

DATE: September 2, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26579

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Katherine Antigone Trowbridge, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a dual citizen of the United States and Hungary, has failed to fulfill the requirements of the Memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence, dated August 16, 2000, entitled "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline." (Money Memorandum) by not relinquishing his Hungarian passport to the proper Hungarian authorities, but simply allowing it to lapse. Applicant's immediate family members, including his wife, two children and his parents, with whom he has close and continuing contact, are citizens of and reside in Hungary. The evidence establishes that Applicant is vulnerable to foreign influence. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated September 9, 2002, to the Applicant which detailed 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on foreign preference (guideline C) related to his exercise of dual citizenship with the United States and Hungary, and his intention to renew a foreign passport and continue to use it for travel; and on foreign influence (guideline B) concerns because of the foreign residency and citizenship of close family members.

Applicant, acting *pro se*, filed a notarized response dated December 2, 2002, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge.

On May 5, 2003, this case was assigned to another Administrative Judge, but on May 6, 2003, because of caseload

consideration, the case was reassigned to me to conduct a hearing and issue a written decision. A Notice of Hearing was issued to the parties on May 7, 2003, and the hearing was held on May 22, 2003.

At the hearing, Department Counsel offered two documentary exhibits (Exhibits 1 and 2) and no witnesses were called. Applicant offered no documentary exhibit and offered his own testimony. After the hearing, the record was left open, and Applicant offered one documentary exhibit (Exhibit A) which was not objected to by Department Counsel. The transcript (TR) was received on June 2, 2003.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the documents and the live testimony, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is a 36 year old employee of a defense contractor. He was born in the Hungary in 1966, immigrated to the United States in 1993, and became a naturalized United States citizen in 1998. He received a masters degree in mechanical engineering from a United States university and is employed as a design engineer.

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 indicate a preference for another country over the United States.

Applicant has retained his dual citizenship with Hungary. He has also retained his Hungarian passport, which he has used after he became a United States citizen, for each visit to Hungary. (Tr at 33.) Applicant has traveled to Hungary to visit his family, at least one time every year since 1994, with the exception of the year 2000, when his family came to visit him. (Tr at 49-52.) Two of Applicant's visits were for extended periods of time; he was in Hungary from December 1998 through July 1999 and November 2001 through July 2002. (Tr at 47, 52.)

Subsequent to the hearing, Applicant submitted a copy of his Hungarian passport which showed that it had expired as of July 7, 2003, and he gave a brief explanation that he is not planning to renew his passport. (Exhibit A.) Applicant took no affirmative step to relinquish his Hungarian passport to the proper Hungarian authorities. Applicant also testified that he might renounce his Hungarian passport if it was required, but the testimony was so conditional that I do not consider it to be a good faith expression of willingness to renounce his citizenship. (Tr at 38, 39, 66-68.)

Applicant has voted in elections in the United States since he became a citizen in 1998, but he also voted in a Hungarian election in 2002 (Tr at 46.)

Paragraph 2 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has immediate family members or people to whom he may be bound by affection or obligation who are not citizens of the United States, or may be subject to duress.

Applicant's wife was born in Hungary and currently resides there. They have two children, who also live with the mother in Hungary. One child is a dual citizen of the United States and Hungary, and the other child is a Hungarian citizen only. Applicant had hoped that his wife and children would come and live with him in the United States, but he now believes that they will probably remain in Hungary. (Tr at 63,64.) Applicant's wife has a business in Hungary, but the only real asset of the company is his wife's skills and abilities, so there is no value for Applicant to inherit from this business.

Applicant's parents are citizens of and reside in in Hungary. The father was a teacher and the mother a health technician, but they are now both retired. Applicant's father-in-law is deceased and his mother-in-law resides in Hungary, where she is retired. (Tr at 61, 62.) Applicant also has an uncle who is a retired captain with the Hungarian military. He only has contact with his uncle approximately two times a year. Applicant's parents own two apartments in Hungary, which Applicant estimates have a combined total value of between \$60,000 and \$80,000, and which Applicant is in line to inherit. (Tr at 65, 66.)

Finally, Applicant has had two friends who have been employed by the Hungarian Embassy. He also has attended

Hungarian Embassy events in Washington. D.C.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Foreign Preference

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 also include:

E2.A3.1.2.1 The exercise of dual citizenship.

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

Foreign Influence

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 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.

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 or present in, a foreign country

E2.A2.1.2.8. A substantial financial interest in a country, or in any foreign-owned or -operated business that could make the individual vulnerable to foreign influence.

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

E2.A2.1.3.1. 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.

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the 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 is nonetheless security worthy. As noted by the United States Supreme Court in *Department of 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." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of those who testified, I conclude the following with respect to guidelines C and B:

Guideline C is based on actions taken by an individual which indicate a preference for a foreign country over the United States. Applicant's failure to relinquish his Hungarian passport to the proper Hungarian authorities raises serious foreign preference (guideline C) concerns. It is a violation of the Money memorandum, and therefore Applicant is absolutely barred from retaining a security clearance. Applicant's conditional willingness to renounce his Hungarian citizenship must also be considered adversely to Applicant. Disqualifying Condition (DC) 1 applies because Applicant's use of his Hungarian passport on many occasions after he became a United States citizen and his voting in an election in Hungary are continuing examples of Applicant's exercising dual citizenship. DC 2 also applies because of Applicant's failure to return his passport to the proper authorities. No mitigating condition (MC) applies in this case under Guideline C.

Under Guideline B, a security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he is bound by affection, influence or obligation, are not citizens of the United States or may be subject to duress. DC 1 must be considered when 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, must be considered in assessing Applicant's current suitability for access to classified information. The fact that Applicant's parents, his wife and his two young children all are citizens of and reside in Hungary must be considered adversely under DC 1. Additionally, the potential to inherit two apartments with an estimated total value of between \$60,000 and \$80,000 would be a substantial financial interest so that DC 8 also applies in this case. No MC applies under Guideline B.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline C: AGAINST THE APPLICANT

Subparagraph 1. a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Paragraph 2. Guideline B: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.d.: Against the Applicant

Subparagraph 2.e.: For the Applicant

Subparagraph 2.f.: For the Applicant

Subparagraph 2.g.: For the Applicant

Subparagraph 2.h.: Against 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.

Martin H. Mogul

Administrative Judge