

DATE: January 13, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-19383

## **DECISION OF ADMINISTRATIVE JUDGE**

**PAUL J. MASON**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Catherine Engstrom, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Though Applicant has six close family members who are resident citizens of a foreign power, there are no foreign influence concerns as these family members are neither agents of a foreign power nor in a position to be exploited by a foreign power in a way that could force Applicant to choose between his family member(s) and the United States (U.S.). Applicant's acquisition of the deed for 2.5 acres of Polish farmland from his parents does not have adverse security significance under the foreign influence guideline. However, in view of Applicant's exercise of his Polish citizenship in May 1996 (after obtaining his U.S. citizenship in April 1992) to acquire 2.5 acres of Polish farmland, coupled with his declination to renounce his dual citizenship and the lack of

supporting evidence to prove he surrendered his Polish passport, Applicant has not met his ultimate burden of persuasion under the foreign preference guideline. Clearance is denied.

### **STATEMENT OF CASE**

On June 3, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued an SOR to the Applicant which detailed 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 Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. On June 27, 2003, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

The case was assigned to me on September 7, 2003. On September 10, 2003, this case was set for hearing on October 15, 2003. The Government submitted two exhibits and Applicant submitted one exhibit. Testimony was taken from Applicant. The transcript was received on November 6, 2003.

### **RULINGS ON PROCEDURE**

Government exhibits shall be referred to as (GE) while Applicant's exhibits shall be marked as (AE). References to the transcript shall be referred to as (Tr.) followed by the page number.

In my review of the evidence in this case, I have taken official notice of the Polish Consular Information Sheet (October 24, 2003).

### **FINDINGS OF FACT**

The SOR alleges foreign influence (Guideline B) and foreign preference (Guideline C). Applicant's admissions to the factual allegations shall be incorporated in the following findings of fact:

Applicant is 45 years old and employed as a senior microwave engineer. He seeks a secret clearance. Applicant has been working for his current employer since February 2002.

**Foreign Influence.** When Applicant was 22 years old in 1979, he came to the U.S. and began college. (Tr. 30) He was married in 1984. His wife was born in Poland in December 1957, and became a naturalized U.S. citizen in September 1990. Applicant's wife is currently an artist with her studio at the home she occupies with Applicant.

In June 1988, Applicant graduated from a U.S. technical university with a bachelor of science degree in electrical engineering, then he began his career. He received his U.S. citizenship in April 1992. In April 1996, he renewed his Polish passport so he could acquire some land from his parents in anticipation of inheritance. His Polish passport was scheduled to expire in April 2006.

Applicant's mother is 67 years old, and his father is 69 years old. They are resident citizens of Poland . The 2.5 acres of land they transferred to Applicant has been in the family through inheritance for generations.

Applicant's two sisters have been working for banks the last five or six years. Applicant's 42-year-old brother works for a Polish company that manufactures material for the construction industry. (Tr. 20)

Applicant's mother-in-law is 78 years old; she was employed as a tailor before she retired.

Applicant acquired 2.5 acres of land in May 1996 from his parents. The parcel is income producing farmland that currently grows vegetables and feed for the horses Applicant's father owns. There is no building on the property. (Tr. 36)

**Foreign Preference.** As noted above, in approximately May 1996, Applicant acquired 2.5 acres of farmland from his parents. In order to perfect his receipt of the land, he was advised by a Polish attorney to renew his Polish passport so that he could establish Polish citizenship. Once Applicant renewed his passport, he sent a copy of the renewed passport to Poland, and authorized his brother to receive the land in Applicant's behalf. (Tr. 33-38) Applicant never used his Polish passport to travel in Europe.

On May 30, 2002, Applicant provided a sworn statement. In explaining what he had to do to receive the inheritance of 2.5 acres from his parents, he was uncertain if he had to maintain Polish citizenship to keep the acquired land.

Applicant never had to serve in the Polish military or perform any type of service in lieu of a military obligation. Applicant was not registered with Polish embassy to obtain benefits. Applicant never voted in a Polish elections nor held foreign office. Applicant considers his son's acceptance to a U.S. military academy as the best evidence of Applicant's allegiance to the U.S.

Applicant explained his beliefs about his Polish citizenship in his sworn statement:

My loyalties are with the U.S. But at this present date and time, I would not be willing to renounce my Polish citizenship nor have I taken any steps to do so. I am not willing to do so because this is where my heritage and family come from. Poland is not a threat to the U.S., but a friendly United Nations member. I do not see the need for my having

to renounce my Polish citizenship. (GE 2)

At the conclusion of his sworn statement, Applicant said he would relinquish his passport instead.

At the hearing, after analogizing his heritage to that of a former U.S. national security advisor, Applicant reiterated his beliefs about his Polish citizenship by stating; "and my feeling is that I should not have to renounce Polish citizenship to prove my allegiances here." (Tr. 43)

At the hearing, Applicant claimed that about two or three weeks after the February 2002 sworn statement, he sent his passport to the Polish embassy either by certified mail return receipt requested or by registered mail (Tr. 26), however, he lost the proof-of-mail receipt. In addition, Applicant claimed he also sent an electronic mail (e-mail) in July or August 2002 to the embassy requesting confirmation they had received his Polish passport. Applicant was given 15 days to November 12, 2003 to send me documentation in support of his claims. No documentation was received.

**Character Evidence.** Mr. X has known Applicant for 22 years professionally and personally. Mr. X has watched Applicant progress from technician to principal engineer as a result of hard work and diligent application of his scholastic achievements. Applicant, according to Mr. X, is a tremendous asset in his technological field.

## POLICIES

Enclosure 2 of the Directive sets forth disqualifying conditions (DC) and mitigating conditions (MC) that must be given binding consideration in making security clearance determinations. These conditions must be considered in every case according to the pertinent guideline; however, the conditions are in no way 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 case presents its own unique facts and circumstances, it should not be assumed that the conditions exhaust the entire realm of human experience or that the conditions apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Conditions most pertinent to evaluation of the facts in this case are:

### Foreign Influence (Guideline B)

#### Disqualifying Conditions (DC):

1. An immediate family member, or a person to whom the individual has close bonds of affection or obligation, is a citizen of, or resident or present in, a foreign country;
2. Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse influence or duress exists;
3. Relatives, cohabitants, or associates who are connected with any foreign government.

#### Mitigating Conditions (DC):

1. A determination that the 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 US.
3. Contact and correspondence with foreign citizens are casual and infrequent;

### Foreign Preference (Guideline C)

#### Disqualifying Conditions (DC):

1. The exercise of dual citizenship;

## 2. Possession and/use of a foreign passport;

Also applicable in determining whether foreign preference exists is the Memorandum of August 16, 2000, entitled "Guidance to DoD 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." The memorandum guidance indicates that:

possession and/or use of a foreign passport may be a disqualifying condition. It contains no mitigating factor related to the applicant's convenience, safety, requirements of foreign law, or the identity of the foreign country. The only applicable mitigating factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying the guideline are that the possession and use of a foreign passport in reference to a U.S. passport raises doubt as to whether the person's allegiance to the U.S. is paramount and it could also facilitate foreign travel unverifiable by the U.S. Therefore, consistent application of the guideline 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 U.S. Government;

## 6. Using foreign citizenship to protect financial or business interests in another country.

### Mitigating Conditions (MC):

1. Dual citizenship is based solely on parents' citizenship or birth in a foreign country;
2. Indicators of possible foreign preference occurred before obtaining U.S. citizenship;
3. Activity is sanctioned by the U.S.;
4. Individual has expressed a willingness to renounce dual citizenship.

### **General Policy Factors (Whole Person Concept)**

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at pages 16 and 17 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 behavioral changes; (7) the motivation for the conduct; and, (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

### **Burden of Proof**

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge 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 establish a *prima facie* case under foreign influence (Guideline B) by proving controverted facts. Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation that is sufficient to overcome the Government's *prima facie* case and demonstrates Applicant presently qualifies for a security clearance.

### **CONCLUSIONS**

Under the foreign influence guideline, 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 U.S. or may be subject to coercion or duress. Financial interests in other countries are also relevant to security determinations if the interests make an individual potentially vulnerable to coercion, exploitation, or pressure. Applicant resides with his spouse, a dual citizen of Poland and the U.S. Because Applicant's spouse, mother, father, mother-in-law, brother, and two sisters are citizens of Poland, DC 1 (an immediate family member, or a person to whom the individual has close ties of affection or obligations, is a citizen of, or resident or present in, a foreign country) must be considered. Regarding Applicant's wife, who is also a dual citizen of Poland and the U.S., DC 2 (sharing living quarters with a person or persons, regardless of citizenship status, if the potential for adverse foreign influence exists) should also be weighed against the facts and circumstances. However, since there is no evidence in the record to infer or suggest his wife's sharing living quarters poses a potential for adverse foreign influence, DC 2 shall be eliminated from consideration even though the mother of Applicant's wife is a resident citizen of Poland.

The foreign influence concerns raised under DC 1 of the guideline may be mitigated by MC 1 by a determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters) cohabitant, or associate(s) in question are 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 U.S. The facts reflect none of Applicant's close family members are associated with the Polish government. Applicant's mother and father do not appear to be in a position to be exploited as they are retired farmers as Applicant's grandparents were. Applicant's mother-in-law is a retired tailor. Both Applicant's sisters have been employed by banks for the past six years. Having weighed the past and present status of each of Applicant's family members, there is insufficient evidence to find any of the members in a position to be exploited by a foreign power in a way that could force Applicant to choose between the family member and the U.S. Accordingly, Applicant has removed the foreign influence concerns raised by his immediate family members. Applicant's acquisition of 2.5 acres, though income producing, does not qualify as a substantial interest in a foreign country that could make him vulnerable to foreign influence.

**Foreign Preference.** The foreign preference guideline is based on actions by an individual that indicate a preference for a foreign country over the U.S. The Government's case under the foreign preference guideline is based on Applicant's dual citizenship (DC 1), his renewal of his Polish passport (DC 2) in May 1996, and using his foreign citizenship to ensure or perfect his inheritance of a financial interest in Poland (DC 3). Applicant came to the U.S. in 1979, received his technical education degree in June 1988, and obtained his U.S. citizenship in April 1992. However, in May 1996 Applicant renewed his Polish passport so that he could establish Polish citizenship in order to inherit land from his parents. Applicant's active exercise of foreign citizenship puts Applicant in a position of being subject to the duties and obligations of two different countries. Applicant's actions in renewing his Polish passport to perfect his foreign inheritance raises security concerns under DC 1, DC 2 and DC 3.

Foreign preference concerns are mitigated if the dual citizenship was based solely on the parents' citizenship or Applicant's birth in a foreign country (MC 1), the indicators of possible foreign preference occurred before obtaining U.S. citizenship (MC 2), the activity is sanctioned by the U.S. (MC 3) or the individual has expressed a willingness to renounce dual citizenship (MC 4). MC 1 applies because Applicant's dual citizenship resulted from his parents' actions and not his own. However, MC 1 is not dispositive of Applicant's ultimate burden of persuasion in this case because he renewed his Polish passport in May 1996. By renewing his foreign passport after obtaining his

U.S. citizenship, Applicant demonstrated a preference for Poland over the U.S. even though he did not physically use the passport.

Applicant claims he surrendered his passport two or three weeks after his interview with the investigator in February 2002, and received proof he had executed the surrender. Furthermore, Applicant stated he submitted an e-mail to the Polish embassy to remind Polish officials to send him documentation they had received his passport. Applicant was allowed fifteen days to submit documentation to support his claim but none was received. Since there is no evidence Applicant ever had official approval from the U.S. government to possess his Polish passport, Applicant bears a heavy burden to show he surrendered his foreign passport. Applicant's unsupported testimony of having surrendered his passport falls short of overcoming DC 2.

MC 4 of the foreign preference guideline recognizes a willingness to renounce dual citizenship can overcome countervailing evidence foreign preference. Choosing not to abandon dual citizenship as Applicant has done, is clearly a lawful position since the U.S. does not require its citizens to choose between U.S. and foreign citizenship. However, in the area of safeguarding classified information, the government has a compelling interest to ensure security clearance holders will execute their duties and responsibilities free of possible preference for the interests of a foreign country over the U.S. Residual doubts remain about the status of Applicant's Polish passport based on his actions in renewing his Polish passport in May 1996 so that he could reestablish his Polish citizenship to qualify for his anticipated inheritance. These doubts are compounded by the failure of Applicant to offer independent evidence to substantiate the claimed surrender of his passport in February 2002. Applicant's evidence in mitigation does not satisfactorily rebut the Government's case under the foreign preference guideline. In finding against Applicant under the foreign influence and foreign preference guidelines, I have also considered the general policy factors of the whole person concept.

### **FORMAL FINDINGS**

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (foreign influence, Guideline B): FOR THE APPLICANT.

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.
- f. For the Applicant.
- g. For the Applicant.
- h. For the Applicant.

Paragraph 2 (foreign preference, Guideline C): AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against 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.

Paul J. Mason

Administrative Judge