

DATE: July 7, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-01395

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Juan Rivera, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 29-year-old U.S. citizen who also has foreign citizenship through her mother, a naturalized U.S. citizen. Applicant possessed a foreign passport, which expired in 2000 and which she used once when she was about 18-years-old. However, she has not relinquished her foreign passport, but continues to maintain her status as a foreign citizen. Applicant's foreign citizen contacts lack security significance. Applicant has mitigated security concerns under Guideline B (Foreign Influence), but has not mitigated concerns under Guideline C (Foreign Preference). Clearance is denied.

STATEMENT OF THE CASE

On January 6, 2003, the Defense Office of Hearings and Appeals (SOR) issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns under Guideline B (Foreign Influence) and Guideline C (Foreign Preference). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to continue Applicant's security clearance.⁽¹⁾

On January 27, 2003, Applicant answered the SOR (Answer) and requested a hearing. The case was assigned to me on March 11, 2003. DOHA subsequently issued a Notice of Hearing setting this case to be heard on April 2, 2003. All parties appeared as scheduled and the government presented five exhibits (GE 1 through 5), of which GE 1 and GE 2 were admitted as evidence without objection. I granted Department Counsel's request that I take administrative notice of the information contained in GE 3 through GE 5 for identification only.⁽²⁾ Applicant presented six exhibits (AE A through F). I admitted AE A as evidence and agreed to take administrative notice of Applicant's remaining exhibits. Applicant also testified in her own behalf. DOHA received the transcript (Tr) on April 9, 2003.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant was born in the United States in 1973. Her father is a retired Navy officer who married a German citizen whom he met in the United States. Applicant's mother has lived here since at least 1970, when Applicant's oldest brother was born, and she is now a U.S. citizen. Except for her father's overseas assignments in Iceland and Japan when she was a child, Applicant was raised and educated in the United States. She holds an undergraduate degree and a masters degree from two different U.S. universities, and has an extensive employment history in the U.S. She is now employed by a defense contractor as a research assistant.

Applicant and her two older brothers, also born and raised in the United States, have German citizenship through their mother. Applicant obtained a German passport that she used when she traveled to Germany for the first time after she finished high school in 1990 or 1991.⁽³⁾ Thereafter, she continued to possess the passport and either renewed it or obtained a new one in 1995.⁽⁴⁾ It expired in November 2000. She has not used the passport since 1991 and does not now know where it is.⁽⁵⁾

In 1994 and 1995, Applicant traveled to Germany after her junior and senior years in college. Each visit was about two months long. With the help of her mother's cousin and family friends in Germany, Applicant found work during each visit to improve her language skills and to support herself while she traveled. In 1994, she worked as a janitor, but the following year she worked as a nurse's assistant. There is no information available to support the SOR allegation in subparagraph 1.d that Applicant went to Germany to renew her passport or reaffirm her foreign citizenship.

Applicant's maternal grandmother, now deceased, opened a bank account in Germany for Applicant about 20 years ago. The account has been used over the years to deposit birthday and holiday gifts of cash and is now worth about \$5,000.00. Applicant currently lives with her parents and has a net worth of about \$15,000.00 in cash and owns a car. She does not use the German bank account in her everyday finances.

Applicant has two maternal aunts who are German citizens. She last visited one of them in 2000, and has contact with them through e-mail or letters between two and five times annually. Both aunts are elderly and have no connection with any foreign government.⁽⁶⁾

Applicant has stated she does not wish to renounce her German citizenship. She told a Defense Security Service investigator she wishes to hold on to her foreign citizenship because it is part of her heritage.⁽⁷⁾ At the hearing, she reiterated her unwillingness to give up her foreign citizenship.⁽⁸⁾

POLICIES

The Directive sets forth adjudicative guidelines⁽⁹⁾ to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, specifically, that Applicant has close ties of affection who are foreign citizens and has possessed and used a foreign passport, I conclude the relevant adjudicative guideline to be applied here are Guideline B (Foreign Influence) and Guideline C (Foreign Preference).

BURDEN OF PROOF

A security clearance decision is solely intended to resolve whether it is clearly consistent with the national interest⁽¹⁰⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.⁽¹¹⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁽¹²⁾

CONCLUSIONS

Guideline B (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 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.⁽¹³⁾

The government has established that Applicant's mother and brothers are foreign citizens. Further, Applicant has two maternal aunts who are
⁽¹⁴⁾

German citizens still residing in that country. Therefore, Guideline B Disqualifying Condition (DC) 1 applies. By contrast, Applicant's mother and brothers are citizens of the United States as well. Applicant's brothers were born and raised in the U.S. and appear to have no ties to Germany other than their mother's heritage. Applicant's mother has lived here more than 30 years, is a naturalized citizen and has built most of her adult life around her American family. Applicant's aunts are elderly and have no connection to the German government or any other foreign organization. Applicant's contact with them are casual and infrequent, consisting of cards or e-mail at most five times each year. Guideline B Mitigating Condition (MC) MC 1⁽¹⁵⁾ and MC 3⁽¹⁶⁾ apply. I conclude from these facts that Applicant's foreign contacts have minimal, if any, security significance. On balance, considering that most of her life and interests have always been in the United States, and in light of the minimal risk associated with Applicant's foreign contacts, I resolve Guideline B for Applicant.

Guideline C (Foreign Preference). A security concern arises when an individual acts in such a way as to indicate a preference for a foreign country over the United States, raising the possibility he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.⁽¹⁷⁾

The Government has established its case as alleged in SOR subparagraphs 1.a, 1.b and 1.c that Applicant exercised her German citizenship when she used a German passport in 1990 or 1991. She also continued to possess a foreign passport until its expiration in 2000. This is disqualifying conduct under Guideline C DC 1⁽¹⁸⁾ and DC 2⁽¹⁹⁾ insofar as it indicates a preference by Applicant for her status as a German citizen over her status as an American. However, the government has not established its case regarding SOR subparagraph 1.d. Applicant traveled to Germany in 1994 and 1995, but there is no support for the government's contention she did so to maintain her German passport. Nor has the government established that Applicant's German bank account (SOR 1.e) is indicative of her preference for another country. There is no information available to suggest this is a financial interest in another country that Applicant sought to protect through exercise of her foreign citizenship.⁽²⁰⁾ It is a passive account opened for her by a relative when Applicant was a child, and Applicant does not use it in managing her day-to-day finances. It does not constitute a significant financial interest that might affect Applicant's preference for the U.S.

As for her German passport, possession of it would allow Applicant to travel without accountability and outside the ambit of U.S. immigration controls, an unacceptable circumstance when such conduct is undertaken by someone with access to U.S. classified information. That the passport has expired may not diminish its security significance. Guideline C DC 2 has no corresponding Mitigating Condition (MC), a situation addressed by an Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I) memorandum issued in August 2000. The ASDC3I memorandum allows that disqualification may not be required in cases where Applicant has surrendered the passport. While that has not occurred here, Applicant's foreign passport expired three years ago and she does not know where it is. For all intents and purposes, she no longer possesses a foreign passport. Given that she has used her U.S. passport for all foreign travel since 1991, and in light of the overwhelming weight of her American interests as compared to her German interests, it might seem unlikely she would renew her foreign passport. However, Applicant does not wish to renounce her German citizenship. An expressed willingness to renounce could be viewed as mitigation of possible foreign preference, but it is not something the government can require as a condition of getting a clearance. Still, Applicant's position in this regard shows she intends to maintain her status as a dual citizen, which allows her to reacquire her German passport (which is the case with any similarly-placed Applicant). Coupled with her continued reluctance to consider renouncing her German citizenship, the government may reasonably continue to be concerned Applicant may again obtain a foreign passport and use it for overseas travel. Therefore, I conclude Applicant has failed to mitigate the government's concerns about her possession and/or use of a foreign passport. I conclude Guideline C against the Applicant.

Applicant has argued correctly that her dual citizenship status is legal and the United States does not require its citizens to choose between citizenship here and any foreign citizenship they may hold. However, the government has a compelling interest in ensuring those persons who have access to classified information will carry out their fiduciary obligations unfettered by possible preference for the interests of a foreign country over those of the United States. This compelling interest may, at times, trump the legality of an Applicant's actions or status. Questions remain concerning the current status of Applicant's foreign passport and her future intent regarding her foreign citizenship, and those questions create doubts about Applicant's suitability to hold a clearance. Any such doubts must be resolved in favor of the national interest.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Foreign Preference (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: For the Applicant

Subparagraph 1.e: For the Applicant

Paragraph 2, Foreign Influence (Guideline B): FOR THE APPLICANT

Subparagraph 2.a: For the Applicant

Subparagraph 2.b: For the Applicant

Subparagraph 2.c: 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 the Applicant.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Tr., p. 25 - 28.
3. Tr., p. 67.
4. GE 2.
5. Tr., p. 67.
6. GE 1; GE 2; Tr., p. 46.
7. GE 2.
8. Tr., p. 49.
9. Directive, Enclosure 2.
10. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
11. *See Egan*, 484 U.S. at 528, 531.
12. *See Egan*; Directive E2.2.2.

13. Directive, E2.A2.1.1.

14. 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;

15. 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;

16. E2.A2.1.3.3. Contact and correspondence with foreign citizens are casual and infrequent;

17. Directive, E2.A3.1.1.

18. E2.A3.1.2.1. The exercise of dual citizenship;

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

20. E2.A3.1.2.6. Using foreign citizenship to protect financial or business interests in another country;