

KEYWORD: Foreign Preference

DIGEST: Applicant, born in England, applied for an English passport after he became a United States citizen. Applicant has fulfilled the requirements of the Memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence, dated August 16, 2000, (Money Memorandum) by returning his English passport to the English Government. None of Applicant's family members, who are citizens of and reside in England, are in a position to be exploited in a way that could force Applicant to choose between loyalty to these family members and his loyalty to the United States. Mitigation has been shown. Clearance is granted.

CASE NO: 02-25472.h1

DATE: 05/25/2004

DATE: May 25, 2004

In Re:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-25472

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Edward W. Loughren, Department Counsel

FOR APPLICANT

Anthony Ruggieri, Esq.

SYNOPSIS

Applicant, born in England, applied for an English passport after he became a United States citizen. Applicant has fulfilled the requirements of the Memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence, dated August 16, 2000, (Money Memorandum) by returning his English passport to the English Government. None of Applicant's family members, who are citizens of and reside in England, are in a position to be exploited in a way that could force Applicant to choose between loyalty to these family members and his loyalty to the United States. Mitigation has been shown. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated July 14, 2003, 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 the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, or denied. The SOR was based on foreign preference (guideline C) related to his exercise of dual citizenship with the United States and England and foreign influence (guideline B) concerns because of the foreign residency and/or citizenship of close family members.

Applicant filed a notarized response dated August 2, 2003, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On February 2, 2004, the case was assigned to me to conduct a hearing, and pursuant to formal notice dated February 14, 2004, a hearing was held on March 17, 2004.

At the hearing, Department Counsel offered four documentary exhibits (Government Exhibits 1- 4) and no witnesses were called. Applicant, through counsel, offered three documentary exhibits (Exhibits A-C) and offered his own testimony. The transcript (TR) was received on March 31, 2004.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of the Directive. The SOR contains three allegations, 1.a., through 1.c., under Guideline C and five allegations, 2.a. through 2.e., under Guideline B. Applicant admitted SOR allegations 1.b., 1.c., 2.a., and 2.d. Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 59 years old. He is employed as an engineering manager by a United States defense contractor that wants him to have a security clearance. He has been employed by this company since 1982.

Applicant was born in England. He came to the United States on a two year work visa. Three months later, his wife and four children arrived in the United States. He became a United States citizen in 1990.

Paragraph 1 (Guideline C - Foreign Preference). The Government alleges in this paragraph that Applicant is ineligible for clearance because he has acted in such a way as to indicate a preference for another country over the United States.

Despite the fact that Applicant obtained a United States passport after he became a U.S. citizen, he renewed his English passport in May of 2000. He testified that he did this with the idea that it might be beneficial to use this passport in the event of a hijacking (Tr at 17). With the exception of one occasion, where he inadvertently entered the wrong line at an airport, he never used his English passport after he became a United States citizen. In 2004, when he became aware of the requirements under the Money memorandum, he returned his English to the British consulate General (Exhibits B and C).

Applicant testified that it was his belief that when he became a United States citizen in 1990, he renounced his English citizenship (Tr at 29). It is now his understanding that the British government does not revoke British citizenship, even when an individual becomes a citizen of another country, but if he could revoke his British citizenship he testified that

he would (Tr at 37, 38).

Paragraph 2 (Guideline B - Foreign Influence). The Government alleges in this paragraph that Applicant is ineligible for clearance because he has immediate family members or people to whom he may be bound by affection or obligation who are not citizens of the United States, or may be subject to duress.

Applicant's wife and two sons, aged 28 and 30, are British citizens who have resided in the United States since 1979. None of the three has made the effort to become U. S. Citizens, although, both sons are married to and have children who are U.S. citizens. His two daughters, ages 31 and 38, are dual citizens of England and the United States. Both of them have served in the United States Air Force.

Applicant's sister lives in England and is an English citizen . He communicates with her regularly. He also has three aunts and two sisters-in-law, who live in England and are English citizens (Tr at 39-41). None of these family members belong to, participate in, or are active with any government agency of England.

Applicant received an inheritance from his father's estate. He made two transfers of \$125, 000 and \$58,000 to a United States bank , and he virtually closed out that account (Tr at 24, Exhibit A). He estimates his financial holdings in this country to be worth approximately three hundred thousand dollars (Tr at 32, 33).

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2.

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse

information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. See Directive 5220.6, Enclosure 2, Section E2.2.4.

The following guidelines and concerns are relevant to this case:

Guideline B Foreign Preference

E2.A3.1.1. The Concern: When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

Guideline B Foreign Influence

E2.A2.1.1. The Concern: 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 United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation or pressure.

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern 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 criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of those who testified, I conclude the following with respect to guidelines C and B:

Guideline C is based on actions taken by an individual that indicate a preference for a foreign country over the United States. Applicant's renewal of a British passport after becoming a United States citizen raises some foreign preference (guideline C) concerns. Disqualifying condition (DC) E2.A3.1.2.1., the exercise of dual citizenship applies. I rule that DC E2.A3.1.2.2, the possession a foreign passport, also applies. However, Applicant never was aware of the restriction of renewing a passport of a country other than the United States. When he became aware of the requirements under the Money Memorandum, he returned his British passport to the British Consulate General. It is also significant that with the exception of one inadvertent usage, he only used his United States passport after becoming a U. S. Citizen

Applicant testified that he was willing to renounce his British passport. Mitigating Condition (MC) E2.A3.1.3.4, an expressed willingness to renounce dual citizenship, applies.

Under Guideline B, a security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he is bound by affection, influence or obligation, are not citizens of the United States or may be subject to duress. The evidence of immediate family members, who are citizens of England and some who also reside in England, comes within DC E2.A2.1.2.1.

Based on the nature of the overall record and the totality of the evidence, including the lack of government involvement of Applicant's family members and Applicant's extremely strong attachment to his family in the United States, and his significant financial interests here, I have determined that his family members, here or in England, do not constitute an unacceptable security risk and come within MC E2.A2.1.3.1., a determination that the immediate family member(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 United States.

After considering all of the evidence of record on this issue, I conclude that the mitigating evidence substantially outweighs the evidence supporting the SOR and even in the unlikely event pressure was exerted upon Applicant to compromise classified information, he would reject it, and would report the incident to the proper authorities.

FORMAL FINDINGS

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

Paragraph 1. Guideline C: FOR THE APPLICANT

Subparagraph 1. a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Paragraph 2. Guideline B: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

Subparagraph 2.c.: For the Applicant

Subparagraph 2.d.: For the Applicant

Subparagraph 2.e.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Martin H. Mogul
Administrative Judge