

KEYWORD: Foreign Preference; Foreign Influence

DIGEST: Applicant is unable to successfully mitigate the foreign preference and foreign influence security concerns due to (1) his possession of a Filipino passport and (2) his family ties to the Philippines. Clearance is denied.

CASENO: 04-06196.h1

DATE: 11/08/2005

DATE: November 8, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-06196

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

**APPEARANCES**

**FOR GOVERNMENT**

Edward W. Loughran, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is unable to successfully mitigate the foreign preference and foreign influence security concerns due to (1) his possession of a Filipino passport and (2) his family ties to the Philippines. Clearance is denied.

### **STATEMENT OF THE CASE**

On December 21, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B for foreign influence and Guideline C for foreign preference. In his Answer, dated January 13, 2005, Applicant denied the allegations in subparagraphs 1.a and 2.a, and he admitted the remaining allegations. Also, he requested a determination be made in his case without a hearing.

On February 22, 2005, Department Counsel submitted his written case consisting of all relevant and material information that could be adduced at a hearing. This so-called File of Relevant Material (FORM) was mailed to Applicant and received on March 28, 2005. Applicant did not submit any information within the 30-day period after receiving the FORM. The case was assigned to me on May 11, 2005. Issuing a decision was delayed due to a heavy caseload.

### **FINDINGS OF FACT**

After a thorough review of the record evidence, I make the following findings of fact:

Applicant is a 67-year-old man who was born in the Philippines in April 1938. He is employed as a security officer for a security company. He is seeking a security clearance for this employment, and to that end, he completed a security-clearance application in January 2003.

From approximately 1967 until 1994, Applicant was employed working with the U.S. Navy in the Philippines. When the U.S. military withdrew its forces from the Philippines, Applicant was allowed to immigrate to the U.S. via a special immigrant status program. In October 1994, Applicant and his family arrived in the U.S. and he has lived here since. He became a U.S. citizen through the naturalization process in 2003. Applicant's spouse, who is also a native-born Filipino citizen, recently obtained U.S. citizenship.

As a citizen of the Philippines, Applicant arrived in the U.S. with a Filipino passport. He renewed that passport in August 2002 and it does not expire until August 2007 (Exhibit 8). Applicant continues to possess the Filipino passport notwithstanding his acquiring U.S. citizenship in 2003. During the background investigation in February 2004, Applicant provided the following information about the Filipino passport:

I maintain a current Philippine passport, however, I have not used it since I became a naturalized US citizen. I am willing to renounce this passport including returning it to the Philippine embassy in [State A] (Exhibit 7).

In April 2004, DOHA issued an interrogatory to Applicant requesting that he provide documentation verifying that he had surrendered his Filipino passport to appropriate authorities (Exhibit 9). Included with the interrogatory was a copy of the Money Memorandum setting forth Defense Department policy on foreign passports. He received the interrogatory on May 6, 2004, but did not provide proof of surrender. Applicant was provided a copy of the Money Memorandum when he received the SOR in December 2004 (Exhibit 2). In a letter dated February 22, 2005, Department Counsel explained the gist of the Money memorandum and suggested Applicant address this issue in his response to the FORM (Exhibit 4). Enclosed with the letter was a copy of the Money memorandum. To date, Applicant has not presented any documentary evidence or information establishing that he has surrendered his Filipino passport or taken steps to renounce his Filipino citizenship.

Based on his long-time employment with the U.S. Navy, Applicant receives a \$75 per month pension or social security payment from the Filipino Government. Applicant owns a small house in the Philippines, but he allows his sister and her family to live there for free. When visiting there, Applicant may stay in the home, but he professes no intention to live there on a full-time basis again. The record is silent on the monetary value of the home.

Applicant's mother, sister, and brother are citizens of and residents in the Philippines. His mother is a homemaker, his sister is a teacher, and his brother is a farmer. Most recently, Applicant vacationed in the Philippines to visit his

relatives for three weeks in March 2000 and August 2002.

As requested by Department Counsel, I have taken administrative or official notice of certain facts concerning the Philippines as set forth in Exhibits 10 and 11. In particular, I note the following: (1) the Philippines is a developing democratic republic located in Southeast Asia; (2) the terrorist threat to American citizens in the Philippines remains high due to ongoing activities by known terrorist groups; and (3) as of February 2005, the U.S. State Department advised Americans traveling to or residing in the Philippines to exercise caution and maintain heightened security awareness.

## **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. 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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security

clearance is not a determination of an applicant's loyalty.<sup>(2)</sup> Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

In August 2000, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I), issued a policy memorandum--the so-called Money Memorandum, because it is signed by Assistant Secretary Arthur L. Money--clarifying the application of the foreign preference security guideline for cases involving possession and/or use of a foreign passport. In pertinent part, the Money Memorandum "requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains approval for its use from the appropriate agency of the United States Government." A copy of the Money Memorandum was provided to Applicant when he received the SOR. The Money Memorandum is binding or controlling Defense Department policy that I am required to apply, and it is beyond my authority to assess the wisdom or effectiveness of this policy, as that is the responsibility of policy-making officials.

## **BURDEN OF PROOF**

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(3)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(4)</sup> The government has the burden of proving controverted facts.<sup>(5)</sup> The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.<sup>(6)</sup> The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.<sup>(7)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(8)</sup> Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.<sup>(9)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(10)</sup>

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(11)</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

## CONCLUSIONS

Under Guideline C, a security concern may exist when a person acts in such a way as to indicate a preference for a foreign country over the U.S. In particular, the exercise of dual citizenship raises a security concern because the active exercise of foreign citizenship may indicate a preference for that foreign country over the U.S. Of course, dual citizenship by itself is not automatically a security concern. Absent the exercise of dual citizenship or indicia of some affirmative action demonstrating foreign preference, mere possession of foreign citizenship by virtue of birth does not fall within the scope of Guideline C.

Here, the government established its case under Guideline C, because Applicant exercised dual citizenship by possessing the Filipino passport after obtaining U.S. citizenship. By doing so, Applicant demonstrated a preference for the Philippines. Under these circumstances, DC 1<sup>(12)</sup> and DC 2<sup>(13)</sup> apply against Applicant. In addition, given the state of the record, I cannot conclude he has complied with the Money Memorandum, which requires a clearance be denied or revoked based on possession of a foreign passport. Applicant's has done nothing to show that he has surrendered the Filipino passport despite more than sufficient notice of the Money Memorandum.

Turning to the mitigating conditions under Guideline C, MC 1<sup>(14)</sup> applies because his dual citizenship is based on his birth in a foreign country.<sup>(15)</sup> MC 2<sup>(16)</sup> does not apply because the disqualifying behavior discussed above took place<sup>(17)</sup>

after he became a U.S. citizen. MC 3 does not apply because there is no indication that Applicant's actions were sanctioned by the United States. Finally, MC 4<sup>(18)</sup> does not apply because Applicant has not indicated that he is willing to renounce his Filipino citizenship. Although it appears that his life is now rooted in the U.S., the record evidence does not prove that he surrendered the Filipino passport as required by the Money Memorandum. On this basis, he has failed to successfully mitigate the security concern. Accordingly, Guideline C is decided against Applicant.

Under Guideline B, a security concern 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 U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. In addition, common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service.

Here, the government established its case under Guideline B, because Applicant has family and financial ties to the Philippines. His mother, brother, and sister are citizens of and residents in that country. The strength of the ties is also demonstrated by Applicant's trips to visit his relatives. Applicant also receives a small pension and owns a house in the Philippines. Taken together, these circumstances raise a security concern under DC 1<sup>(19)</sup> and DC 8.<sup>(20)</sup> The remaining DC do not apply based on the facts and circumstances here.

I reviewed the mitigating conditions under Guideline B and conclude that only MC 5<sup>(21)</sup> applies. Applicant receives some credit under MC 5 because his financial interests in the Philippines, the \$75 monthly pension and the house, are rather minimal. The remaining MC do not apply based on the facts and circumstances here. In particular, I gave consideration to MC 1,<sup>(22)</sup> but it does not apply. It appears that none of the family members are agents of the Filipino government or any other foreign power.<sup>(23)</sup> But that does not end the analysis, as Applicant must show his family members are not in position to be exploited.

In deciding if an applicant has met the second prong of MC 1, it is proper to consider how the foreign country at issue is governed. The focus is not the country or its people, but its rulers and the nature of the government they impose. This approach recognizes it is nonsensical to treat North Korea as if it were Norway. Here, we know the Philippines has had a long and friendly relationship with the U.S. based on shared history and commitment to democratic principles. Also, we know the Philippines is troubled by the presence of terrorist groups and there is a terrorist threat to American citizens in the Philippines. Given these circumstances, Applicant's family members are in a position where there is a potential for them to be exploited in a way that could force him to choose between loyalty to his family members and the interests of the U.S. Therefore, I conclude Applicant is unable to successfully mitigate the security concern. Accordingly, Guideline B is decided against Applicant.

Although I decided this case against Applicant, this decision should not be construed as an indictment of his loyalty and patriotism to the U.S., as those matters are not at issue. Instead, the clearly-consistent standard--which is a demanding standard--requires I resolve any doubt against Applicant. His possession of the Filipino passport and his family ties to

the Philippines create such doubt. To conclude, Applicant has failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

## **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline C: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

SOR ¶ 2-Guideline B: Against Applicant

Subparagraph a: For Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Subparagraph e: For Applicant

Subparagraph f: For 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. Clearance is denied.

Michael H. Leonard

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. Executive Order 10865, § 7.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
11. *Egan*, 484 U.S. at 528, 531.
12. E2.A3.1.2.1. The exercise of dual citizenship.
13. E2.A3.1.2.2. Possession and/or use of a foreign passport.
14. E2.A3.1.3.1. Dual citizenship is based solely on parents' citizenship or birth in a foreign country.
15. ISCR Case No. 99-0452 (March 21, 2000) at pp. 2-3 (Modifying its earlier rulings, the DOHA Appeal Board, in an expansive reading of MC 1, concluded the literal language of MC 1 allows it to be applied even when an applicant exercises foreign citizenship after becoming a U.S. citizen).
16. E2.A3.1.3.2. Indications of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship.
17. E2.A3.1.3.3. Activity is sanctioned by the United States.



18. E2.A3.1.3.4. Individual has expressed a willingness to renounce dual citizenship.
19. 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.
20. 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.
21. E2.A2.1.3.5. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.
22. 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.
23. *See* 50 U.S.C. § 1801(b), which defines the term "agent of a foreign power."