KEYWORD: Foreign Preference; Foreign Influence

DIGEST: Applicant was born in New Zealand. Before emigrating to the U.S., he completed an apprenticeship in a naval dockyard and obtained a master's degree from a New Zealand university. In the U.S., he accepted invitations to social events at the New Zealand embassy. He retained an active foreign passport after becoming a U.S. citizen, but he has surrendered it to the appropriate authority. His mother and five siblings are citizens and residents of New Zealand, but none of them are connected to the government, defense-related industries, or businesses involved in economic espionage. Security concerns based on foreign preference and foreign influence are mitigated. Clearance is granted.

CASENO: 05-04516.h1

DATE: 03/27/2006

DATE: March 27, 2006

In re:

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

Applicant for Security Clearance

ISCR Case No. 05-04516

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was born in New Zealand. Before emigrating to the U.S., he completed an apprenticeship in a naval dockyard and obtained a master's degree from a New Zealand university. In the U.S., he accepted invitations to social events at the New Zealand embassy. He retained an active foreign passport after becoming a U.S. citizen, but he has surrendered it to the appropriate authority. His mother and five siblings are citizens and residents of New Zealand, but none of them are connected to the government, defense-related industries, or businesses involved in economic espionage. Security concerns based on foreign preference and foreign influence are mitigated. Clearance is granted.

STATEMENT OF THE CASE

On July 29, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance.[(1)] The SOR alleges security concerns under Guidelines C (Foreign Preference) and B (Foreign Influence).

Applicant answered the SOR in writing on September 14, 2005. He denied the general allegation of foreign preference under Guideline C, admitted holding dual citizenship (SOR ¶ 1.a.) and having an active New Zealand passport (¶ 1.b.), denied maintaining professional contact with employees and officials of the New Zealand embassy (¶ 1.c.), admitted working in government-connected research institute (¶ 1.d.) and a New Zealand naval dockyard (¶ 1.e.), and offered explanations. He also denied the general allegation of foreign influence under Guideline B, but he admitted his mother and five siblings are citizens and residents of New Zealand (¶¶ 2.a. and 2.b.), admitted maintaining two bank accounts in New Zealand (¶ 2.c.), and offered explanations.

Applicant requested a hearing. The case was assigned to me on January 23, 2006, and heard as scheduled on February

22, 2006. I kept the record open until arch 10, 2006, to enable Applicant to provide additional evidence regarding disposition of his New Zealand passport. He timely submitted a 6-page packet of documents, and it is incorporated in the record as Applicant's Exhibit (AX) P. Department Counsel's response to Applicant's post-hearing submission is incorporated in the record as Hearing Exhibit (HX) II. DOHA received the transcript (Tr.) on March 1, 2006.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 35-year-old senior software engineer for a defense contractor. He was born and educated in New Zealand. He came to the U.S. in February 1998,[(2)] when he was 27 years old, and became a naturalized U.S. citizen in July 2003.[(3)] He has never held a security clearance.

Applicant's spouse was born in Manchester, United Kingdom, and she became a naturalized U.S. citizen before she met Applicant. She works as a statistician for a private company.[(4)]

From 1988 to 1992, Applicant worked as a civilian apprentice in instrument calibration at a New Zealand naval dockyard. Although the apprentices were referred to as "cadets," they were civilian employees with no military obligations. The term "cadet" was used to connote "white collar" positions and distinguish the apprentices from the "blue collar" dockyard employees.[(5)] After obtaining a certificate as an electronics technician, he resigned from the program and enrolled in a university in New Zealand, where he received a master's degree.

From 1994 to 1998, he worked at a horticultural and food research institute in New Zealand. The institute was a privatized company formed take over a government function. It performed research on pesticides and crop growth. The institute was privately owned and operated without a government wage system or benefits package.[(6)]

By virtue of his birth in New Zealand, Applicant holds dual U.S.-New Zealand citizenship. At the time of the hearing, he held an active New Zealand passport issued before he became a U.S. citizen. He has traveled twice since becoming a U.S. citizen, once to Sweden for a conference and to New Zealand to vacation and visit his family, and he used his U.S. passport on both occasions.[(7)] However, when he entered New Zealand and presented his U.S. passport, the

immigration officer, noting he was born in New Zealand, asked him to present his New Zealand passport; and Applicant complied.[(8)] He was informed by the New Zealand embassy that he cannot surrender his passport without renouncing his citizenship.[(9)] Applicant offered to destroy his New Zealand passport in my presence.[(10)]

After the hearing, Applicant submitted a copy of his letter to the New Zealand Department of Internal Affairs surrendering his current passport as well as his previous expired passport. The current passport was torn into many pieces, making it unusable. The letter was sent by registered mail on March 9, 2006.[(11)]

Applicant admitted attending events at the New Zealand embassy in the U.S. He testified he had placed himself on the embassy social list when he attended a meeting of alumni from his New Zealand alma mater at the embassy. Thereafter, he was invited to several events that amounted to lobbying events intended to promote joint U.S.-New Zealand enterprises. He attended two events, one involving the New Zealand yachting team, and declined a third. All three occurred before he became a U.S. citizen. He attended in an individual, nonofficial capacity and regarded the events as social events.[(12)]

Applicant's mother and five siblings are citizens and residents of New Zealand. He has regular telephone contact, about once a month, with his mother. During the last year, he contacted his oldest brother twice and had no contact with his other siblings.[(13)] He has visited his mother and siblings twice in New Zealand since his immigration to the U.S.[(14)]

Applicant's mother worked as an accountant until she was 21 years old. She spent the remainder of her life as a mother and homemaker. She is retired, receives a small pension, and is entitled to the U.S. equivalent of Medicare.[(15)]

Applicant's oldest brother works in private business and has never worked for the government.[(16)] His second-oldest brother trained as an apprentice at the same dockyard where Applicant was trained and now works for private industry. Except for his apprenticeship, he has never worked for the government.[(17)] His third brother is a machinist in private industry and has never worked for the government.[(18)] His older sister works as a caregiver in a retirement home and has never worked for the government.[(19)] His younger sister is a homemaker, is on welfare, and has never been employed by the government.[(20)]

Applicant maintains two small bank accounts in New Zealand. As of the date of the hearing, one account had a balance equivalent to about $464 in U.S. currency and the other about $128 in U.S. currency. He uses these two accounts as a means of sending money to his mother. Last October he deposited the equivalent of about $350 in the account to allow his mother to purchase a three-month supply of her blood pressure medications.[(21)] By contrast, his U.S. bank account has a balance of about $27,000.[(22)]

Applicant's father-in-law, a U.S. citizen, regards him as trustworthy, conscientious, and committed to being a responsible U.S. citizen.[(23)] A coworker who has known him for two years regards him as a "strong" engineer, a trustworthy person, a loyal citizen, and very conscientious in protecting proprietary information.[(24)] His project manager regards him as hardworking and trustworthy, with a "mature understanding of the nature of competitive information" that must be protected.[(25)] His supervising manager, who has known him for more than five years, considers him a "very committed, dedicated professional individual" and "a better citizen than most of the other natural citizens" he knows.[(26)] Another coworker, who has known Applicant since he arrived in the U.S., described him as trustworthy, considerate, and very careful with proprietary information.[(27)] Applicant's facility security officer, who has known him for about 18 months, considers him very safety and security conscious. [(28)]

New Zealand is a parliamentary democracy closely patterned on the United Kingdom.[(29)] It has a robust economy based on exports of agricultural products. It is an active trading partner with the U.S. and it encourages foreign investment.[(30)] It has a small defense establishment oriented toward defending New Zealand against low-level threats, contributing to regional security, and playing a part in global security efforts. It is an active participant in multilateral peacekeeping.[(31)] The U.S. and New Zealand have excellent relations, sharing common elements of history, culture, and commitment to democratic principles.[(32)]

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline C (Foreign Preference)

When an applicant acts in such a way as to indicate a preference for a foreign country over the U.S., he or she may be prone to provide information or make decisions that are harmful to the interests of the U.S. Directive ¶ E2.A3.1.1. A disqualifying condition may arise if an individual exercises dual citizenship (DC 1), or possesses or uses a foreign passport (DC 2). Directive ¶¶ E2.A3.1.2.1., E2.A3.1.2.2. The use of a foreign passport is an exercise of dual citizenship.

Applicant's possession of a New Zealand passport after becoming a U.S. citizen, and his admitted use of it on one occasion, albeit reluctantly, establish DC 1 and DC 2.

The evidence shows Applicant's employment at the research institute in New Zealand was not government employment. I conclude Applicant has refuted the allegation he worked for the New Zealand federal government from 1994 to 1998, and I resolve SOR ¶ 1.d. in his favor.

DC 3 applies where an applicant has performed military service in a foreign country. Directive ¶ E2.A3.1.2.3. Although Department Counsel argued that Applicant became part of the New Zealand defense establishment by working as a "cadet" in a naval dockyard, the evidence establishes that he was employed as a civilian, and the term "cadet" was used merely to connote a "white collar" position. I conclude DC 3 is not established, and I resolve SOR 1.e. in his favor.

Several mitigating conditions (MC) are relevant. MC 1 applies if dual citizenship is based solely on parents' citizenship or birth in a foreign country. Directive ¶ E2.A3.1.3.1. This mitigating condition is established because Applicant did not affirmatively seek foreign citizenship, but acquired it by virtue of his birth in New Zealand.

When use of a foreign passport is involved, the clarifying guidance issued by the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (the "Money Memorandum") dated August 16, 2000, requires denial of a clearance unless the applicant surrenders the foreign passport or obtains official approval for its use from the U.S. Government. Applicant has met this requirement by surrendering both his expired and his current New Zealand passports.

MC 2 applies if indicators of possible foreign preference occurred before the individual obtained U.S. citizenship. Directive ¶ E2.A3.1.3.2. MC 2 is established for Applicant's employment at the New Zealand dockyard, his possession and use of a New Zealand passport before becoming a U.S. citizen, and his social contacts with the New Zealand embassy.

MC 4 applies if the individual has expressed willingness to renounce dual citizenship. Directive ¶ E2.A3.1.3.4. This condition is established because Applicant expressed his willingness to renounce his dual citizenship before and during the hearing if it posed an impediment to obtaining a security clearance, and he surrendered his New Zealand passport.

After weighing the disqualifying and mitigating conditions and evaluating the evidence in the context of the whole person, I conclude Applicant has mitigated the security concern based on foreign preference.

Guideline B (Foreign Influence)

A security risk may exist when an applicant's immediate family, or 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. Directive ¶ E2.A2.1.1. A disqualifying condition (DC 1) may arise when "[a]n immediate family member [spouse, father, mother, sons, daughters, brothers, sisters], 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." Directive ¶ E2.A2.1.2.1. Because Applicant's mother and five siblings are citizens and residents of New Zealand, I conclude DC 1 is established.

A disqualifying condition (DC 8) may arise when an applicant has a "substantial financial interest" in a foreign country. Directive ¶ E2.A2.1.2.8. Applicant's small bank accounts used to transmit money to his mother fall far short of a "substantial financial interest." I conclude DC 8 is not established, and I resolve SOR ¶ 2.c. in his favor.

Since the government produced substantial evidence to establish DC 1, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

In cases where an applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members, 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." Directive ¶ E2.A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to chose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power").

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Although New Zealand historically has been regarded

as friendly to the U.S., the distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S.

The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). Applicant testified that none of his immediate family members are connected to the New Zealand government, industries involved in government or national defense, or high technology businesses likely to be involved in economic espionage. Department Counsel presented no evidence refuting Applicant's testimony. New Zealand does not conduct intelligence activities targeting the U.S. and is not a known practitioner of economic espionage. While none of the individual family circumstances discussed above are determinative, they are all relevant in assessing their vulnerability to exploitation. After considering Applicant's family ties individually as well as in totality, I conclude MC 1 is established.

MC 3 applies when an applicant's contacts and correspondence with foreign citizens are "casual and infrequent." There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Applicant has not rebutted this presumption. Accordingly, I conclude MC 3 is not established, because his contacts with his immediate family are infrequent but not casual.

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concern based on foreign influence.

FORMAL FINDINGS

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

Paragraph 1. Guideline C (Foreign Preference): FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline B (Foreign Influence): FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

1. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).

2. Government Exhibit (GX) 2 at 1; AX E, F.

3. AX B, C, D.

4. Tr. 78-80.

5. Tr. 54-56, 68.

6. Tr. 53-54; AX H, I.

7. Tr. 49.

8. Tr. 50.

9. Tr. 75.

10. Tr. 50-51, 61, 71.

11. AX P.

12. AX K, L, J; Tr. 51-52.

13. Tr. 56-57.

14. Answer to SOR at 3.

15. Tr. 66-67.

16. Tr. 68.

17. *Id.*

18. Tr. 69.

19. Tr. 69-70.

20. Tr. 70.

21. Tr. 58.

22. X M, N, O; Tr 59.

23. Answer to SOR at Attachment B.

24. *Id.* at Attachment C; Tr. 108-11.

25. AX A.

26. Tr. 90-91.

27. Tr. 95-99.

28. Tr. 102-05.

29. HX I at 1-3.

30. *Id.* at 4.

31. *Id*. at 5.

32. *Id.* at 6.