

DATE: December 11, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-17030

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a dual citizen of Germany and the United States, has not fulfilled the requirements of the Memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence, dated August 16, 2000, (Money Memorandum) by retaining her current German passport rather than relinquishing it to the proper German authorities. Additionally, she has not renounced her German citizenship nor indicated a willingness to do so. Applicant's aunt, who is a citizen and resident of Germany, is not in a position to be exploited by Germany in a way that could force Applicant to choose between loyalty to these family members and her loyalty to the United States. Overall, mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated April 27, 2006, to the Applicant which 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 for the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, or denied. The SOR was based on Foreign Preference (Guideline C) and Foreign Influence (Guideline B) concerns.

Applicant, acting *pro se*, filed a notarized response, dated May 24, 2006, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On July 11, 2006, the case was assigned to me to conduct a hearing. Pursuant to formal notice dated September 13, 2006, a hearing was held on October 24, 2006.

At the hearing, Department Counsel offered six documentary exhibits (Exhibits 1 through 6) and no witnesses were called. Applicant offered six documentary exhibits (Exhibits A through F) and offered her own testimony, and that of five other witnesses. The transcript (Tr) was received on November 3, 2006.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of the Directive. The SOR contains two allegations, 1.a. and 1.b., under Guideline C, and one allegation, 2.a., under Guideline B. Applicant admitted SOR allegations 1.b. and 2.a., but she denied 1.a.. The admissions are incorporated herein as Findings of Fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the documents introduced at the hearing, and the live testimony, and upon due consideration of that evidence, I make the additional Findings of Fact:

Applicant is 35 years old. She is employed as a photographer by the United States Air Force, and she seeks a security clearance for her employment. .

Applicant was born in Canada of parents, who are United States citizens. She is not married and has no children. Her father was born in Germany and her mother in the United States. Applicant is a dual citizen of the United States and Germany.

Paragraph 1 (Guideline C - Foreign Preference)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because she has acted in such a way as to indicate a preference for another country over the United States.

Applicant possess a German passport that was issued on March 14, 2001, and does not expire until March 13, 2011. She first received the German passport in 1980 and she renewed it in 2001. Applicant also has a United States passport.

Applicant was made aware prior to the hearing and again at the hearing that pursuant to the Money Memorandum, if she retained a current passport from a country other than the United States she would be barred from obtaining or retaining a security clearance. At the hearing, Applicant testified that she did not believe she was willing to surrender her German passport. The record remained open subsequent to the hearing, until November 7, 2006, to give Applicant an opportunity to establish that she had returned her German passport to the proper German authorities and renounced her German citizenship. Applicant did not offer any evidence after the hearing that she had surrendered her German passport or renounced her German citizenship.

Paragraph 2 (Guideline B - Foreign Influence)

The Government alleges in this paragraph that Applicant is ineligible for clearance because she has an immediate family member to whom she may be bound by affection or obligation, who is not a citizen or resident of the United States.

Applicant's aunt, her father's sister, is a German citizen and resident. She is employed as a homeopathic doctor, and she does not work for the German Government. Applicant speaks to her aunt approximately every few months. She last visited her aunt in Germany in the summer of 2006.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section

E2.2.

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. See Directive 5220.6, Enclosure 2, Section E2.2.4.

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of those who testified, I conclude the following with respect to Guidelines C and B:

(Guideline C - Foreign Preference)

Guideline C is based on actions taken by an individual that indicate a preference for a foreign country over the United States. Applicant's decision to continue to retain a German passport raises serious Foreign Preference (Guideline C) concerns. In reviewing the Disqualifying Conditions (DC), I find that DC (E2.A3.1.2.1.), the exercise of dual citizenship applies because Applicant reapplied for and has retained her German passport. DC (E2.A3.1.2.2.), possession and/or use of a foreign passport, also applies. Finally, since Applicant failed to surrender her German passport, it is a violation of the Money Memorandum, and therefore Applicant is absolutely barred from retaining a security clearance. Applicant's unwillingness to renounce her German citizenship must also be considered adversely to Applicant. No Mitigating Condition (MC) is applicable in this case.

(Guideline B - Foreign Influence)

Under Guideline B, a security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he is bound by affection, influence or obligation, are not citizens of the United States or may be subject to duress. The evidence of Applicant's aunt, who, is a citizen and resident of Germany comes within DC (E2.A2.1.2.1.), an immediate family members, or persons to whom the individual has close ties of affection or obligation, are citizens of, or resident or present in, a foreign country. Based on the nature of the overall record and the

totality of the evidence, including the lack of government involvement of Applicant's aunt, I have determined that her aunt in Germany does not constitute an unacceptable security risk, and MC (E2.A2.1.3.1.), a determination that the immediate family member, in question is not an agent 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 involved and the United States, applies.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline C: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Guideline B: FOR APPLICANT

Subparagraph 2. a.: 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.

Martin H. Mogul

Administrative Judge