

DATE: October 10, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-01222

## **DECISION OF ADMINISTRATIVE JUDGE**

**PHILIP S. HOWE**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Kathryn D. MacKinnon, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is 24 years old. He works for a defense contractor. He has dual Polish and United

States citizenship. He has a Polish passport which expires in 2004. He also has a United States passport. He voted in the Polish senate elections in 2001 after becoming a United States citizen in 1999. He stated his duty was to vote in elections in countries in which he has citizenship. Applicant did not mitigate the grave security concerns present. Clearance denied.

### **STATEMENT OF THE CASE**

On March 7, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under the personnel security Guidelines C (Foreign Preference) and B (Foreign Influence) 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 Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

On March 18, 2003, Applicant responded to the SOR allegations. He requested his case be decided on the written record in lieu of a hearing. On July 7, 2003, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) <sup>(1)</sup> was provided to the Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant filed a response to the FORM on August 13, 2003. This case was assigned to me on September 25, 2003.

### **FINDINGS OF FACT**

Applicant admitted the allegations in all subparagraphs of the SOR, except subparagraph 2.b.. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 24 years old. He is unmarried. He graduated from college and is studying for a masters degree. He works for a defense contractor. Applicant has Polish citizenship. He immigrated to the United States and became a naturalized United States citizen in 1999. When Applicant became a United States citizen, he took the standard citizenship oath required by United States law and the Immigration and Naturalization Service. (Exhibit 3 Answer, and Response; Exhibit 4 at 1)

Applicant's parents and brother live in the United States, and maintain Polish and United States dual citizenship. His brother graduated from college in 2003. (Exhibit 3 Answer, and Response; Exhibit 4 at 4, 5)

Applicant voted in the 2000 Presidential election in the United States. He also voted in the Polish Senate election in 2001. He stated that he has a duty as a Polish and a United States citizen to vote in both elections. Applicant also has a Polish passport, which he used during his visit to Poland in 2000. Applicant's Polish passport expires in March, 2004. He obtained a United States passport in 1999, which he also uses on his trips. His latest trip to Poland from December 9, 2002 to January 9, 2003, during which he used his United States passport. His prior trips to Poland were in 1995 and 2000. (Exhibit 3 Answer, and Response; Exhibit 5 at 1, 2)

Applicant's parents own and maintain an apartment in Poland. They want to have a residence in Poland so they have a place to stay when they go back to visit Poland and do not have to pay for a hotel. Applicant's parents voted in the 2001 Polish senatorial elections. They also voted in the United States Presidential elections in 2000 because they are also United States citizens. Applicant's parents reside in the United States. Applicant's parents visited Poland three or four times using their Polish passports each time. (Exhibit 3 Answer; Exhibit 5 at 1, 2)

Applicant's relatives, including a grandfather aged 95, live in Poland. Applicant corresponds and communicates with his relatives in Poland. They are his family and he maintains contact with them. (Exhibit 3 Answer; Exhibit 5 at 2)

Applicant expressed a willingness to surrender his Polish passport and his Polish citizenship. He states no one asked him to take those actions. Applicant has not initiated any action to take those actions, and has not accomplished them. Applicant would take those actions to obtain a security clearance. Applicant does not have Irish citizenship or an Irish passport. (Exhibit 3 Answer; Exhibit 5 at 2)

Applicant lives with his parents. He uses their apartment in Poland when he travels there. (Exhibit 3 Answer; Exhibit 4 at 1 and 4)

## **POLICIES**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The president has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, 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 that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (See Directive, Section E2.2.1., Enclosure 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 condition 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 other behavior specified in the Guidelines.

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Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. See *Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*\*6-8 (App. Bd. 2001). Once the Government has established a prima facie case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

#### **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. Directive ¶ E2.A3 .1.1.

Conditions that could raise a security concern and may be disqualifying include:

The exercise of dual citizenship. Directive ¶ E2.A3.1.2.1.

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

Voting in foreign elections. Directive ¶ E2.A3.1.2.8.

E2.A3.1.3. Conditions that could mitigate security concerns include:

Dual citizenship is based solely on parents' citizenship or birth in a foreign country. Directive ¶ E2.A3.1.3.1.

Individual has expressed a willingness to renounce dual citizenship.

Directive ¶ E2.A3.1.3.4.

## **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. Directive, ¶ E2.A2.1.1.

Conditions that could raise a security concern and may be disqualifying include:

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. Directive, ¶ E2.A2.1.2.1.

Conditions that could mitigate security concerns include:

A determination that the immediate family member(s) 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. Directive, ¶ E2.A2.1.3.1.

Applicable also is the Memorandum of August 16, 2000, entitled "Guidance of DoD Central Adjudication Facilities (CAF) Clarifying the Application of Foreign Preference Adjudicative Guidelines", by the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I), commonly known as the "Money Memo". This memorandum guidance states that

possession and/or use of a foreign passport may be a disqualifying condition. . . The only applicable mitigating factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline are that the possession and use of a foreign passport in preference to a U.S. passport raised doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States.

The United States citizenship oath, found at 8 U.S.C. § 1448, states in part, "I hereby declare, on oath, That I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; That I will support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; That I will bear true faith and allegiance to the same; . . ."

## **CONCLUSIONS**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Guideline C - Foreign Preference: The Government met its burden and established the facts by substantial evidence. Individuals who act in ways that indicated preference for a foreign country over the United States may be prone to provide information or make decisions that are harmful to the interests of the United States. (Directive ¶ E2.A3.1.1.) Applicant used his Polish passport for his own convenience which indicates a foreign preference, exercising the rights and privileges of a citizen of that country, holding himself out as a citizen of that country and not as a citizen of the United States. [ISCR Case No. 99-0295, 2000 DOHA LEXIS 219 at \*15 (App. Bd. Oct. 20, 2000)] Applicant declared he is a dual citizen, and he exercised dual citizenship by voting in a Polish election after he became a United States citizen. Taking the U.S. oath of allegiance is not conclusive evidence that Applicant does not have a foreign preference. [ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 at \*36 (App. Bd. Feb. 8, 2001)] Clearly, Applicant does have a foreign preference based on his use of the Polish passport and voting in a Polish election after taking the United States citizenship oath in which he swore he renounced all foreign allegiances and obligations. He now states he is duty-bound to vote in Polish elections because he is a Polish citizen. Applicant cannot have a foreign preference and a security clearance in the United States. Therefore, Disqualifying Conditions (DC) 1 (dual citizenship), 2 (possession and use of a foreign passport), and 8 (voting in foreign elections) apply.

Applicant must now meet his burden to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). Applicant has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3. Here, Applicant has failed to meet his burden. He has not overcome the requirements of the ASDC3I memorandum which reiterates that the failure to surrender the foreign passport is a disqualifying condition. Applicant has a valid Polish passport until March, 2004. He has taken no steps to surrender it. It is not the obligation of the United States to seize the passport, but rather the obligation, in accordance with his citizenship oath, for Applicant to take the initiative and surrender the Polish passport. He has not done so. Mitigating Condition (MC) 1 (Dual citizenship is based solely on the parent's citizenship or birth in a foreign country) might apply here. However, Applicant is now an adult and can make his own decision about his citizenship. He took the oath voluntarily in 1999, but has not complied with it. In addition, the willingness to renounce dual citizenship is MC 4. But Applicant has not taken any action to renounce his dual citizenship. The willingness to renounce is hollow absent the actions of renunciation. Moreover, they do not outweigh the disqualifying weight of the ASDC3I memorandum requirements, coupled with Applicant's use of a foreign passport and voting in a foreign election after becoming a United States citizen. Therefore, I find against Applicant on this guideline, and he cannot receive a security clearance.

Guideline B - Foreign Influence: Disqualifying Conditions (DC) 1 (An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen or, or resident or present in, a foreign country) and 2 (Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists) apply here. The Government presented sufficient evidence to establish its allegations. Applicant's parents and brother are dual citizens, and he resides with his parents. Therefore, these two DC apply.

I find Mitigating Condition (MC) 1 (the immediate family members are not agents of a foreign power or in a position to be exploited) is applicable here. There is no record evidence that any of Applicant's family members are agents of any government. However, Applicant may be in a position at some time of vulnerability to be influenced by coercive or noncoercive means because of his relatives remaining in Poland. Those foreign contacts are considered in light of all of the evidence on the record. This one MC does not outweigh the DC which are applicable. I find against Applicant on this Guideline.

## **FORMAL FINDINGS**

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline C: Against Applicant

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Paragraph 2 Guideline B: Against Applicant

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant, except For Applicant on Irish citizenship.

Subparagraph 2.c.: Against Applicant

## **DECISION**

In light of all the circumstances and facts 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.

Philip S. Howe

Administrative Judge

1. The Government submitted six items in support of the SOR.