KEYWORD: Foreign Preference; Foreign Influence

DIGEST: Applicant's repeated use of his Australian passport even after he obtained a United States (U.S.) passport, and his unambiguous desire to maintain his Australian citizenship for economic reasons and to permit his continued membership on the Australian wrestling team, coupled with his efforts to establish dual citizenship for his daughter (born in the U.S.), demonstrates an impermissible foreign preference that has not been mitigated. Applicant has also failed to remove the foreign influence concerns generated by the PRC citizenship of his wife and in-laws. Even Applicant's daughter raises foreign influence concerns as pressure could be place through her to Applicant. Clearance is denied.

CASENO: 03-24425.h1

DATE: 01/26/2006

DATE: January 26, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-24425

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Nichole L. Noel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's repeated use of his Australian passport even after he obtained a United States (U.S.) passport, and his unambiguous desire to maintain his Australian citizenship for economic reasons and to permit his continued membership on the Australian wrestling team, coupled with his efforts to establish dual citizenship for his daughter (born in the U.S.), demonstrates an impermissible foreign preference that has not been mitigated. Applicant has also failed to remove the foreign influence concerns generated by the PRC citizenship of his wife and in-laws. Even Applicant's daughter raises foreign influence concerns as pressure could be place through her to Applicant. Clearance is denied.

STATEMENT OF CASE

On September 7, 2004, 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 a Statement of Reasons (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. Applicant's undated answer was received by DOHA. Applicant requested a hearing before an Administrative Judge.

The case was assigned to me on January 3, 2005. On February 28, 2005, this case was set for hearing on March 17, 2005. The Government submitted two exhibits and requested me to take administrative notice of three exhibits that shall be described in the next paragraph. Testimony was taken from Applicant. The transcript was received on March 25, 2005.

FINDINGS OF FACT

The SOR lists two allegations under the foreign preference guideline and six allegations under foreign influence. Applicant admitted all allegations. Applicant is 32 years old and employed by a defense contractor. He seeks a secret security clearance.

Foreign Preference. According to his security clearance application (SCA), Applicant was born in Australia in 1973 to United States (U.S) citizens. He spent his first eight years in Australia before moving to Canada, then to the U.S. Applicant attended college at a southern university in the U.S. from 1992 to 1998 and received a bachelor's degree in science. From December 1998 to August 1999, Applicant studied the Chinese language in the Peoples Republic of China (PRC) before marrying a citizen of the Peoples Republic of China (PRC) in August 1999. Also in August 1999, Applicant started working for an American company doing business in the PRC. He was employed there until January 2001 when he returned to the U.S., and enrolled in business school in March 2001. In July 2002, Applicant earned a master's in business administration.

In his sworn statement dated August 6, 2003, Applicant explained his views of dual citizenship. While he considers a strong allegiance to the U.S., he wants to be able to work, live and own businesses in Australia. Without Australian citizenship, his ability to do business will be hampered (Tr. 21). As a competitive wrestler who is well known in the Australian wrestling community and wants to continue competing there. Losing his Australian citizenship would make his future participation on the Australian team very remote. To ensure his daughter has the same opportunities he has experienced through dual citizenship, Applicant registered his daughter in 2000 for Australian citizenship at the embassy. In addressing the subject of maintaining his Australian citizenship and possessing a security clearance, Applicant stated:

I would like to remain an Australian citizen and receive my security clearance that I am applying for, however if this option is not available, I would consider the option of renouncing my citizenship. I would also be open to any stipulation about using my Australian passport on travel to and from Australia, or anything else while I have [a] security clearance (GE 2).

At the hearing, Applicant reiterated his position that he did not want to renounce his dual citizenship because of the opportunities open to him and those that will be open for his daughter (Tr. 23) like traveling or living there (GE 2).

Applicant received his Australian passport in 1994 and the U.S. passport in 1996. Before the Australian passport expired, Applicant always used it because he believed as a holder he was expected to use the passport when entering Australia (Tr. 24-25). Applicant stated he regularly traveled to Australia for wrestling activities (GE 1; GE 2).

Applicant owned two restaurants in Australia for about a year. He has never owned property in China. He has no bank account or investments in Australia or China. He does not pay taxes to the Australian government. Applicant's U.S. home is valued at approximately $120,000.00. He currently has about $15,000.00 in his savings account, $5,000.00 in his retirement account, and $1,000.00 in his checking account (Tr. 36). Applicant has never performed military service for Australia nor would he bear arms for Australia.[(1)]

Foreign Influence. Applicant's wife is a citizen of the PRC. She is 31 years old. Applicant's daughter, five years old, was born in the PRC in March 2000, and was registered as an Australian citizen some time later that year. Applicant's parents-in-law are resident citizens of PRC, self-sufficient in retirement, and own their own property (Tr. 31) The SCA indicates that one of his parents-in-law is 61 years old and plans to immigrate to the U.S. Applicant's wife speaks to them about once every two months while Applicant converses with them about once every 6 months. Applicant remembers his parents-in-law with gifts at Christmas.

Applicant's brother-in-law is a citizen resident of the PRC. He is employed in the Chinese government as a member of the Communist Party in the farm bureau. Applicant's brother-in-law is employed in the farm bureau of the Communist Party because he needs the job, not for any political reason according to Applicant. However, if his brother-in-law decided he no longer wanted to work in the party, he would no longer have a job in the farm bureau. Applicant and his wife talk with his brother-in-law about once a year. In May 2004 Applicant visited immediate family and friends for about three weeks. The brother-in-law told Applicant the former no longer believed in goals of the Communist Party. Applicant's sister-in-law is employed in a government-owned factory that is slated to go out of business. She will continue to be employed until all bookkeeping connected to the final closure is completed. Applicant saw his sister-in law in May 2004 during his three-week visit.

During the period Applicant lived in the PRC between July 1998 and January 2001, he initially taught English at a PRC teachers college from July to December 1998. From December 1998 to August 1999, Applicant studied Chinese at a PRC university (Tr. 29). From August 1999 to February 2001, Applicant worked for a American marketing firm doing business in the PRC. Applicant was employed with this company in marketing-related activities such as conducting seminars to match products with buyers (Tr. 30).

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531 "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 481U.S. at 531; *see* Directive E2.2.2.

Foreign Preference

The security concern arises when an individual acts in a way that indicates a preference for a foreign country over the United States (U.S.).

Foreign Influence

The security concern emerges when an individual's immediate family, including cohabitants, and other persons to whom hew or she may be bound by affection, influence, or obligation are not citizens of the U.S. or may be subject to duress. Contacts with citizens of other countries or financial interests in other countries are also relevant in deciding whether theses contacts make the individual potentially vulnerable to coercion, exploitation, or pressure.

CONCLUSIONS

Foreign Preference. Guideline C is based on the actions of an individual that denote a preference for a foreign country over the U.S. Foreign Preference (FP) disqualifying condition (DC) E2.A.3.1.2.1. (*the exercise of dual citizenship*) and FP DC E2A3.1.2.2. (*possession and/use of a foreign passport*) are applicable in these circumstances because of Applicant's misplaced belief that using the Australian passport is what the government of Australia expected him to do when he entered the country. By obtaining an Australian passport in 1994 and using his foreign passport on a regular basis, Applicant has exercised rights and privileges of an Australian citizen. The exercise of dual citizenship puts him in a position of being subject to the duties or obligations owed to two different countries, which could pressure him into making decisions harmful to the U.S.

If the foreign preference concerns are based solely on the parents' citizenship or Applicant's birth in the foreign country, the FP mitigating condition (MC) E2.A3.1.3.1. (*dual citizenship is based solely on parents' citizenship or birth in a foreign country*) applies to alleviate those concerns. Dual citizenship (based on parents' citizenship or an applicant's birth in a foreign country) itself is not *per se* disqualifying. See, ISCR Case No. 99-0454 at 6 (App. Bd. October 17, 2000). Although his dual citizenship emerged with his birth in Australia to U.S. citizens, Applicant continued to enjoy a benefit of his foreign citizenship even after he obtained a U.S. passport in 1996 by continuing to use his foreign passport. Therefore, FP MC E2.A3.1.3.1. does not mitigate the evidence of foreign preference. FP MC E2.A3.1.3.1. (*indicators or foreign preference occurred before obtaining U.S. citizenship*) is also inapplicable as Applicant continued to exercise a benefit of Australian citizenship after he had become a U.S. citizen and obtained his U.S. passport. Turning to FP MC E2.A3.1.3.3. (activity is sanctioned by the U.S.), the only situation an individual may continue to use a foreign passport is when the use is officially approved by the U.S. There is no evidence Applicant has the approval of the U.S. to use his foreign passport. The fact that Applicant's passport expired in October 2004, and Applicant has no plans to renew it carries very little weight in demonstrating Applicant's allegiance to the U.S. Applicant could simply change his mind and renew the passport. oreover, an expired passport is not the equivalent of a surrendered passport, and therefore, carries no probative value to support an applicant's intention to renounce his foreign citizenship. ISCR Case No. 00-0009 at 4 (App. Bd. Sept. 26, 2001).

FP MC E2.A3.1.3.4. (*individual has expressed a willingness to renounce dual citizenship*) is also potentially applicable in deciding whether Applicant's preference is unequivocally for the U.S. The record reflects Applicant possessed a conditional preference for the U.S. in August 2003 when he furnished his sworn statement. His desire to keep his foreign citizenship appears to have become stronger since then, given his testimony that he wants to continue to enjoy the economic, olympic, and familial benefits attendant to Australian citizenship. Accordingly, Applicant has failed to overcome the Government's case under subparagraphs 1.a. and 1.b. of the FP guideline. Though Applicant may not have understood his continued use of a foreign passport could be disqualify his security clearance application, the intensity of his desire to keep his Australian citizenship compels the conclusion his allegiance will remain divided between the two countries. In finding against Applicant under the FP guideline, I have also evaluated the general factors of the whole person concept.

Foreign Influence. A security risk may exist when an individuals immediate family, including cohabitants, and other persons to whom her or she may be bound by affection, influence or obligation are not citizens of the U.S. or may be subject to duress. These situations could create potential for foreign influence that could result in compromise of classified information. Contacts with citizens of other countries are also relevant to security determinations if they make

an individual potentially vulnerable to coercion, exploitation, or pressure. The Government has established a case of foreign influence (FI) because Applicant's wife, parents-in-law, brother-in-law, and sister-in-law are citizens of the PRC. These ties activate FI DC E2.A2.1.2.1. (*an immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country*) and FI DC E2.A2.1.2.2. (*sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence exists*). Applicant's spouse is a citizen of the PRC. The daughter's age makes her a remote target for influence from Australia as the country has been a strong ally since before the second World War. However, she could be used by the PRC as a conduit for influence to reach Applicant. Applicant's brother-in-law is a member of the Communist Party. Applicant's sister-in-law works for a PRC owned factory.

In view of the fact Applicant's immediate family members are citizens of the PRC, Applicant has a heavy burden of demonstrating these family members do not pose a security risk. The PRC is a communist country with a totalitarian government that has conducted unrelenting espionage activities against the U.S. military and commercial interests over many years. FI MC E2.A2.1.3.1. (*a determination that the immediate 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 positions 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.*) may be utilized to determine whether the FI concerns have been removed. Even though Applicant has probably satisfied the first element of FI MC E2.A2.1.3.1., his parents-in-law, his wife, brother-in-law and sister-in-law are in a position where pressure could be applied to and through them to Applicant. Applicant even conceded that if his brother were to quit the party, he would lose his job. Given his brother-in-law's and sister-in-law's relationship to the PRC government, pressure could placed on them or Applicant's wife by coercive or noncoercive methods, e.g., through political or economic means, in an effort to target Applicant.

Applicant maintains his contacts with his wife's immediate family should not be a security concern. FI MC E2.A2.1.3.3. (*Contact an correspondence with foreign citizens are casual and infrequent*) When assessing the scope of family contact between an applicant and his family, it is important to consider the totality of an applicant's family ties in a foreign country, not just each family tie in isolation. ISCR Case No. 01-22693 at 7 App. Bd. Sep. 22, 2003).There is a rebuttable presumption that an applicant also has ties of affection with his wife's family ISCR Case No. 01-03120 at 8 (App. Bd. Feb. 20, 2002) because Applicant's wife could be targeted for influence in an effort to reach Applicant. While his contact with each individual family member may be infrequent, I cannot conclude his contact with them falls within the ambit of FI MC E2.A2.1.3.3. In sum, although Applicant's contacts with his in-laws may be infrequent, the contacts are not casual. There is a risk Applicant's daughter could be targeted by the PRC through one of his in-laws through his daughter to Applicant. Applicant has a substantial burden of demonstrating he is not in a position of vulnerability to FI concerns occasioned by his daughter and wife's in-laws. Applicant's evidence is insufficient to satisfy his burden under FI MC E2.A2.1.3.1., FI MC E2.A2.1.3.3. and the general factors under E.2.2.1. of the Directive. Applicant' residence in the PRC from July 1998 until January 2001 is extenuated by his pursuit of education and employment activities that raise no security concerns.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (Foreign Preference, Guideline C): AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

Paragraph 2 (Foreign Influence, Guideline B): AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

c. Against the Applicant.

d. Against the Applicant.

e. Against the Applicant.

f. 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.

Paul J. Mason

Administrative Judge

1. At the bottom of the first page of GE 2 is the sentence, "I have ran for office in or voted in any type of election while living in Australia." The word "never"appears to be missing from the sentence. Applicant did not address the statement during the hearing. Having carefully examined the present sentence structure, and the meaning of the sentence when the word "never" is added after "have," my commonsense view is that Applicant meant he never ran for office or voted in an election. Weighing and balancing this interpretation with the sentence before and the sentence after, then with the entire paragraph, I am confident Applicant's intent was to convey the positions that he had never run for office and never voted in an Australian election.