

DATE: June 27, 2003

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21662

**DECISION OF ADMINISTRATIVE JUDGE**

**RICHARD A. CEFOLA**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The Applicant is not a dual citizen; but according to the laws of Germany, she is deemed to be a German national. As a German national, she has a right to a German passport. The Applicant has had a German passport since 1985. Its most recent rendition expired at the end of May 2003, but can be renewed. Although a U.S. citizen, the Applicant has traveled, using her German passport, on numerous occasions. She has chosen not to surrender her German passport. The Applicant's 67 year old retired German uncle, her 15 year old dual national daughter, and her two dual national step-children are not a foreign influence vis-avis the Applicant. Her retention of a German passport, however, demonstrates a foreign preference. Clearance is denied.

**STATEMENT OF THE CASE**

On February 14, 2003, 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 or about March 12, 2003.

The case was received by the undersigned on April 11, 2003. A notice of hearing was originally issued on April 15, 2003, but due to the granting of a requested continuance by the Applicant, the case was not heard until June 10, 2003. The Government submitted documentary evidence. Testimony was also taken from the Applicant, who called one witness to testify on her behalf. The transcript was received on June 24, 2003. The issues raised here are whether the Applicant's foreign preference and perceived foreign influence militates against the granting of a security clearance. [The Applicant admits the factual basis of all of the allegations, except for 1.a. as she denies she is a German citizen.]

**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 40 years of age, has a bachelor's degree, and is employed by a defense contractor who seeks a security clearance on behalf of the Applicant. 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.~1.c. The Applicant was born in the United States to German citizens (Transcript (TR) at page 17 lines 3~10). Although she is not considered to be a German "citizen" by Germany, she is considered to be a German "national" (TR at page 18 line 19 to page 21 line 21, and at page 42 line 20 to page 43 line 7). As a German national, the Applicant obtained a German passport in 1985, and its most recent rendition expired in May 31, 2003 (TR at page 18 line 19 to page 21 line 21, at page 23 lines 15~25, at page 24 lines 15~21, at page 26 line 3 to page 27 line 13, at page 36 lines 8~19, and Government Exhibit (GX) 3). Although it is now expired, it can be renewed (TR at page 49 lines 3~12). Given the opportunity, the Applicant has decided not to surrender her expired German passport (TR at page 42 line 20 to page 44 line 2).

### Guideline B - Foreign Influence

2.a.~2.c. The Applicant's 67 year old retired uncle is a citizen of and resides in Germany (TR at page 34 lines 9~21, at page 35 lines 7~19, and at page 44 lines 3~15). He was employed in the field of electronics by a private firm (*id*). The Applicant's daughter and two step-daughters reside in the U.S., but are also dual citizens with Austria (TR at page 29 line 16 to page 30 line 21, at page 32 line 7 to page 33 line 20, at page 44 line 16 to page 45 line 11, and at page 45 lines 12~21). Her daughter is a 15 year old high school student (*id*). One of the Applicant's step-daughters works in "Pharmaceutical Sales," while the other is "a bartender" (*ibid*). In the past, the Applicant worked for a German airlines; and as such, used her German passport to travel on numerous occasions (TR at page 24 lines 15~21, and at page 36 lines 20~24). Two reasons why she would choose not to surrender her German passport would be to visit her uncle in Germany, or to visit her daughter, if her daughter were to live with the Applicant's ex-spouse in Austria (TR at page 29 line 16 to page 30 line 21, and at page 35 line 16 to page 36 line 11).

### Mitigation

The Applicant's supervisor testified most favorably on her behalf (TR at page 54 line 16 to page 59 line 23). She also has offered an impressive packet of 30 letters of recommendation for her superiors, co-workers and from her friends (Applicant's Exhibit (AppX) A). All are most supportive of the Applicant's request for a security clearance.

## **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

#### Condition that could raise a security concern:

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

#### Conditions that could mitigate security concerns:

None

## Foreign Influence

### Condition that could raise a security concern:

1. An immediate family member . . . is a citizen of . . . a foreign country;

### Condition that could mitigate security concerns:

1. A determination that the immediate family member(s) . . . 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 or the United States;

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 dual citizen, she is a German national with all the rights and privileges that being a national entails. One of the privileges is the use of a German passport, a privilege she has taken advantage of on numerous occasions. Although her current German passport has expired, it can be renewed. 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 2), she chooses not to surrender her German passport. This demonstrates a clear foreign preference; and as such, Guideline C is found against the Applicant.

As to her elderly uncle who is a citizen of German and her daughters who are dual citizens of the U.S. and Austria, the Applicant has demonstrated that they are not agents of a foreign power, or in a position to be exploited by a foreign power. Thus the first mitigating condition under Foreign Influence is applicable here; and as such, Guideline B is found for the Applicant.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding her foreign preference. The Applicant has thus not met the mitigating conditions of Guideline C, and of Section E.2.2. of the Directive. Accordingly, she has not met her 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.

#### **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