, MC 1 ⁽²⁵⁾ applies because his dual citizenship is based on his parents' citizenship. ⁽²⁶⁾ I have reviewed the remaining MC and conclude none apply. In particular, MC 3 ⁽²⁷⁾ does not apply because there is no evidence to suggest the U.S. Government has approved of Applicant's activities. And MC 4 ⁽²⁸⁾ does not apply because Applicant has consistently expressed an unwillingness to renounce his dual citizenship with Latvia. Indeed, by all appearances, it appears Applicant intends to affirmatively exercise his dual citizenship with Latvia in the future.

Applicant has worked in the defense industry and held a security clearance for many years, and he deserves credit for his many contributions. Although not required to renounce dual citizenship to obtain access to classified information, the fact that Applicant is unwilling to renounce his Latvian citizenship is a clear, logical, and convincing reason to have concern given his affirmative exercise of dual citizenship. The same is true for Applicant's unwillingness to surrender his Latvian passport. In my view, Applicant intends to keep one foot in each country because it suits him. This situation, although perfectly legal and ethical, creates a divided preference, which is a bona fide security concern. In addition, because Applicant is unwilling to surrender his Latvian passport, the Money emorandum requires the clearance be denied or revoked. Accordingly, Guideline C is decided against Applicant.

To conclude, this decision should not be construed as an indictment of Applicant's loyalty and patriotism to the U.S., as those matters are not at issue. Instead, the clearly-consistent standard requires I resolve any doubt against Applicant, and his divided preference between the U.S. and Latvia creates doubt about his security suitability. In reaching my decision, I have considered the evidence as a whole, the whole-person concept, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline C: Against the Applicant

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

SOR ¶ 2-Guideline B: For the Applicant

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

DECISION

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

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Transcript at pp. 91-97.
3. Transcript at pp. 98-99.
4. Transcript at p. 87.
5. Transcript at pp. 87-88.
6. Directive, Enclosure 2, Attachment 2, at pp. 21-22.
7. Directive, Enclosure 2, Attachment 3, at pp. 23-24.
8. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
9. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
10. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
11. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
12. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
13. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
14. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
15. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
16. *Egan*, 484 U.S. at 528, 531.
17. ISCR Case No. 98-0419 (April 30, 1999) at p. 5.
18. *Id.*
19. "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."
20. "A determination that the immediate family member(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."
21. "The exercise of dual citizenship."

22. "Possession and/or use of a foreign passport."

23. "Voting in foreign elections."

24. ISCR Case No. 01-24306 (September 30, 2003) at p. 5 (Addressing the issue of an expired foreign passport, the DOHA Appeal Board stated that "[s]urrender contemplates returning it to the issuing authority, and merely keeping a foreign passport until it expires does not satisfy this requirement in the ASDC3I memo.") (citation omitted).

25. "Dual citizenship is based solely on parents' citizenship or birth in a foreign country."

26. 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 foreign citizenship after becoming a U.S. citizen).

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

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