

KEYWORD: Foreign Preference; Foreign Influence; Drugs

DIGEST: Applicant, a U.S. naturalized citizen and a citizen of Switzerland solely by virtue of his birth and his parents' birth in the country, has retained and used his Swiss passport when it is more convenient than using his U.S. passport when traveling abroad. He fails to absolve himself of preference concerns. Because Applicant's immediate and extended family members who reside in Switzerland are shown to be potentially vulnerable to pressure or coercion in light of Applicant's country preference, foreign influence concerns are not mitigated either. Security concerns posed by Applicant's past use of marijuana and expressed intention to continue using the substance in the future is cause for invoking the Smith Amendment's (10 U.S.C. Sec. 986) mandatory preclusion from holding a security clearance. Clearance is denied.

CASENO: 03-18112.h1

DATE: 05/16/2005

DATE: May 16, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-18112

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

## **FOR GOVERNMENT**

Mark E. Curry, Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant (a U.S. naturalized citizen and a citizen of Switzerland solely by virtue of his birth and his parents' birth in the country) has retained and used his Swiss passport when it is more convenient than using his U.S. passport when traveling abroad, and fails to absolve himself of preference concerns. Because Applicant's immediate and extended family members who reside in Switzerland are not shown to be agents of Switzerland or potentially vulnerable to pressure, foreign influence concerns are mitigated. Security concerns posed by Applicant's past use of marijuana and expressed intention to continue using the substance in the future preclude his mitigation of the Government's concerns about his past and future drug concerns, without invoking the Smith Amendment's (10 U.S.C. Sec. 986) mandatory preclusion. Clearance is denied.

### **STATEMENT OF CASE**

On June 8, 2004, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, 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, and recommended referral to an administrative judge for determination whether clearance should be granted or continued.

Applicant responded to the SOR on June 26, 2004, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on October 7, 2004. Applicant failed to respond to the FORM within the 30 days afforded him to provide supplement documentation regarding the issues. The case was assigned to me November 12, 2004.

## **SUMMARY OF PLEADINGS**

Under Guideline C, Applicant is alleged to have demonstrated a preference for Switzerland by (1) exercising dual citizenship between Switzerland and the U.S. and (2) possessing a Swiss passport as of May 2003, which did not expire until April 2004.

Under Guideline B, Applicant is alleged to have shown the potential for foreign influence by virtue of (a) his parents being dual citizens of Switzerland and the U.S. and currently residing in the U.S., (b) one brother's being a dual citizen of Switzerland and the U.S. and currently residing in Denmark, (c) another brother's being a citizen and resident of Switzerland, and (d) his grandparents, aunts, uncles, and cousins being citizens and residents of Switzerland.

Under Guideline H, Applicant is alleged to (i) have used marijuana in varying frequency from about 1995 until at least April 2003, (ii) have used ecstasy on at least three occasions between about 1995 and August 2002, and (iii) intend to continue to use marijuana. By virtue of his alleged prior marijuana use and intention to continue using marijuana, 10 U.S.C. Sec. 986 (the Smith Amendment) is alleged to apply.

For his response to the SOR, Applicant admitted most of the allegations, denying only that he has the intention to use marijuana in the future. Applicant adds no explanations to his answer.

## **FINDINGS AND FACTS**

Applicant is a 28-year old optical engineer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Born to Swiss parents in Switzerland, Applicant immigrated to the U.S. with his parents in 1989. He was naturalized as a U.S. citizen in 2001 but retains his Swiss citizenship and passport. Since becoming a U.S. citizen, Applicant has used both his U.S. and Swiss passports to travel. Depending on which one best suits his needs at the time, he will use one or the other to enter and exit a particular country (*see ex. 5*). Applicant insists he will not relinquish either his Swiss citizenship or Swiss passport for any reason. As a dual citizen, he retains the right to return to Switzerland permanently if he chooses. He estimates, in turn, that he might return to Switzerland someday to live. Even though he currently does not have financial ties to Switzerland, he conceivably could inherit property from his Swiss parents and grandparents

some day.

Applicant identifies with Switzerland (his country of birth) and expresses a definite allegiance to the country, where he may return to live (ex. 5). While he claims an equal allegiance to the U.S., he would never bear arms in defense of the U.S. against Switzerland and would do everything in his power to prevent any use of arms against his birth country. He questions any requirement that he report his foreign travels and may or may not report them, depending on the questioning and governing travel regulations in place (ex. 5).

Applicant's Swiss passport was issued in 1989 and (according to Applicant) was scheduled to expire in April 2004 (*see* ex. 5). While there is no proof in the administrative record that the passport has already expired, Applicant makes it clear that he intends to keep his Swiss passport regardless of its expired status and will never relinquish his Swiss citizenship for any reason.

Applicant currently has grandparents, aunts, uncles, and cousins who are both citizens and residents of Switzerland, and with whom he has close affiliation. He has frequent contact with his Swiss relatives and has visited them in Switzerland (to include 2000 and 2001). None of his Swiss relatives currently work for the Swiss Government. Applicant provides no financial support to any of his Swiss family members.

Applicant used marijuana once in college (between 1995 and 1997) and twice a month between 1997 and June 2001. Besides marijuana, Applicant tried ecstasy on three occasions, twice in college and once in 2002 at a concert. His typical practice was to share a marijuana cigarette or pipe bowl with two or more friends a couple of times a year (three or four puffs per use). Beginning in 2001 he cut back in his marijuana use to roughly twice a year when visiting friends. He last used marijuana in April 2003, when visiting a friend. Marijuana relaxed him and never deprived him of control. After initially expressing a desire to continue using marijuana in the future in a signed, sworn DSS statement of May 2003 (probably at the same rate of use, *i.e.*, with friends, about two times a year), Applicant recanted and denied any intended future use in his answer.

## **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation

and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Foreign Preference**

*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.

### **Foreign Influence**

*The Concern:* A security risk may exist when an individual's immediate family, including co-habitants, and other persons to whom he or she may be bound by affection, influence, or are obligation *are not* citizens of the United States *or may* be subject to duress. These situations could create the potential for foreign influence that 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.

### **Drug Involvement**

*The Concern:* Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

### **Burden of Proof**

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security

clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation..

## CONCLUSIONS

Issues of security concern include preference questions arising out of Applicant's dual citizenship with Switzerland and the U.S., his having immediate and extended family members in Switzerland, such that raise potential concerns about their being vulnerable to future pressure or duress that could result in the compromise of classified information, and his continued use of marijuana.

### **Foreign Preference**

By virtue of his birth in Switzerland to parents of Swiss descent and citizenship, Applicant was endowed with Swiss citizenship through his parents. This citizenship could not be lost except by express renunciation, approved by the Swiss government, which Applicant has never explored. To the contrary, Applicant has never sought or expressed any intention to renounce his Swiss citizenship and even reaffirms his intention to retain his Swiss citizenship and passport, which is set to expire in April 2004. He continues to use his Swiss passport when traveling abroad and pledges to retain it for his use when he finds it convenient to do so.

The Appeal Board has tended to blur convenience/force of law distinctions when appraising legal necessity passport usage in multiple returns to country situations (as here). *See* ISCR Case No. 99-0424 (February 8, 2001); ISCR Case No. 99-0254 (February 16, 2000). Exercise of choice to retain and use his Swiss passport out of a desire to preserve his options when traveling abroad is itself a voluntary election, not a submission to legal compulsion. By retaining and using his Swiss passport when he finds the circumstances to warrant, and vouching for his Swiss allegiance, Applicant displays a conscious preference for Switzerland, even as he continues to express continued allegiance to his adopted country, the U.S.

So, even Applicant's limited exercise of dual citizenship is sufficient under the facts of this case to invoke Disqualifying Condition (DC) E2.A3.1.2.1 (*The exercise of dual citizenship*) and E2.A3.1.2.2 (*The possession and/or use of a foreign passport*) of the Adjudicative Guidelines for foreign preference. Use and/or possession of a foreign passport is considered a *per se* basis for denying or suspending a security clearance under the clarifying provisions of the memorandum of August 16, 2000 authored by the Asst SecDef forC3I ("the ASDC3i memorandum"), unless the foreign passport is surrendered, or the Applicant obtains official approval for its use from the appropriate agency of the U.S. Government. Nothing in the ASDC3i memorandum on foreign passports indicates that possession of a foreign passport may be extenuated or mitigated by an applicant's showing of personal convenience or hardship typically encountered in utilizing the visa process involved with travel abroad on a U.S. passport. DOHA's Appeal Board has construed the ASDC3i memorandum to be legally binding on DOHA administrative judges and the Board. *See* ISCR Case No. 02-07625 (May 2004). Neither judges nor the Board retain jurisdiction to review or pass judgment on the wisdom or desirability of the ASDC3i memorandum. *See* ISCR Case No. 02-04237 (August 2003). Moreover, the Appeal Board does not distinguish valid from expired foreign passports when applying the ASDC3i memorandum's *per se* surrender requirements to applicants possessing foreign passports. *See* ISCR Case No. 03-06174 (February 28, 2005). The Board's interpretation of the memorandum's foreign passport surrender condition requires an actual surrender to the issuing authority to avoid the memorandum's *per se* clearance bar. Under the Board's reasoning, neither an applicant's destroying the passport nor simply letting it expire are considered acceptable substitutes for a surrender.

Concerns over continued Applicant preference for Switzerland are considerable for so long as he retains his Swiss passport (whether currently valid or expired) and dual Swiss citizenship. With unsettled questions still very much in evidence about Applicant's reluctance to take any bold steps towards surrender of his Swiss passport and renunciation of his Swiss citizenship, too many preference questions loom at the present time to credit Applicant with satisfying the heavy mitigation burden imposed on applicants by the Appeal Board in similar situations. In using and retaining his Swiss passport and showing no inclination to surrender the passport and renounce his Swiss citizenship, Applicant has demonstrated a preference for Switzerland that is not mitigated. Unfavorable conclusions warrant with respect to the Guideline C allegations.

## **Foreign Influence**

Besides foreign preference concerns, Government finds security risks associated with Applicant's immediate and extended family members being citizens and residents of Switzerland (save for one brother who resides in Denmark). Applicant communicates with his family members regularly and is a potential beneficiary of his parents' property

located in Switzerland. Applicant's ties to Switzerland invite application of Disqualifying Condition 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*) of the Adjudicative Guidelines for foreign influence.

The Adjudicative Guidelines governing collateral clearances do not dictate *per se* results or mandate particular outcomes for any chosen set of guidelines covering risks of foreign influence. What is considered to be an acceptable risk in one foreign country may not be in another. While foreign influence cases must by practical necessity be weighed on a case-by-case basis, guidelines are available for referencing. Personnel security assessments continue to be governed by the same Change 4 requirements of the Directive for appraising the security risks associated with the individual's having family abroad, which include both common sense assessments of country risks and information available from public sources.

While the foreign influence provisions of the Adjudicative Guidelines are ostensibly neutral as to the character of the subject country, they should not be construed to ignore the geopolitical aims and policies of the particular foreign regime involved. Switzerland, a self-described neutral country, is a constitutional republic, governed by executive and legislative branches whose leadership and influence is directed and circumscribed by secular tenets. Switzerland is also a country with a strong track record of respect for human rights and the rule of law.

Because Switzerland remains a stable European democracy with a tradition of neutrality throughout two world wars and a secure infrastructure and track record of respecting human rights and the rule of law, the risk of a pressure or influence situation involving an immediate or extended family member could be expected to be minimal. True, Applicant has shown no willingness to take up arms against Switzerland (his birth country) and has demonstrated a preference for Switzerland over the U.S. (his adopted country). Under these circumstances, Applicant's presumed threshold to withstanding pressure directed from Swiss authorities is likely to be lower than it would be for an American citizen without any demonstrated preference for the foreign country involved. Unlike Guideline C's underlying preference concerns, however, the expressed core security concern of Guideline B is the applicant's potential vulnerability to pressure from influence placed on family members residing in the foreign country, without regard to any allegiance the applicant might feel to the foreign country involved. This core security concern in Guideline B shifts the focus from the applicant's vulnerability to influence by virtue of a country preference to family members bound by affection and residing in the foreign country. Security concerns raised under Guidelines C and B must necessarily then be assessed separately, and from different perspectives. The Government does not suggest a different construction in its FORM submission.

Given Switzerland's background as a neutral country with no history of waging pressure against its resident citizens to exact classified or proprietary economic information from U.S. nationals, any potential security risks created by Applicant's having immediate and extended family members domiciled in Switzerland are determined to be minimal in the present circumstances and mitigated. These family members are neither Swiss agents nor in a likely position to be exploited by Swiss authorities and enable Applicant to invoke the mitigation benefits of E2.A2.1.3.1 (*A determination that the immediate family members, co-habitant or associate are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the persons involved and the United States*) of the Adjudicative Guidelines. Favorable conclusions warrant with respect to the allegations covered by Guideline B.



## Applicant's drug abuse history and Smith Amendment application

Over an eight year period spanning 1995 and 2003, Applicant used illegal drugs (marijuana for the most part). By 2001 he had reduced his use of illegal drugs to marijuana twice a year, a practice he indicated he would continue with in the future when questioned about it in his May 2003 DSS interview. Because of his answer denial of any intent to continue using marijuana and the relatively small amount of annual use he admitted to, it is difficult to gauge his actual use of marijuana in 2004 and beyond based solely on the developed administrative record. Conceivably, Applicant could have convinced in a hearing that he has not used marijuana at all since April 2003. With a record of still recent marijuana use and stated intention to continue using the substance, however, his mitigation prospects are much more difficult to gauge.

On the strength of the evidence presented, several disqualifying conditions of the Adjudicative Guidelines for drug abuse are applicable: E2.A8.1.2.1 (*Any drug abuse*), E2.A8.1.2.2 (*Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*) and E2.A8.1.2.5 (*Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. Recent drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will invariably result in an unfavorable determination*).

For anyone determined to be a user of illegal drugs, the Smith Amendment (*see* 10 U.S.C. Sec. 986(c)(2)) precludes the granting and continuing of a security clearance. What qualifies as a user of illegal drugs for statutory coverage purposes is not defined by either the legislation in force or its history. Applicant, by virtue of (a) his acknowledged recent use of marijuana (with a last use reported in April 2003) and (b) his past stated intention to continue using marijuana, raises enough questions about his future drug use intentions to make the Smith Amendment's *per se* clearance bar potentially applicable, but not compelling. As a punitive statute, the Smith Amendment should be narrowly construed and requires a more probative showing of current marijuana use than what Applicant has fully acknowledged (*viz.*, twice a year use after 2001, coupled with an expressed intention to continue his use, which he later withdrew in his sworn answer). Neither Applicant nor the Government supply the proof necessary to apply the Smith Amendment's *per se* bar in the present circumstances. Absent clear statutory coverage of limited drug frequency like Applicant's, the better practice is to avoid determining the statute's reach where (as here) sound results can be achieved using accepted principles of reason and common sense.

Here, Applicant's admitted marijuana usage and expressed intentions to continue using the substance in the future is enough to create considerable doubts about his future recurrence. Such doubts preclude safe and predictable judgments about his ability to avert drug use recurrence in the future. Accordingly, unfavorable conclusions warrant with respect to the allegations covered by Guideline H.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E2.2.1 of the Adjudicative Process of Enclosure 2 of the Directive.

## **FORMAL FINDINGS**

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance:

GUIDELINE C (FOREIGN PREFERENCE): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

GUIDELINE B: (FOREIGN INFLUENCE): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: FOR APPLICANT

Sub-para. 2.c: FOR APPLICANT

Sub-para. 2.d: FOR APPLICANT

GUIDELINE H (DRUGS): AGAINST APPLICANT

Sub-para. 3.a: AGAINST APPLICANT

Sub-para. 3.b: AGAINST APPLICANT

Sub-para. 3.c: AGAINST APPLICANT

Sub-para. 3.d: AGAINST 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge