

DATE: October 6, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-08947

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was born in Lithuania in 1934. His family's property was confiscated first by the Soviets in 1940 and then by the Germans in 1941. He and his family were sent to a concentration camp because they are Jews. Applicant applied for, and now possesses, a Lithuanian passport obtained solely for the purpose of perfecting his claim for his family's property in Lithuania. Absent official approval of the U.S. Government, an applicant who possesses a foreign passport may not be granted a security clearance. Clearance is denied. I recommend the U.S. Government approve Applicant's use of his Lithuanian passport for the sole purpose of perfecting his claim for his family's property.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 11 April 2003, DOHA issued a Statement of Reasons (SOR), under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ detailing the basis for its decision-failure to meet the foreign preference (Guideline C) personnel security guideline of the Directive. Applicant answered the SOR in writing on 23 April 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 25 July 2003. On 11 September 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript (Tr.) of the proceeding on 22 September 2003.

FINDINGS OF FACT

Applicant was born in Kaunas, Lithuania, in November 1934. Ex. 1 at 1; Tr. 11. Lithuania was an independent nation between the two World Wars, but was annexed by the Soviet Union in 1940. *CIA Factbook*, <http://www.cia.gov/cia/factbook/geos/1h.html#Intro> (last updated Oct. 2, 2003).

The Soviets confiscated all private properties, including that owned by Applicant's family. Tr. 16. In 1941, the Germans attacked the Soviet Union and invaded Lithuania. Much of the property seized by the Soviets, except that which

belonged to Jews, was returned by the Germans to the rightful owners. Applicant is a Jew. Applicant and his family were sent to a concentration camp. Tr. 16. Less than 10 percent of those confined in the camp survived. The camp guards were Lithuanians, and they did most of the killing in the camp. Applicant was liberated by the Soviet Army in 1945. Tr. 17.

Applicant immigrated to the U.S. in 1950. In 1955, he enlisted in the U.S. Army. He became a naturalized U.S. citizen in 1958. Tr. 10-11. He served in the Army for 40 years, 32 of which were in the Special Forces. He began as a private (E-1) and retired as a major general (O-8). Tr. 17; Ex. D. Applicant's military decorations include two Silver Stars, three Bronze Stars, and two Purple Hearts. Tr. 18.

On 11 March 1990, Lithuania declared its independence from the Soviet Union, but this proclamation was not generally recognized until September of 1991. *CIA Factbook*. In 1997, the Lithuanian legislature passed a law granting Lithuanians dispossessed of real property by previous governments of that country to have their property restored. In order to file such a claim, the individual must be able to prove his Lithuanian citizenship with a Lithuanian passport. Ex. D at 1, 2.

Concerned about the ramifications of acquiring a foreign passport, Applicant had an Army judge advocate inquire with the State Department area officer for Lithuania as to the appropriateness of Applicant obtaining a Lithuanian passport to pursue his claim. The judge advocate was informed by the State Department that "there is no problem obtaining a Lithuanian passport for this purpose, and that it is not viewed in any way shape or form as an attempt to renounce U.S. citizenship or endanger [Applicant's] retirement." Ex. B at 3. Applicant applied for a Lithuanian passport, and one was issued to him in 1998. It expires in 2008. Applicant used his Lithuanian passport to formalize his claim for restoration of his family's property. Tr. 11-12. The property is real estate worth "some place short of a million dollars." Tr. 13. Applicant has asked to be compensated the monetary value of the property rather than have the title to the property restored to him. *Id.*

Applicant has not used the passport for any purpose other than to file the property claim with the Lithuanian Government. Tr. 12, 19. He has not traveled to Lithuania and does intend to do so unless required to do so to perfect his claim. He plans to keep the Lithuanian passport only so long as it takes to resolve his claim. Tr. 12, 14. Applicant has no other assets or financial holdings in Lithuania and is not seeking any other benefits. Tr. 14.

Applicant is married to a U.S. citizen by birth. He has four children, all of whom were U.S. citizens by birth. Two of his four daughters served in the U.S. military, as did all four of his sons-in-law. At the time of the hearing, one son-in-law was serving in combat.

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* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).*

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An 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.

CONCLUSIONS

In the SOR, DOHA alleged under Guideline C that Applicant was a dual citizen of the U.S. and Lithuania (¶ 1.a.) and possessed a valid passport from the Republic of Lithuania (¶ 1.b.). Under Guideline C, when an applicant acts in such a way as to indicate a preference for a foreign country over the U.S., he may be prone to provide information or make decisions that are harmful to the interests of the U.S. Directive ¶ E2.A3.1.1.

The Government established by substantial evidence that Applicant exercised his dual citizenship by possessing a foreign passport and using it to perfect his claim for restoration of his family's property in Lithuania (DC 1; DC 2). It also appears that he is using his foreign citizenship to protect his financial interests in Lithuania. DC 6. Although these interests are not minimal-being somewhere in the neighborhood of \$1 million-his claim to property is somewhat speculative. It is not clear his claim will be approved or in what amount. *Cf.* ISCR Case No. 97-0403 at 3 (App. Bd. May 13, 1998) (holding "Applicant does not have a financial stake in country A merely because he may (or may not) inherit unknown real or personal property at some time in the future from his parents who currently reside in country A."). Nevertheless, it would be difficult to conclude that an applicant with a pending claim in a foreign country approaching \$1 million is not potentially vulnerable to making decisions that are harmful to the U.S. to insure maximizing his chances of collecting on the claim.

On the other hand, Applicant's Lithuanian citizenship is based solely on his birth there (MC 1), and he has expressed a willingness to give up his passport, and citizenship, when his claim is resolved (MC 4). It is a mitigating condition under the foreign preference security guideline if an applicant's conduct is sanctioned by the United States. MC 3. Although the State Department area officer expressed his opinion that there would be no problem in obtaining a Lithuanian passport to assert a property claim, I am unable to conclude that such an opinion represents official approval of the U.S. Government. MC 3 does not apply.

After carefully reviewing all of the evidence in this case, I am convinced Applicant's possession of a foreign passport to perfect a claim for his family's property in Lithuania does not represent an unreasonable security concern. Applicant has no allegiance to or preference for Lithuania. He refuses to travel there unless it is necessary to perfect his claim. It is clear that he has not forgotten what Lithuanian citizens did to him, his family, and other Jews. Applicant's allegiance to the U.S. is incontrovertible.

Despite my favorable conclusions in this case, I am not at liberty to grant Applicant a clearance. An applicant who possesses or uses a foreign passport may only be granted a security clearance if his possession or use is officially approved by the U.S. Government. Memo. from Arthur L. Money, Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, *Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guidance* (Aug. 16, 2000). Finding is against Applicant. Nevertheless, I recommend the U.S. Government approve Applicant's use his Lithuanian passport for the sole purpose of perfecting his claim for his family's property.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline C: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

DECISION

In light of all of 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.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.