

KEYWORD: Foreign Preference; Foreign Influence

DIGEST: Applicant is a 48-year-old aerospace engineer who has worked for the same federal contractor since 1998. He is a dual citizen of Germany and the United States. He held a German passport since approximately 1985, but relinquished it recently to the German Consulate. Applicant has property and investment interests in Germany. Applicant failed to mitigate the security concerns under Guidelines C and B. Clearance is denied.

CASENO: 04-03664.h1

DATE: 03/20/2006

DATE: March 20, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03664

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Kevin Hancock, Esq.,

Robert Gardner, Esq.

SYNOPSIS

Applicant is a 48-year-old aerospace engineer who has worked for the same federal contractor since 1998. He is a dual citizen of Germany and the United States. He held a German passport since approximately 1985, but relinquished it recently to the German Consulate. Applicant has property and investment interests in Germany. Applicant failed to mitigate the security concerns under Guidelines C and B. Clearance is denied.

STATEMENT OF THE CASE

On October 24, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant Statement of Reasons (SOR) stating it was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline C (foreign preference) and Guideline B (foreign influence).

In a sworn statement, dated November 17, 2005, Applicant responded to the SOR allegations and requested a hearing. In his SOR responses, Applicant admitted SOR allegations in ¶¶ 1.a, 1.b, 1.c, 1.d, 1.e, and denied allegations in ¶¶ 1.f, 2.a through 2.d. The case was assigned to me on December 12, 2005. A notice of hearing was issued on January 19, 2006, scheduling the hearing for February 7, 2006. The hearing was conducted as scheduled. The government submitted seven exhibits that were marked as Government Exhibits (GE) 1-7. The exhibits were admitted into the record without objection. Applicant testified on his own behalf, two witnesses testified for him and he submitted eight exhibits that were marked as Applicant's Exhibits A-H. Applicant requested that the Adjudicated Guidelines under AE A, ⁽²⁾ be used to determine security clearance eligibility. Department Counsel objected stating that until implementing provisions have been approved and specific direction received from the Director DOHA on the specific implementation date, the current guidelines should be used. I ruled until directed to use the new guidelines I am bound by the direction of the Director DOHA. The objection was sustained. The exhibits were admitted without additional objections. DOHA received the hearing transcript (Tr.) on February 27, 2006.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR, are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 48-year-old aerospace engineer who has worked for the same defense contractor since 1998. He was born of German parents who immigrated to the United States in 1956. He was born in the United States in 1957, and is an American citizen. In approximately 1964, Applicant's family moved back to Germany. His parents remained U.S. citizens and were permanent resident aliens in Germany. Applicant currently holds a secret security clearance that he has held consistently since approximately 1996.

In 1985, while in Germany, Applicant researched his viability to be a German citizen.⁽³⁾ He proved to German authorities that his ancestry was German, complied with their regulations, and he was therefore entitled to be a German citizen.⁽⁴⁾ The German government then recognized him as such and he assumed dual citizen status as a United States and German citizen. Applicant's motivation for pursuing German citizenship was because he had completed his schooling in Germany and because he was not a German citizen, he would be required to obtain a labor permit to work in Germany.⁽⁵⁾ At the time it was very difficult for non-members of the European Union to obtain labor permits, so he became a German citizen and benefitted from his status. He was 28 years old at the time.

While in Germany, Applicant was employed by a private company which had a contract with the German Space Agency from about 1988 to 1995.⁽⁶⁾ He is eligible for a German pension commensurate with the time he worked in Germany.⁽⁷⁾

Applicant's brother, is also a dual citizen of Germany and the United States, living in Germany with his wife and child who are citizens of Germany. His brother works in quality assurance for a private razor company.⁽⁸⁾ All of Applicant's other relatives, except two cousins that he has minimal contact with, live in Germany.⁽⁹⁾ He is very close to the maternal side of his family, that includes an aunt, uncle, and two cousins and their children.⁽¹⁰⁾ He visits them about once a year. He maintains contact with his brother and aunt monthly and the other relatives about quarterly.⁽¹¹⁾ Although not as close to the paternal side of his family, he has given his paternal cousin a power of attorney to attend to his financial affairs in Germany.⁽¹²⁾ He does not have very much contact with his paternal uncle and aunt and their other two children. Applicant travels to Germany approximately once a year to visit family and maintain his pilot's license. While there he usually stays with his aunt.

Applicant has a friend who works for the Germany Space Agency. He has worked there for 21 years. Applicant met him when they both attended the same college and shared classes. Later they worked on the same team at the German Space

Agency. He and Applicant became very close friends and he would celebrate special family occasions with him and would babysit his children.⁽¹³⁾ They continue to maintain contact usually through email correspondence. They have visited each other sometimes while on personal travel and sometimes combined with a business trip, both in the United States and Germany.⁽¹⁴⁾ The last time they visited each other was in December 2003.

Applicant also has a friend who is a Lieutenant Colonel in the German Army, currently serving as a military assistant to the German Ambassador to a foreign country.⁽¹⁵⁾ They have known each other since 1963, when they were boys. They maintain contact through email and Applicant also communicates with his friend's wife.⁽¹⁶⁾

Applicant has a German driver's license that has no expiration and remains valid.⁽¹⁷⁾ He obtained a German Identification Card in 1985, that he was required to have as a German citizen living in Germany.⁽¹⁸⁾ It became invalid when he moved to the United States, although he still retains it. Applicant jointly owns, with other family members, a one quarter interest in two small parcels of land in Germany.⁽¹⁹⁾ It is valued at approximately \$3,500. Applicant intends on retaining his property interest in the land. He also has investment interests in Germany and owns approximately \$15,000 worth of German bonds that will mature in approximately 2008, and may be valued at around \$20,000.⁽²⁰⁾ Applicant did not know if only German citizens could buy these German bonds. He also maintains a German checking account that he uses when he is in Germany. He also uses this account to pay annual premiums of approximately \$1,200-\$1,500 on a German life insurance policy and for presents for his family.⁽²¹⁾ The policy is an investment tool that will mature when he is 62 years old and he will receive about \$50,000. His niece is the beneficiary. He does not own any U.S. life insurance.

Applicant has a pilot's license that he obtained in Germany and returns there annually to complete the mandatory requirements to keep it current.⁽²²⁾ He maintains a U.S. pilot's license that must be used with his German license for the U.S. license to be valid.

Applicant moved to the United States in 1995 for economic reasons. He believed he would have a better quality of life in the United States and he would be able to own his own home. Applicant believes he has held a German passport since approximately 1985, and reapplied for one in 1999 at the German Consulate in Los Angeles, California.⁽²³⁾ He obtained the passport so it would be easier for him to travel to Germany and throughout the European Union.⁽²⁴⁾ He has since relinquished his German Passport to the German Consulate who defaced it and declared it invalid.⁽²⁵⁾ However, the invalidation by the German Consulate specifically stated that it did not affect the status of Applicant's German citizenship and he was still considered a German citizen.⁽²⁶⁾ Applicant considers himself a dual citizen of Germany and the United States.⁽²⁷⁾ Applicant is not willing to renounce his German citizenship.⁽²⁸⁾ He stated "I have been raised in a German culture, and I do not believe by simply making the paper statement of giving up my German citizenship, that that would prove anything. It would not effect any contacts or any emotions or any feelings that I have towards Germany. It would simply be a paper statement, but it would not personally affect any ...any emotions that I have for Germany."⁽²⁹⁾ He believes that having a German passport holds himself out as a German citizen.⁽³⁰⁾ He has maintained a valid U.S. passport for as long as he can remember.⁽³¹⁾ He stated his primary loyalty is to the United States.⁽³²⁾

Applicant owns a home in the United States assessed at approximately \$165,000, with about \$50,000 worth of equity. (33) He has retirement investments in the United States worth about \$145,000. (34) The majority of his assets are in the United States. His mother resides with him. He believes he has a much better quality of life in the United States than he would be able to attain in Germany. (35)

Applicant advises his security facilities officer when he travels to Germany and if he has any foreign contacts. (36) He is aware of the pertinent requirements for foreign travel. Applicant voted in Germany when he was living there as a dual citizen from 1985 to 1995. (37) He did not participate in United States elections during this time. Once moving to the United States he participated in U.S. elections. Applicant has not served in either the German or American armed forces.

Three witnesses testified on behalf of Applicant. They describe him as very conscientious about security rules and regulations. He is extremely diligent, often taking the lead in ensuring classified material is secured and handled properly. He is considered thorough and could always be counted on to do things right. He is considered to be very serious about his security responsibilities and played a role in training other employees about security issues.

Germany is a federal republic. It emphasizes close ties with the United States and is a member of North Atlantic Treaty Organization. (38) The United States policy towards Germany is to maintain and preserve a close and vital relationship, not only as friends and trading partners, but also as allies. (39)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline C, pertaining to foreign preference, and Guideline B, pertaining to foreign influence with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁴⁰⁾ The government has the burden of proving controverted facts.⁽⁴¹⁾ The burden of proof is something less than a preponderance of evidence.⁽⁴²⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.⁽⁴³⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁴⁴⁾

No one has a right to a security clearance⁽⁴⁵⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁴⁶⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽⁴⁷⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽⁴⁸⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline C-Foreign Preference is a security concern because 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.

Guideline B-Foreign Influence is a concern because 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 obligations 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 interest in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guidelines C and B.

Based on all the evidence, Foreign Preference Disqualifying Condition (FP DC) E2.A3.1.2.1 (*The exercise of dual citizenship*); FP DC E2.A3.1.2.2 (*Possession and/or use of a foreign passport*); FP DC E2.A3.1.2.4 (*Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country*); FP DC E2.A3.1.2.5 (*Residence in a foreign country to meet citizenship requirements*); FP DC E2.A3.1.2.6 (*Using foreign citizenship to protect financial or business interest in another country*); and FP DC E2.A3.1.2.8 (*Voting in foreign elections*) apply. Applicant sought, applied for, and secured German citizenship in 1985. He obtained and used his German passport. The possession and/or use of a foreign passport is an exercise of dual citizenship. He used his passport for travel to Germany and the European Union. A foreign preference can be shown by an applicant's exercise of the rights and privileges of foreign citizenship for reason of personal convenience or expediency.⁽⁴⁹⁾ Use of a foreign passport for personal convenience is not extenuating or mitigating.⁽⁵⁰⁾ He has since had his passport invalidated by the German consulate, but retains his dual citizenship. Applicant worked as a German citizen in Germany and is eligible for a pension. He voted in Germany while living there and then voted in U.S. elections while living in the U.S. Applicant has investments in German bonds and accepted educational benefits while residing in Germany. All of the above disqualifying conditions apply.

I have considered all the mitigating conditions and especially considered Foreign Preference Mitigating Condition (FP MC) E2.A3.1.3.1 (*Dual citizenship is based solely on parents' citizenship or birth in a foreign country*); (FP MC) E2.A3.1.3.2 (*Indicators of possible foreign preference (e.g. foreign military service) occurred before obtaining United States citizenship*); and FP MC E2.A3.1.3.4 (*Individual has expressed a willingness to renounce dual citizenship*), and conclude none apply. Applicant actively and purposely pursued becoming a German citizen. It is something he sought out and had to go to German authorities to prove. He exercised his German citizenship by investing in German bonds, having a German bank account and life insurance, and using his German passport to travel in the European Union. He also has a German driver's license and German pilot's licence that he returns to Germany annually to renew. Applicant's foreign preference occurred because he applied to become a German citizen. He plans to maintain his dual status and is not willing to renounce his German citizenship. In accordance with a memorandum issued by Assistant Secretary of Defense for Command, Control, Communication, and Intelligence, Arthur L. Money, dated August 16, 2000, (Money Memorandum), a security clearance must be denied or revoked for an Applicant with a foreign passport "unless the applicant surrenders the foreign passport." Surrender of the passport contemplates returning it to the issuing authority. Applicant returned his German passport to the appropriate authority. Although he has relinquished his German passport, Applicant intends to continue to exercise his dual citizen status. He considers himself emotionally tied to Germany. I find none of the above mitigating conditions apply.

Based on all the evidence, Foreign Influence Disqualifying Condition (FI DC) 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 or present in, a foreign country*), and FI DC E2.A2.1.2.8 (*A substantial financial interest in a country, or in any foreign -*

owned or operated business that could make the individual vulnerable to foreign influence) apply. Applicant's brother is a dual citizen of the U.S. and Germany. His sister-in-law, niece, aunt, uncle and cousins are all citizens and residents of Germany. Applicant is very close to his aunt, uncle and cousins and stays with them when he visits Germany. He owns property with his aunt and brother. He communicates with his brother and aunt monthly. Applicant also has a two close friends in Germany that he has close ties of affection with, one a friend he worked with, celebrated special occasions with, and even cared for his children. He and his friend visit each other and maintain email communication. His other friend a Lieutenant Colonel in the German Army, has been a friend since childhood and they maintain contact through emails. Both friends are individuals with close ties of affection to Applicant. In addition, both friends work for the government, one is a senior officer in the German army, the other is a long time employee of the German Space Agency. Applicant owns real property in Germany, maintains a bank account, investments in German bonds, and a life insurance policy. Applicant maintains a dual economic life in both the U.S. and Germany.

I have considered all the mitigating conditions and especially considered Foreign Influence Mitigating Condition (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 position 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 United States*); FI MC E2.A2.1.3.3 (*Contacts and correspondence with foreign citizens are casual and infrequent*); and FI MC E2.A2.1.3.5 (*Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities*) apply. Applicant maintains close ties with his family in Germany. Applicant's relationship with his relatives and friends is more than casual and infrequent. Although his family members are not likely agents of a foreign power because of his affection and loyalty to them their contact is more than casual and infrequent. He is very close to his family, communicating often and visiting annually. Applicant's friends are agents of a foreign power by virtue of their jobs. He maintains contact with them and visits when they are traveling for business or pleasure.

The question is whether Applicant's relatives and friends are in a position to be exploited by a foreign power in a way that could force Applicant to choose between loyalty to his relatives vice the United States. Another consideration is whether these people are vulnerable to exploitation in such a way as to have Applicant act adversely to the interests of the United States. A factor to consider, while not determinative, is an analysis of the character of the foreign power and entities within the foreign country. This review is not limited to countries that are hostile to the United States. Friendly countries may have profound disagreements with the United States or have engaged in espionage against the United States especially in economic, scientific, military, and technical fields. A friendly relationship is not determinative, but it may make it less likely that a foreign government would attempt to exploit a U.S. citizen through relatives or associates in that country. Although there are terrorist activities and components in most country, Germany is a country with longstanding close ties with the United States. The United States has maintained a large military presence in Germany since World War II and conducts numerous joint military and civilian operations. Although at times Germany may disagree with the United States on political issues it does not have a history of human rights violations or exploitation of its citizens. I find Applicant's relationship with his family and friends in Germany is not the type that would be exploited. Every person with a relative in another country could pose a risk. I have balanced that probability in this case and find due to the nature of the relationship between the United States and Germany, that the risk does not rise to the level of potential exploitation. I find Applicant has successfully mitigated the security concerns regarding his family and friends in Germany. I find the potential vulnerability is minimal.

Applicant has substantial financial interests in Germany. Although he has greater accumulated wealth in the United States, he still maintain a bond investment valued at \$15,000 today and estimated to be more at maturity in 2008, a German life insurance policy that will mature when he is 62 and be worth \$50,000, a checking account with about \$1,200 to \$1,500 in it, and he owns two parcels of land in Germany. Applicant's financial interests are not minimal and sufficient to potentially affect his security responsibilities. Applicant failed to mitigate the security concerns regarding his financial interests under Guideline B, foreign influence.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered the whole person and kept in mind that any doubt as to whether access to classified information must be resolved in favor of national security. Applicant is a citizen of both Germany and the United States and maintains strong ties to Germany. He has family, friends, and financial interests there. Although Applicant has held a security clearance since 1996, his continued exercise of dual citizenship is a serious concern. Balancing the potentially disqualifying and mitigating conditions and considering the totality of all the evidence, I conclude Applicant has failed to meet his heavy burden and failed to mitigate the security concerns under Guidelines C. I also find that although he has mitigated the security concerns regarding his family and friends, he has not mitigated the concerns regarding his financial interest. Therefore, I find he has failed to mitigate the security concerns under Guideline B.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline C: FOR THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: Against the Applicant

Subparagraph 1.g: For the Applicant

Paragraph 2. Guideline B: AGAINST THE APPLICANT

Subparagraph 2.a: For the Applicant

Subparagraph 2.b: For the Applicant

Subparagraph 2.c: For the Applicant

Subparagraph 2.d: Against the Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Carol G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. White House Memorandum from Stephen J. Hadley, Assistant to the President for National Security Affairs, Re: Adjudicated Guidelines, dated December 29, 2005.

3. Tr. 32-35.

4. *Id.*

5. Tr. 34.

6. Tr. 35, 62.

7. Tr. 63.

8. Tr. 36.

9. Tr. 37.

10. Tr. 79.

11. Tr. 37.

12. Tr. 80.

13. Tr. 40.

14. Tr. 40-41.

15. Tr. 41.

16. Tr. 41-42.

17. Tr. 83.

18. Tr. 57.

19. Tr. 42.

20. Tr. 43.

21. Tr. 90.

22. Tr. 78.

23. Tr. 43-44; 55-57.

24. Tr. 44.

25. AE E and D.

26. *Id.*; Tr. 44-47.

27. Tr. 47.

28. Tr. 59.

29. Tr. 59.

30. Tr. 60.

31. Tr. 55.

32. Tr. 49.
33. Tr. 48
34. Tr. 49.
35. Tr. 49.
36. Tr. 64.
37. Tr. 66-67.
38. United States Department of State Background Note: Germany, dated November 2005, at 9.
39. *Id.* at 10.
40. ISCR Case No. 96-0277 at p. 2 (App. Bd. Jul 11, 1997).
41. ISCR Case No. 97-0016 at p. 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
42. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
43. ISCR Case No. 94-1075 at pp. 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
44. ISCR Case No. 93-1390 at pp. 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
45. *Egan*, 484 U.S. at 531.
46. *Id.*
47. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
48. Executive Order 10865 § 7.
49. ISCR Case No. 02-02052 at 4 (App. Bd. Apr. 8, 2003)
50. ISCR Case. No. 99-0424, 2001 DOHA Lexis 59 at *47 (App. Bd. Feb 8, 2001)