

DATE: April 16, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33659

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Esquire , Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 29-year-old engineering assistant was born in Poland to Polish parents, but has been a naturalized U.S. citizen since 2000, while retaining both his Polish citizenship and passport. His use of the Polish passport precludes a finding that he has an unequivocal preference for the U.S. and his failure to demonstrate his surrender of the Polish passport makes him ineligible to hold a DoD security clearance, pursuant to the Money Memorandum. Mitigation has not been adequately established. Clearance is denied.

STATEMENT OF THE CASE

On September 18, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On October 14, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the written record, i.e., without a hearing. Department Counsel issued a File of Relevant Material (FORM) on January 27, 2004. The Form instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. Any response was due by March 18, 2004, but no submission to the FORM has been received. The matter was assigned to me for resolution on March 25, 2004.

FINDINGS OF FACT

Applicant is a 29-year-old engineering assistant for a defense contractor. He was born in Poland to Polish parents and became a naturalized American in 2000. He has not demonstrated his renunciation of his Polish citizenship or the surrender of his Polish passport, thus coming within the restrictive language of the oney Memorandum. In addition, his conduct does not show an unequivocal preference for the U.S. The September 18, 2003 SOR contains two allegations under Guideline C (Foreign Preference), 1.a. and 1.b., and two allegations under Guideline B (Foreign Influence), 2.a. and 2.b. In his October 14, 2003 response to the SOR, Applicant denies (with an explanation) allegation 1.a. and admits allegations 1.b., 2.a., and 2.b. The admitted allegations are accepted and incorporated herein as Findings of Fact.

After considering the totality of the evidence derived from the FORM and its attachments, including Applicant's response to the SOR, I make the following additional FINDINGS OF FACT as to the status, past and present, of each SOR allegation:

Guideline C (Foreign Preference)

1.a. - In a signed sworn statement to the Defense Security Service (DSS) on August 13, 2003, Applicant stated that he intended to renew his Polish passport, which had expired on June 2, 2003, even though he has been a naturalized U.S. citizen since September 14, 2000 and has possessed a valid U.S. passport since September 28, 2001. His rationale is that his U.S. employer may send him to their plant in Poland to work for a period in excess of three months, which he believes could be done only if he had a Polish passport (Item 2 at page 2). He is willing to renounce his Polish citizenship and is not planning to renew his Polish passport after it expired in June 2003.

1.b. - Applicant owns a condominium in Poland and has no plans to sell it. It was given to him by his mother. No one lives there and there is no financial income from it.

Guideline B (Foreign Influence)

2.a. - Applicant traveled to Poland in 1999, 2000, and 2002. His purpose was to visit his mother, who now lives in the U.S., so he has no plans to travel to Poland in the future (Item 5). Since becoming a U.S. citizen in 2000, he has used his U.S. passport to enter Poland, but, on the advice of Polish authorities he used his Polish passport to leave Poland.

2.b. - Applicant's parents and sister are citizens of Poland, currently residing in the U.S. They all now hold U.S. Green Cards as legal resident aliens (Item 5). Even when they resided in Poland, there had never been any attempts to use them to improperly influence Applicant

Applicant was born in Poland in 1974 to Polish parents. When he was a child, his parents obtained a Polish passport for him so he could travel abroad. He came to the U.S. in 1994 and became a naturalized U.S. citizen in 2000 (Item 5). His only current tie to Poland appears to be the condominium given him by his mother. His statement that: "I have no plans to sell" the condominium has not been further explained. The fact that the property is not income producing suggests that whatever Applicant's reason may be, it is not to protect some financial or other significant interest in Poland.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant

in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors,

individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed

that the factors cited above 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 financial judgment and conduct. Because Applicant chose to have this matter decided without a hearing and without submitting any additional information in response to the FORM, all credibility determinations and findings of fact are necessarily based entirely on the contents of the FORM and applicant's response.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of

whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that 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, here based solely on the written record.

In the defense industry, the security of classified information is entrusted to civilian workers

who must be counted on to safeguard classified information and material twenty-four hours a day.

The Government is therefore appropriately concerned where available information indicates that an

applicant for a security clearance, in his or her private life or connected to work, may be involved

in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately

or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government

of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either

by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns 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 conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the

Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended,

at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

Since this matter is being decided without a hearing, my evaluation is necessarily limited to the contents of the various documents that are found in the case file, the latest of which is Applicant's response to the FORM. Applicant is a man of 42, born in 1961. He first received a DoD Secret-level security clearance in 1989, at age 28 (Item 4 at 31). The Government's concerns about Applicant fall into three areas: (1) Foreign Preference and (2) Foreign Influence. I have carefully considered Applicant's submissions. As to SOR 1.a., in his August 18, 2003 sworn statement to DSS, Applicant states he did intend to renew his Polish passport that had expired on June 2, 2003. In other words, at the time he made the August statement he no longer possessed a valid Polish passport, but knew that he could obtain a new passport.

In Applicant's October 2003 response to the SOR, he states that he may need to continue possessing and using a valid Polish passport for employment reasons. So, while the state of the record does not show that Applicant currently possesses a valid Polish passport, neither does it show to the contrary. The state of the record is thus that Applicant *did* possess a valid Polish passport and may or may not have one at present. Under DoD's security clearance program, once it is established that Applicant did possess a valid Polish passport, any doubts about its present status must be construed against an Applicant, if only because he has not carried the burden of demonstrating a favorable status and resolution of the issue. On this basis, I must conclude that Applicant still retains his Polish citizenship and a valid Polish passport or, at least, the ability to quickly obtain a valid new one. Consequently, Applicant has not demonstrated an unequivocal preference for the United States. Under the totality of the record, specifically Applicant's varied statements and conduct, (1) the Money Memorandum is applicable in that Applicant has not shown he has surrendered the Polish passport and (2) he clearly has not demonstrated an unequivocal preference for the United States.

Guideline B (Foreign Influence) - Disqualifying Condition (DC) 1 (immediate family member(s) who is a citizen of a foreign country) is applicable, but so is itigating Condition (MC) 1 (determination that the immediate family member would not constitute an unacceptable risk) - since they are all now legal resident aliens in the United States.

Guideline C (Foreign Preference) - DC 1 (exercise of foreign citizenship) and 2 (possession and/or use of a foreign passport) are applicable. MC 1 is applicable in that Applicant's Polish citizenship is based on his birth there, but he has exercised that citizenship to obtain renewals of his Polish passport. Under the oney Memorandum, his failure to demonstrate he has surrendered his Polish passport precludes any finding of mitigation of this guideline.

FORMAL FINDINGS

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

Guideline B (Foreign Influence) For the Applicant

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

Guideline C (Foreign Preference) Against the Applicant

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. 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.

BARRY M. SAX

Administrative Judge