

KEYWORD: Foreign Preference

DIGEST: Applicant, a 30-year-old dual citizen of Germany and the U.S., was born in Germany. Her mother is a German-born naturalized U.S. citizen, and her father is a German-born German citizen. She was raised, educated, and employed in Germany. She accepted, possessed, and repeatedly used her German passport, even to enter the U.S. on two occasions, rather than use her U.S. passport. Applicant's actions in refusing to surrender her German passport, even after being furnished with copies of the ASD/C³I memorandum, mandates denial of her application for a security clearance, unless she obtains official approval for its use from the appropriate agency of the U.S. Government, something she has not done. Clearance is denied.

CASENO: 03-19524.h1

DATE: 03/24/2005

DATE: March 24, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-19524

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 30-year-old dual citizen of Germany and the U.S., was born in Germany. Her mother is a German-born naturalized U.S. citizen, and her father is a German-born German citizen. She was raised, educated, and employed in Germany. She accepted, possessed, and repeatedly used her German passport, even to enter the U.S. on two occasions, rather than use her U.S. passport. Applicant's actions in refusing to surrender her German passport, even after being furnished with copies of the ASD/C³I memorandum, mandates denial of her application for a security clearance, unless she obtains official approval for its use from the appropriate agency of the U.S. Government, something she has not done. Clearance is denied.

STATEMENT OF THE CASE

On March 30, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR 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, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn, written statement, dated April 20, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have her case decided on the written record in lieu of a hearing. Department Counsel submitted the government's written case on January 6, 2005.⁽¹⁾ A complete copy of the file of relevant material (FORM)⁽²⁾ was provided to Applicant, and she was afforded an opportunity to file objections and submit material in refutation,

extenuation, or mitigation. Any such submission was to be received no later than 30 days from the date of receipt of the FORM. Applicant received the FORM on January 11, 2005. Accordingly, any submission was to be made no later than February 10, 2005. (3) Applicant chose to make no submission. The case was assigned to me on arch 18, 2005.

FINDINGS OF FACT

Applicant has admitted all of the factual allegations pertaining to foreign preference under Guideline C (subparagraphs 1.a. through 1.d.). Those 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 same, I make the following additional findings of fact:

Applicant is a 30-year-old employee of a defense contractor, currently serving as an administrative specialist, and she is seeking to obtain a SECRET security clearance.

Applicant was born in 1975 in the Federal Republic of Germany (Germany)--a NATO ally of the U.S. Her mother is a German-born naturalized U.S. citizen, having been naturalized in September 1967, (4) and her father is a German national. (5) Both parents have been employees serving the U.S. Army in Germany, without any break in service, since 1974. (6) Applicant, a dual citizen of Germany and the U.S., (7) was raised, educated, and employed in Germany. (8)

The U.S. Government issued Applicant a U.S. passport in November 1994. (9) The German Government issued Applicant a German passport in January 1999. (10) The German passport expired in January 2004. (11) Applicant used her German passport on two occasions, in May 2001 and October 2001, to enter the U.S. (12) During an interview conducted by a contract investigator for the Defense Investigative Service (DIS) in November 2002, Applicant stated she "would have to have a very good reason to give up [her] German citizenship." (13) She stated the same regarding giving up her German passport. (14) As the German passport was set to expire in 2004, it is not known if it was renewed, and neither party has specifically addressed the issue.

Several members of the U.S. Army who have known her and her family for a number of years have supported her application for a security clearance and characterized her in glowing terms.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E.2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

GUIDELINE C - FOREIGN PREFERENCE: 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the Conclusions section below.

On August 16, 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD/C³I) issued a passport policy "clarification" pertaining to Adjudicative Guideline C--foreign preference. ⁽¹⁵⁾ A photocopy of the memorandum was furnished to Applicant on several occasions. The memorandum states, in pertinent part:

The purpose of this memorandum is to clarify the application of Guideline C to cases involving an applicant's possession or use of a foreign passport. The guideline specifically provides that "possession and/or use of a foreign passport" may be a disqualifying condition. It contains no mitigating factor related to the applicant's personal 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 this guideline are that the possession and use of a foreign passport in preference to a U.S. passport raises doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. ***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 United States Government.*** Modification of the Guideline is not required. (Emphasis supplied)

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security," ⁽¹⁶⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of credibility, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

The government has established its case under Guideline C. Applicant has been portrayed as a dual citizen of the U.S. and Germany who has acted in such a way as to indicate a preference for a foreign country, in this instance, Germany, over the United States, and in so doing, she may be prone to provide information or make decisions harmful to the interests of the United States. In support of its contentions, the government has cited Applicant's acceptance, possession, and repeated use of a German passport, and her failure and refusal to surrender that passport. Applicant's actions clearly fall within Foreign Preference Disqualifying Condition (FP DC) E2.A3.1.2.1. (*the exercise of dual citizenship*), and FP DC E2.A3.1.2.2. (*possession and/or use of a foreign passport*).

Also applicable are Foreign Preference Mitigating Condition (FP MC) E2.A3.1.3.1. (*dual citizenship is based solely on parents' citizenship or birth in a foreign country*). However, specifically not applicable is FP MC E2.A3.1.3.4. (*individual has expressed a willingness to renounce dual citizenship*).

The ASD/C³I memo states there are no mitigating factors "related to an applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country," a phrase which I construe to relate solely to the use of a foreign passport, and not to mere possession of same. On the other hand, the memo requires a 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." While there may be lingering skepticism as to this policy "clarification;" or the mandated disinterest in the identity of the foreign country involved, even a country now largely aligned with the United States in democratic principles and political policies such as Germany, it is inescapable that the policy, as "clarified" by ASD/C³I and interpreted by the Appeal Board, must be complied with.

Applicant's actions in refusing to surrender her German passport unless there was a very good reason to do so, even after being furnished with copies of the ASD/C³I memorandum, mandates denial of her application for a security clearance unless she obtains official approval for its use from the appropriate agency of the U.S. Government. She has furnished no evidence that the use of the German passport was "authorized" or that she has surrendered it. Consequently, I conclude Applicant has failed to mitigate or overcome the government's case. Accordingly, allegations 1.a. through 1.d. of the SOR are concluded against Applicant.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1., Guideline C: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: 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. Clearance is denied.

Robert Robinson Gales

Chief Administrative Judge

1. The FORM is erroneously dated January 6, 2004, rather than 2005. The letter of transmittal clearly indicates the correct date to be January 6, 2005.
2. The government submitted seven items in support of its contentions.
3. The Memorandum of Assignment of this case to me erroneously identified November 4, 2004 as the due date.
4. Item 4 (Security Clearance Application, dated January 22, 2002), at 3.
5. *Id.*
6. Item 6 (Responses to Interrogatories, dated January 6, 2004), at 5.
7. Item 4, *supra* note 4, at 1.
8. *Id.*, at 1-2; Item 6, *supra* note 6, at 5.
9. U.S. passport, attached to Item 6, *supra* note 6, at 2.
10. German passport, attached to Item 6, *supra* note 6, at 2.
11. *Id.* The date "January 21, 2001," as set forth in subparagraph 1.c. of the SOR, is erroneous, and should be reflected as 2004.
12. *Id.*, at 5-6; Item 3 (Response to SOR, dated April 20, 2004).
13. Item 5 (Statement of Subject, dated November 6, 2002), at 1.
14. Item 3, *supra* note 12.
15. Item 7 (ASD/C³I Memorandum from Arthur L. Money, Subject: *Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline*, dated August 16, 2000).
16. Exec. Or. 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)