

DATE: August 18, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 02-12733

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a 61-year-old President/CEO of his company. He retains U.K. citizenship based on his birth there. He came to the U.S. in 1980 and became a U.S. citizen in 1990. He possesses a U.K. passport, renewed in 1998, six years after obtaining a U.S. passport. He has used the U.K. passport, for his convenience, in preference to the U.S. passport, in entering the U.K. and France. Although aware of DoD policy prohibiting the granting of a security clearance to anyone still in possession of a foreign passport, he has not surrendered his. His financial interests are minimal compared to his assets in the U.S. He makes a strong case that he would not be influenced by his brothers in the U.K. to act improperly as to classified information. Mitigation was shown as to Guideline B, but not as to Guideline C. Clearance is denied.

**STATEMENT OF THE CASE**

On November 15, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On December 5, 2002, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made on the written record by a DOHA Administrative Judge. The FORM was issued on February 7, 2003. Applicant was informed that any response had to be submitted within 30 days of his receipt of the FORM. He received the FORM on March 24, 2003, and any response was due by April 24, 2003, but none was received. The matter was assigned to me on May 1, 2003.

## FINDINGS OF FACT

Applicant is a 61-year-old company President and CEO. The SOR contains seven allegations, 1.a. - 1.g., under Guideline C (Foreign Preference), and two allegations, 2.a. and 2.b., under Guideline B (Foreign Influence). In his response to the SOR, Applicant admits all SOR allegations, with explanations. The 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:

### Guideline C (Foreign Preference)

- 1.a. - Applicant exercises dual citizenship with the United Kingdom (U.K.);
- 1.b. - Applicant possesses a valid U.K. passport, which expires on April 4, 2008;
- 1.c. - Applicant renewed his U.K. passport on April 4, 1998, after he had become a U.S. citizen on June 20, 1990;
- 1.d. - Applicant maintains a checking and savings account with Bank A in the U.K.
- 1.e. - Applicant earned a pension from his former employment in the U.K. His monthly pension is deposited into his account at Bank in the U.K.
- 1.f. - Applicant owns 200,000 shares of stock in telephone company B, which was a U.K. company, but which has been U.S. owned since 2001;
- 1.g. - Applicant travels to the U.K. on business, but less than when the company was U.K. owned.

### Guideline B (Foreign Influence)

- 2.a. - Applicant has two brothers who reside in the U.K. and are citizens of the U.K.;
- 2.b. - Applicant's children are citizens of the U.K. They reside in the U.S., and are in the process of becoming U.S. citizens.

## POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

### GUIDELINE C (Foreign Preference)

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

1. The exercise of dual citizenship;
2. Possession and/or use of a foreign passport;
3. Accepting . . . retirement benefits . . . from a foreign country.

Conditions that may mitigate security concerns include:

1. Dual citizenship is based solely on parents' citizenship or birth in a foreign country;
4. Individual has expressed a willingness to renounce dual citizenship.

### GUIDELINE B (Foreign Influence)

Condition that could raise a security concern and may be disqualifying:

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.

Condition that could mitigate security concerns include:

1. A determination that the immediate family member(s), cohabitant, or associate(s) in question would not constitute an unacceptable security risk.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns 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 conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

### CONCLUSIONS

Applicant was born in the United Kingdom in 1941. He graduated with an engineering from a U.K. university in 1964. He emigrated to the U.S. and began working for his present employer in 1980. He is now "President and CEO" of the company (GX 5). He became a U.S. citizen in 1990 and obtained a U.S. passport in April 1992.

In his response to Item 3 on his September 27, 1991 Security Clearance Application (SF 86), Applicant states that he is a dual citizen of the U.S. and U.K. (GX 5). In his March 5, 2002 Sworn Statement (GX 4), Applicant's discussion on this point is not clear. He says that he is "not a dual citizen," but he subsequently adds that he is "willing to renounce my foreign citizenship and relinquish my foreign passport" (GX 4). In his December 5, 2002 response to the SOR, Applicant "admit[s]" his dual citizenship, states that he is "not clear as to what defines Dual Citizenship," and adds that he has "never formally relinquished my British citizenship, but would be willing to do so" (GX 3).

SOR 1.a., 1.b., and 1.c. - For the purposes of this decision, I conclude that Applicant is a dual citizen of the U.S. and

U.K. and that he has exercised his U.K. citizenship by renewing his U.K. passport in 1998, after he had become a U.S. citizen in 1990. He also exercised the U.K. citizenship by using the U.K. passport for travel to the U.K. and to France, because use of the U.K. was "a lot more convenient." As of the closing of the record in the present case, Applicant retains the valid U.K. passport, although he is willing to surrender it (GX 3).

SOR 1.d. and 1.e. - Continuation of the U.K. bank account is a "convenience" to accept the pension payments, amount not stated, that he receives as a result of working 39 years in the U.K. before he emigrated to the U.S. He could have the payments sent to a U.S. bank account, but has not yet done so.

SOR 1.f. and 1.g. - The 200,000 shares in telephone company A owned by Applicant came about because telephone company A originally controlled Applicant's present company, <sup>(1)</sup> now separate and U.S. owned, for which he has worked for 39 years. He is willing to sell the shares if told it is a matter of security significance. The stock is "fully reported to the IRS" (GX 3). The parent company was originally U.K. owned but is now a U.S. corporation, requiring less travel by Applicant to the U.K.

As to SOR 1.d to SOR 1.g., the value of Applicant's assets in the United States far outweighs any pension he receives from the U.K. based on employment that ended more than two decades ago. Based on the totality of the evidence, I conclude that these factors are not significant enough to be of current security significance.

#### Guideline B (Foreign Influence)

SOR 2.a. - Applicant's two brothers in the U.K. are in their 60s, retired and pro-American (GX 3).

SOR 2.b. - Applicant's children, 36 and 38, respectively, have lived most of their lives in State A and are currently in the process of becoming U.S. citizens. The two children have produced three grandchildren, who are native-born Americans (GX 3).

This 61-year-old Applicant lived in the U.K. for the first 39 years of his life (GX 4), which means he moved to the United States in about 1980, and has thus lived and worked here for about 23 years. He applied for a security clearance, apparently for the first time, in 2001. The concerns expressed in the SOR, all of which he has admitted, are based entirely on foreign preference and foreign influence issues. Since the SOR was issued in November 2002, Applicant has been aware of the Government's specific concerns for many months, but has taken no action to ameliorate those concerns.

At the end of Applicant's response to the SOR, he expresses his pride at the privilege of being an American and views himself as "totally committed to protect the USA." He also "understand[s] and respect[s] the need for caution in these matters" (GX 3). While Applicant's commitment to the U.S. is not an issue, the concerns caused by his exercise of dual citizenship and possession of a foreign passport, remain of security significance because they have not been adequately mitigated.

#### *Possible Mitigation*

Foreign Preference - Disqualifying Conditions (DC) 1 (the exercise of dual citizenship) and 2 (possession and/or use of a foreign passport) certainly apply, as does DC 4 (accepting retirement benefits). DC 8 (substantial financial interest in a foreign owned or foreign operated was originally applicable, but that is no longer the case since the company is now totally U.S. owned. (GX 3 at 1.g.). Mitigating Condition (MC) 1 is applicable because of Applicant's birth in the U.K. to parents who were U.K. citizens, as is MC 4 (individual has expressed a willingness to renounce dual citizenship). The mitigating conditions are weakened, however, by Applicant's periodic renewal of his U.K. passport.

Foreign Influence - Disqualifying Condition 1 is applicable (his brothers in the U.K.). However, I find that MC 1 is also applicable, considering Applicant's age, position, and accomplishments in the U.S. While the language in Disqualifying Condition (DC) 1 indicates that the presence of close family in a foreign country is of concern, that concern can be mitigated by evidence that the risk of pressure being applied does not make the risk unacceptable, *and* that the applicant is not likely to feel "forced to choose between loyalty to the persons involved and the United States." In addition, Applicant's statement at the conclusion of his reply to the SOR indicates his intent to place U.S. interests above that of

the U.K. or any other foreign country. That statement also indicates his commitment to U.S. interests is paramount over any perceived family obligations, makes it unlikely that he would feel forced to choose between his brothers in the U.K. and his obligations to American security interests. The fact that the U.K. is traditionally recognized as perhaps America's strongest ally is also considered a positive factor. I find in favor of applicant as to Guideline B.

In summary, after considering all of the evidence, my remaining concern relates to Applicant's continuing exercise of U.K. citizenship, which though recognized as legal, nonetheless in context has security significance. And even more important, Applicant's explanations about his use of the U.K. amount to a matter of convenience, which the DOHA Appeal Board has concluded is not a valid excuse. Applicant had a choice and he preferred the path of least resistance in getting through immigration and customs in the U. K. and France in less time than if he had used his U.S. passport. The government's concern is that use of foreign passports allows U.S. citizens to travel wherever they want without any stamp or other indication on their U.S. passport. Applicant's lack of action in surrendering his U.K. passport and, to a slightly lesser degree, in not renouncing his U.K. citizenship after indicating his willingness to do both, prevents a conclusion being reached that the disqualifying concerns have been mitigated by demonstrated evidence in mitigation.

There is an even more fundamental problem with Applicant's case. Since this matter was decided without a hearing, I am necessarily limited to the evidence in the case file, which means I must act on the premise that Applicant retains a valid foreign passport. He therefore falls with the restrictions cited in the August 16, 2000 Memorandum from Arthur Money, Assistant Secretary of Defense (Money Memorandum) (GX 6). This document is binding of DOHA Administrative Judges and requires that "any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." Since there is no evidence that Applicant falls within either exception, I am required to conclude that he is not eligible to obtain a security clearance. [\(2\)](#)

### **FORMAL FINDINGS**

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

Guideline C (Foreign Preference) 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

Subparagraph 1.f. For the Applicant

Subparagraph 1.g. For the Applicant

Guideline B (Foreign Influence) For the Applicant

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. 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 Applicant.

**BARRY M. SAX**

**ADMINISTRATIVE JUDGE**

1. The market price for this stock has ranged from \$14 to \$22 per share since last year. Based on these figures, Applicant's 200,000 shares are worth somewhere between \$2.8 million and \$4.4. million.
2. The Money Memorandum, as Government Exhibit 6, was furnished to Applicant as part of the FORM received on March 24, 2003. Given Applicant's level of education and experience, and the lack of any explanation, I conclude that he was aware of what the Memorandum requires.