

DATE: October 29, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09085

DECISION OF ADMINISTRATIVE JUDGE

RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Peregin Lawrence Mele, Applicant's Personal Representative

SYNOPSIS

The Applicant is not now a dual national, but he fully intends to become one. He intends to return to the country of his birth, live there a year to satisfy its residency requirements, and thereby become a dual national. Although his brothers, sisters, and brother-in-law are not agents of, nor are in a position to be exploited by, a foreign power, Applicant's stated intention demonstrates a preference for a foreign country; and as such, his employer's request for a clearance on his behalf is denied. Clearance is denied.

STATEMENT OF THE CASE

On May 10, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the 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 and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on June 17, 2002.

The case was received by the undersigned on August 21, 2002. A notice of hearing was issued on September 9, 2002, and the case was heard on October 9, 2002. The Government submitted documentary evidence, and called one witness to testify. Testimony was taken from the Applicant. The transcript was received on October 16, 2002. The issues raised here are whether the Applicant's foreign preference and perceived foreign influence militates against the granting of a security clearance.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 67 years of age, has two years of college, and is employed by a defense contractor who seeks a security

clearance on behalf of the Applicant.

Guideline C - Foreign Preference

1.a. and 1.g. The Applicant was born in Country A, immigrated to the United States in 1967, and became a U.S. citizen in 1974 (Transcript (TR) at page 21 line 15 to page 22 line 10, Government Exhibit (GX) 2 at page 1, and GX 3 at page 1). Prior to immigrating to the U.S., the Applicant served in the Armed Forces of the country of his birth (TR at page 23 lines 14~23). Military service "was obligatory" (*id*). In a sworn statement, executed by the Applicant on July 12, 2001, the Applicant expressed an intention to become a dual national by reacquiring the citizenship of Country A (GX 3 at pages 1~2). At his hearing he reaffirmed his intention to establish dual citizenship with the country of his birth (TR at page 27 line 9 to page 28 line 8, at page 38 lines 1~11, and at page 48 line 24 to page 49 line 8). This would require the Applicant to return to Country A and establish residency requirements by living there for one year (*id*).

1.b.~1.f. The Applicant owns two properties in Country A, valued at about \$170,000 (TR at page 24 lines 2~16, and at page 31 lines 12~22). His current net worth in the U.S. is about \$1,500,000 (TR at page 31 line 23 to page 32 line 24). He pays real-estate taxes of about \$600 each year on the Country A properties (TR at page 33 lines 7~14). He does not presently own a motor vehicle in Country A, but intends to register an automobile, worth about \$15,000, in his name, once he obtains Country A citizenship (TR at page 26 line 17 to page 27 line 8, and at page 49 line 18 to page 50 line 2). He receives a retirement pension of \$120 each month from Country A, and about \$1,100 each month in social security payments from the U.S. (TR at page 30 lines 13~19, at page 33 lines 15~19, at page 39 line 22 to page 40 line 9, and at page 42 line 17 to page 44 line 4). He uses the proceeds from his Country A pension to pay his Country A property taxes (TR at page 33 lines 7~14).

Guideline B - Foreign Influence

2.a.~2.c. The Applicant's two sisters and two brother are citizens of and reside in Country A (TR at page 22 lines 14~19, at page 32 lines 6~9, at page 29 lines 6~17 and 22~25, and at page 51 line 11 to page 52 line 13). They are all retired, have no connection to Country A's government, and are not in a position to be exploited by Country A (*id*). The Applicant's brother-in-law is employed by Country A as an agricultural inspector, but is not in a position to coerce or exploit the Applicant (TR at page 29 lines 18~21, at page 34 line 22 to page 35 line 2, and at page 52 line 14 to page 53 line 2).

Mitigation

The country of the Applicant's birth is a long-term ally of the U.S.

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. The conditions should be followed in every case according to the pertinent criterion, however, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

Foreign Preference

Conditions that could raise a security concern:

3. Military service . . . for a foreign country;
4. Accepting . . . benefits, such as retirement . . . from a foreign country;
9. . . . acting, so as to serve the interests of another government in preference to interests of the United States.

Condition that could mitigate security concerns:

2. Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship;

Foreign Influence

Conditions that could raise a security concern:

1. An immediate family member . . . is a citizen of . . . a foreign country;
3. Relatives . . . who are connected with any foreign government;
8. A substantial financial interest in a country

Conditions that could mitigate security concerns:

1. A determination that the immediate family members, (. . . brothers, sisters) . . . are not agents of a foreign power or in position to be exploited by a foreign power
5. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

As set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent, and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future.

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must make out a case under Guideline C (foreign preference) and Guideline B (foreign influence), which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's

adverse conduct and her ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct or situation, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

An individual who demonstrates a foreign preference, or who is subject to a foreign influence, may be prone to provide information or make decisions that are harmful to the interests of the United States. The Government must be able to

place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places.

CONCLUSIONS

Although the Applicant is not presently a dual citizen of Country A and of the United States, he has expressed an unequivocal intention to become one. Despite being appraised of the *Money Memo* ("Guide to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudication Guidelines," dated September 1, 2000) (GX 1), the Applicant has no intention to change his stated intention. Thus, he now seeks to also pledge allegiance to another country. This shows a clear preference for Country A over the interests of the United States; and as such, he can not expect to be intrusted with a security clearance from the United States. Guideline C must be found against the Applicant.

As to his foreign relatives who reside outside of the United States, the Applicant has demonstrated that his immediate family members "are not agents of a foreign power or [not] in a position to be exploited by a foreign power," as required by the first mitigating condition under Foreign Influence. In addition, I conclude that it would be unlikely that the Applicant would even consider any such attempt at exploitation. As to his financial interests in Country A, I also find them to be of little consequence when compared with his substantial financial interests in the U.S. Therefore, Guideline B is found for the Applicant.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his foreign preference. The Applicant has thus not met the mitigating conditions of Guideline C, and of Section E.2.2. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guideline C.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: AGAINST THE APPLICANT

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. For the Applicant.
- e. Against the Applicant.
- f. For the Applicant.

Paragraph 2: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

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

Richard A. Cefola
Administrative Judge