

DATE: February 26, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-00566

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN G. METZ, JR.**

**APPEARANCES**

**FOR GOVERNMENT**

Nygina T. Mills, Esquire, Department Counsel

**FOR APPLICANT**

William R. Hardy, Jr., Personal Representative

**SYNOPSIS**

Applicant's possession and use of a foreign passport after becoming a U.S. citizen demonstrated a foreign preference and was not mitigated where Applicant had neither surrendered the passport or obtained formal approval for its use. She intends to retain the passport and her foreign citizenship because of the employment attendant thereto. Given Applicant's demonstrated preference for her foreign citizenship and her residence there, her foreign relatives by both blood and marriage leave her potentially vulnerable to foreign influence. Clearance denied.

**STATEMENT OF THE CASE**

On 21 July 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding <sup>(1)</sup> that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant's undated response answered the SOR and requested an administrative decision on the record. On 24 November 2003, Applicant responded to the File of Relevant Material (FORM)--issued 20 October 2003. The record closed on 14 January 2004, the date Department Counsel indicated no objection to the response. The case was assigned to me on 22 January 2004.

**RULINGS ON PROCEDURE**

In the FORM, Department Counsel moved to delete subparagraph 1.a. (alleging Applicant's dual citizenship) and renumber it as subparagraph 2.b.--under Guideline C. I grant the motion.

**FINDINGS OF FACT**

Applicant admitted the allegations of the SOR, except for subparagraph 1.c. which she clarified by stating that the listed relatives live in Germany; accordingly I incorporate those admissions as findings of fact.

Applicant--a 33-year-old employee of a defense contractor--seeks access to classified information. She has not

previously held a clearance.

Applicant was born in the U.S. in 1970. From her father--a German national who immigrated to the U.S. in 1969--she derived German citizenship. She appears to have exercised no aspect of her dual citizenship until she relocated to Germany.

Applicant was raised in the U.S., but later relocated to Germany. The record is unclear when or why she first moved to Germany, but her clearance application reflects that she has lived at the same address in Germany since July 1995. However, she has been employed in Germany since at least March 1995, working in a garden center until May 2001 when she went to work for her current employer. The application also suggests that she may have resided in Germany since at least Fall 1990. [\(2\)](#)

According to her clearance application, Applicant married a German national in September 1998, although they separated in April 2001. [\(3\)](#) However, she obtained a German passport in October 1998, valid until October 2008. She acknowledged her dual citizenship on her clearance application and she has stated that she asserted her German citizenship as a matter of convenience, to skirt the strict German requirements for foreign nationals seeking work permits in Germany. She is unwilling to surrender her German passport or renounce her German citizenship because of the difficulties in remaining in Germany otherwise. She has not obtained U.S. Government approval for possession or use of her German passport.

The German national that Applicant married was from a family that has known Applicant's family since the grandparent's generation was in elementary school. In addition to her husband, Applicant's in-laws are German citizens residing in Germany and she has two aunts, an uncle, and a cousin who are German citizens residing in Germany.

The record contains no character references or information on Applicant's work performance.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

### **FOREIGN PREFERENCE (GUIDELINE C)**

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.

E2.A3.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A3.1.2.1. The exercise of dual citizenship:

E2.A3.1.2.2. Possession and/or use of a foreign passport;

E2.A3.1.2.5. Residence in a foreign country to meet citizenship requirements;

E2.A3.1.2.6. Using foreign citizenship to protect financial or business interests in another country;

E2.A.1.3. Conditions that could mitigate security concerns include:

None.

### FOREIGN INFLUENCE (GUIDELINE B)

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 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.

E2.A2.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A2.1.2.1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident in, a foreign country;

E2.A2.1.3. Conditions that could mitigate security concerns include:

None.

On 16 August 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD, C<sup>3</sup>I) issued a memorandum<sup>(4)</sup> to clarify the application of Guideline C, Foreign Preference, to cases involving possession and/or use of a foreign passport. In pertinent part, the ASD, C<sup>3</sup>I memorandum **"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."**(Emphasis added).

### Burden of Proof

Initially, the Government must prove controverted facts alleged in the SOR. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation, or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where 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 or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the 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."

### CONCLUSIONS

Although Applicant was born a U.S. citizen, she derived German citizenship from her father. Her passive foreign citizenship possesses little security significance if based solely on derivation from her father. For Applicant's conduct to fall within the security concerns of Guideline C, Foreign Preference, she must have acted in a way to indicate a preference for a foreign nation over the United States. However, inimical intent or detrimental impact on the interests of the United States is not required before the Government can seek to deny access under Guideline C. The Government has a compelling interest in ensuring those entrusted with this Nation's secrets will make decisions free of concerns for the foreign country of which they may also be a citizen. Under this assessment, I conclude the Government has established its case under Guideline C and Applicant has not mitigated the security concern.

While Applicant claims to prefer her U.S. citizenship, her conduct suggests otherwise. Although her reasons for

relocating to Germany are not clear, it is clear she was employed on the economy before being hired to work for her current employer. Certainly, by 1998 she had asserted her claim to German citizenship to obtain a German passport. She is unwilling to surrender her passport or to renounce her German citizenship. Her reasons of convenience boil down to her legitimate interest in being able to remain employed in Germany.

The ASD, C<sup>3</sup>I Memorandum resolves the foreign preference issue. The Money Memo states that Applicant's past possession and use of her foreign passport can be mitigated only if she surrenders the foreign passport or obtains U.S. Government approval for its use. Applicant has undertaken neither action and does not intend to do so. Applicant's suggestion by that the Money Memo is not legally binding on me is contrary both to the plain language of the memo and prior Appeal Board rulings on this issue.<sup>(5)</sup> Because Applicant meets neither of the mitigating factors under the Money Memo, additional analysis of the remaining mitigating conditions (MC) for foreign preference is unnecessary.

While Applicant has a legal right to maintain her dual citizenship with its attendant benefits and responsibilities--and indeed her maintenance of dual citizenship may be quite prudent given the realities of modern society--she has not demonstrated that she can be counted on to always act in preference to the United States. I resolve Guideline C against Applicant.

Similarly, Appellant may be subject to foreign influence because she has relatives to whom she is clearly bound by ties of affection living in Germany as well. Given Applicant's demonstrated preference for her foreign citizenship and her residence in Germany, her foreign relatives by both blood and marriage leave her potentially vulnerable to foreign influence. I resolve Guideline B against Applicant.

### **FORMAL FINDINGS**

Paragraph 1. Guideline B: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Paragraph 2. Guideline C: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph 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.

**John G. Metz, Jr.**

**Administrative Judge**

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated 2 January 1992--amended by Change 3 dated 16 February 1996 and by Change 4 dated 20 April 1999 (Directive).

2. Under the education question, Applicant reported her last education after high school as a two-month certificate

course taken in Germany between August and October 1990.

3. However, there is a discrepancy between the clearance application and Applicant's Answer, where she states that she and her husband separated "after 10 years."

4. The so-called "Money Memo" because it was signed by Arthur L. Money.

5. In similar fashion, the Applicant's argument that NATO SOFA provisions provide a basis for me to grant Applicant's clearance is simply wrong. First, there is nothing in the NATO SOFA that permits me to ignore binding security adjudication guidelines. Second, it may be true that all the employees of Applicant's company fall outside the NATO SOFA definitions of which civilian component employees may be accorded "member of the force" benefits--largely because Applicant's company does not perform the kind of highly technical work required to otherwise qualify for such treatment. Nevertheless, this fact is irrelevant to an assessment of Applicant's eligibility for a clearance. Finally, Applicant could never have qualified as a member of the civilian component (even if the company had such status) for the simple reason that at the time she was hired, she was already a German national and had been "ordinarily resident" in Germany for some time, two specific bars to her being accorded member of the force status.