DATE: September 28, 2005

In Re:

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

Applicant for Security Clearance

ISCR Case No. 03-04615

DECISION OF ADMINISTRATIVE JUDGE

JOHN GRATTAN METZ, JR.

APPEARANCES

FOR GOVERNMENT

Sabrina Elaine Redd, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's possession, use, and renewal 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 nor obtained formal approval for its use. However, the record did not support allegations that Applicant falsified his clearance application. Clearance denied.

STATEMENT OF THE CASE

Applicant challenges the 21 July 2004 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of foreign preference and personal conduct.[(1)] Applicant answered the SOR on 30 July 2004 and requested a hearing. DOHA assigned the case to me 19 November 2004 and I convened a hearing on 24 January 2005. DOHA received the transcript 2 February 2005.

FINDINGS OF FACT

Applicant admitted the SOR allegations under Guideline C. He also admitted the falsification allegations under Guideline E, but denied any intent to mislead the government. Accordingly I incorporate those admissions as findings of fact.

Applicant--a 49-year-old consultant for a defense contractor--seeks access to classified information. He has not previously held a clearance.

Applicant was born in Egypt in 1955, deriving Lebanese citizenship from his parents, who later moved back to Lebanon. He immigrated to the U.S. in 1973 to pursue his education and escape the escalating violence in Lebanon. He became a naturalized U.S. citizen in February 1984. He obtained his first U.S. passport in 1984 and renewed it in 1994. He considers himself a U.S. citizen and pledges allegiance to the U.S.

In 1993, Applicant had his expired Lebanese passport revalidated at the Lebanese Embassy in order to travel to Lebanon, in violation of the travel ban imposed by the U.S. Department of State in 1987. When Applicant arrived in Lebanon, Lebanese officials advised him that his passport had not been properly revalidated by the embassy and he was issued a new passport. Applicant was not sure of the expiration date of the new passport (GE 2, Tr. 82), but provided documentation that suggests that it was valid for either one or five years (AE D). In his November 2002 sworn statement (GE 2) he stated that it might be valid until 2003. He also stated that he did not intend to renew the passport and would be willing to surrender it, except that his ex-wife has had it in her possession since February 2001. The travel ban to Lebanon was lifted in 1994 (AE C), replaced by a travel advisory that continues in effect.

During the mid-to-late 1990s, Applicant traveled extensively to the United Kingdom (U.K.) and other countries in Europe on company projects. Initially, he was working out of his company office in the U.S. and traveled to Europe at company expense, including airfare and reimbursement for travel expenses. In 1998, the company assigned Applicant to its U.K. office as a cost-saving measure. The company would not be paying to have Applicant travel from the U.S., would not be paying travel expenses for Applicant while he was in the U.K., and would only be paying for his business travel from the U.K. to other locations in Europe. However, Applicant's salary would continue to be paid in dollars, but would become taxable by the U.K. government.[(2)] To ameliorate this, the company entered into a "tax equilization" agreement whereby the company would make Applicant whole for any additional income taxes occasioned by his residing in the U.K. (AE A, B). Applicant resided in the U.K. from approximately March 1998 to July 1999. Some of this time he resided in hotels or housing leased in the company's name. He also resided in an apartment leased in his name for about six months. He derived no tangible benefits from his residence in the U.K. Any tangible benefits accrued to his company.

When Applicant completed his clearance application in August 2002, he did not disclose his residence in the U.K. or his renewed Lebanese passport in 1993. However, he did disclose his foreign birth, dual citizenship with Lebanon, and extensive foreign travel. He did not disclose his residence in the U.K. because he considered himself--consistent with the tax agreement he had with his company--a resident in the U.S. He did not disclose his foreign passport because he did not have possession of it and believed it might have expired before the seven-year window asked for in the clearance application.

Applicant has stated a willingness to renounce his Lebanese citizenship (GE 1, 2), but has experienced difficulty doing so because he is unable to produce his Lebanese passport as proof of his Lebanese citizenship (GE 2). Relying on advice given to him by a DOHA security specialist, he sent an 8 June 2004 letter to the Embassy of Lebanon "renouncing my Lebanese citizenship for the purpose of employment on projects for the U.S. government." (GE 3). Although he insisted he was not trying to renounce his Lebanese citizenship solely to obtain his clearance, he made conflicting statements on this point (Tr. 74-77).

Applicant's character reference considers him an honest and trustworthy individual, and also confirmed Applicant's description of his regular business travel to Europe in the 1990s.

POLICIES

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline C (Foreign Preference) and Guideline E (Personal Conduct).

On 16 August 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD, C^3I) issued a memorandum[(3)] 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^3I 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

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.[(4)]

CONCLUSIONS

The government established its Guideline C case by demonstrating that Applicant renewed and used a Lebanese passport in 1993 to travel to Lebanon in violation of the State Department travel ban then in effect for U.S. citizens. This conduct implicates disqualifying conditions (DC) 1 and 2.[(5)]

Applicant meets only one of the mitigating conditions (MC) for foreign preference. MC 4 applies because Applicant has expressed a willingness to renounce his foreign citizenship. The fact that he cannot do so without first proving his Lebanese citizenship does not stop Applicant from receiving the benefit of this C. However none of the other MCs apply. MC 1 does not apply because Applicant's dual citizenship is not based solely on his parents' citizenship or his birth in Egypt, but is based on his active exercise of dual citizenship after his naturalization. MC 2 does not apply because all indicators of possible dual citizenship have occurred since Applicant obtained U.S. citizenship. MC 3 does not apply because Applicant's conduct has not been sanctioned by the U.S., particularly where the conduct occurred to deliberately skirt travel limitations on U.S. citizens.

The ASD, C^3I Memorandum controls the resolution of the foreign preference issue. The memorandum provides that Applicant's past possession and use of his foreign passport can be mitigated only if Applicant surrenders the foreign passport or obtains U.S. Government approval for its use. Applicant has undertaken neither action. Further, the Appeal Board has ruled that possession of an expired passport does not satisfy the Money Memo requirement for surrender of the passport. *See,* DISCR Case No. 01-24306, September 30, 2003. I resolve Guideline C against Applicant.[(6)]

The government did not establish its Guideline E case with regard to Applicant's omission of his foreign passport, as the record evidence does not clearly show that Applicant's passport had been valid within the seven years preceding his August 2002 clearance application. In any event, Applicant lacked the intent to mislead the government on this point, given his extensive disclosure of his other foreign connections. While the government did establish a Guideline E case with regard to Applicant's residence in the U.K., Applicant lacked the intent to mislead the government because he considered his residence there no different than his regular business travel to the U.K., business travel that he freely disclosed on his clearance application. I resolve Guideline B for Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline C: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: For the Applicant

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: 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.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).

2. I take official notice of the fact that most people are taxed on their income where they reside, unless they benefit from statute or treaty that exempts them from those taxes. Thus, military personnel maintain a "home of record" which establishes their income tax liability regardless of where in the U.S. they may be assigned. In a similar fashion, U.S. personnel overseas, whether military, civilian, or contractor may be subject to a treaty or status-of-forces agreement that prevents the host nation from taxing their income.

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

4. *See*, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

5. E2.A3.1.2.1. The exercise of dual citizenship; E2.A3.1.2.2. Possession and/or use of a foreign passport;

6. However, I find subparagraph c. for the Applicant. Applicant's obtaining residence in the U.K. implicated no DC (he was not residing there to meet citizenship requirements) and there is no other record evidence to suggest Applicant prefers the U.K. to the U.S.