

DATE: __ August 13, 1997

In re:

Applicant for Security Clearance

ISCR OSD Case No. 97-0172

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR THE GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended by Change 3, issued a Statement of Reasons (SOR) dated April 10, 1997, 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 and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked.

A copy of the SOR is attached to this Decision and included herein by reference.

On April 29, 1997, Applicant responded to the allegations set forth in the SOR and requested that his case be determined on the written record in lieu of a hearing. The Government submitted its File of Relevant Material on May 31, 1997, a copy of which was forwarded to Applicant with instructions to submit material in explanation, extenuation or mitigation within thirty days of receipt. Applicant elected not to file a response and the case was assigned for resolution to a DOHA Administrative Judge on July 21, 1997. On August 7, 1997, the case was transferred to the undersigned due to workload considerations.

FINDINGS OF FACT

After a thorough review of the evidence in the record, and upon due consideration of same, this Administrative Judge renders the following findings of fact:

Applicant is a 32 year old sales manager who has worked for his current employer, a defense contractor, since December 1995. He seeks a security clearance for his duties there.

Applicant was born in foreign country A to a United States citizen on January 9, 1965. By virtue of his birth abroad to a United States national, Applicant possesses both foreign country A and United States citizenship.

Adopted by two resident citizens of foreign country A, (1) Applicant was raised and schooled there. From September 1978 to September 1983, Applicant studied economics and mathematics at an educational institution in foreign country A. From 1984 to 1988, Applicant served on active duty as an officer in a branch of foreign country A's military.

In January 1989, Applicant commenced employment in foreign country A as a regional sales manager with an international defense industry research and publishing firm. In March 1990, he was transferred to that firm's offices in the United States. He remained employed by that concern until June 1994 when he started a position with another publishing firm.

As a dual citizen of the United States and foreign country A, Applicant is entitled to vote in foreign country A elections. Resident continuously in the United States from March 1990, Applicant since his relocation has not exercised any voting right and/or privilege other than that afforded him as a United States citizen. On November 20, 1993, Applicant married a United States citizen. He intends to remain in the United States because of his employment here and marriage to a United States citizen.

Circa March 1984 to at least April 1997, Applicant possessed a foreign country A passport. Applicant obtained his United States passport on or about January 12, 1988. Over the December 1991 to September 1995 time frame, Applicant made nine separate trips to foreign country A. He used his foreign country A passport to enter the country in preference to his United States passport "for convenience." Applicant used his United States passport for all other travel.

Applicant does not anticipate any financial benefits or privileges from the foreign country A government and has not registered with foreign country A's embassy to obtain benefits. He has never traveled to foreign country A for purposes of fulfilling any citizenship requirements and does not maintain his dual citizenship to protect financial interests, property ownership, or employment or inheritance rights in foreign country A. Applicant has some money invested in a bank in foreign country A which he inherited on the death of his adoptive father. As of January 3, 1997, Applicant was contemplating the purchase of property in foreign country A as a joint investment with his sister who continues to reside in that nation.

Applicant has been forthcoming about his dual citizenship status with the Department of Defense. In conjunction with his personnel security background investigation, Applicant was interviewed by a Special Agent of the Defense Investigative Service (DIS) on January 3, 1997. Applicant advised the Agent that he holds allegiance to both the United States and foreign country A. He indicated he would not use a position of trust with the United States Government to serve the interests of foreign country A in preference to those of the United States. Applicant also denied any further obligation to the foreign country A ministry of defense, but volunteered that he would serve in foreign country A's military again, if required.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, 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 seriousness, recency, frequency and motivation for an applicant's conduct; the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the circumstances or consequences involved; the age of the applicant; the absence or presence of rehabilitation, the potential for coercion or duress, and the probability that the conduct will or will not recur in the future. *See* Directive 5220.6, Section F.3. and Enclosure 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.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most

pertinent to this case:

FOREIGN PREFERENCE

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.

Conditions that could raise a security concern and may be disqualifying include:

- (1) the exercise of dual citizenship
- (2) possession and/or use of a foreign passport
- (3) military service or willingness to bear arms for a foreign country

Conditions that could mitigate security concerns include:

None.

* * *

Under the provisions of Executive Order 10865 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." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the Applicant.

CONCLUSIONS

A dual citizen of foreign country A and the United States from birth, Applicant's foreign citizenship would be of little security significance if it was based solely on his birth on foreign soil. In order for conduct to be cognizable under criterion C, foreign preference, the individual must have *acted* in such a way to indicate a preference for a foreign nation over the United States. Having considered the evidence of record in light of the appropriate legal precepts and factors, this Judge concludes that the Government has established its case with regard to criterion C.

Raised and educated in foreign country A by an adoptive family of country A origin and orientation, Applicant served

four years as an infantry officer in country A's military from 1984 to 1988 and he remained in country A to pursue a civilian career in sales management. By all accounts, he was only nominally a United States citizen. There is no evidence Applicant had any personal experience with the United States during his formative years or any close relatives in this country. Apart from procuring his United States passport on January 12, 1988, there is no evidence that Applicant exercised any right and/or privilege of his United States citizenship prior to the transfer of his job situs to offices in the United States in March 1990. After accepting a benefit of United States citizenship (the passport), Applicant not only continued to maintain a valid country A passport, but on his trips to country A thereafter, Applicant presented his foreign passport in preference to his United States passport "for convenience." Inimical intent or detrimental impact on the interests of the United States is not required before the Government can seek to deny access under criterion C. The Government has a compelling interest in ensuring that those entrusted with this Nation's secrets will make decisions free of concerns for the foreign country of which one is also a citizen in cases of dual citizenship.

In determining the current security significance of Applicant's exercise of rights or privileges afforded him as a citizen of foreign country A, this Administrative Judge must consider the Adjudicative Guidelines pertaining to foreign preference set forth in Enclosure 2 to the Directive. Of the nine listed potentially security disqualifying conditions (DC), Applicant's conduct falls within DCs 1. (exercise of dual citizenship), 2. (possession and or/use of a foreign passport) and 3. (military service or willingness to bear arms for a foreign country). Although Applicant had apparently received an inheritance on the death of his adoptive father, there is no evidence that he was continuing to maintain dual citizenship to protect a financial interest in foreign country A.

Foreign preference concerns are mitigated under the Directive if the dual citizenship is based solely on birth (MC 1.),⁽²⁾ the indicators of possible foreign preference occurred before obtaining United States citizenship (MC 2.), the activity is sanctioned by the United States (MC 3.) or the individual has expressed a willingness to renounce dual citizenship (MC 4.). In Applicant's case, it is his United States citizenship which was based solely on birth. MC 1. does not apply to Applicant's foreign country A citizenship. MC 2. is clearly not apposite where he has held United States citizenship from birth. Moreover, there is no evidence that his foreign military service or his use of his country A passport were sanctioned by the United States. Prior to his employment transfer to the United States, his actions were for the most part consistent with the exercise only of his foreign country A citizenship.⁽³⁾

Having derived economic and political benefits from his foreign country A citizenship for twenty-five of his thirty-two years, he has only recently sought to exercise the rights and privileges attendant with his United States citizenship. To his credit, he has not voted by proxy in foreign country A elections since becoming resident in the United States but has voted in United States elections. While he has also established residence in the United States, married a United States national and indicated an intent to remain here, his presentation of his country A passport when visiting that nation since is an act of foreign preference. As recently as April 29, 1997, Applicant expressed allegiance to country A as well as to the United States and a willingness to again serve in foreign country A's military, if required. As his continued use of his foreign country A passport and his willingness to serve in the foreign military demonstrate, Applicant has no intent to renounce his country A citizenship. As of January 3, 1997, he was contemplating purchasing property in country A with his sister, a resident national of foreign country A. While Applicant has a legal right to maintain his dual citizenship with its attendant benefits as well as responsibilities, it has not been demonstrated that he can be counted on to always act in preference to the United States. He continues to bear allegiance to foreign country A and has both financial and family ties there. There exists an unacceptable risk that his future decisions will be influenced by concerns for foreign country A, whose interests may or may not be completely consistent with those of the United States. Accordingly, subparagraphs 1.a., 1.b., 1.c., and 1.d. are resolved against him.

FORMAL FINDINGS

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

Paragraph 1. Criterion C: AGAINST 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

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.

Elizabeth M. Matchinski

Administrative Judge

1. Applicant's adoptive mother was born in a land whose residents are accorded the rights and privileges of country A citizenship.
2. The Government's position is that mitigating condition 1 (dual citizenship based solely on birth) is available for Applicant. This Administrative Judge does not share such an expansive reading of MC 1, but instead interprets that factor as applying to the situation where dual citizenship was obtained by virtue of one's birth and there has been no active exercise, such as the acceptance of privileges, rights, duties or responsibilities, of the foreign citizenship.
3. The lone action taken in exercise of his United States citizenship was obtaining his United States passport which is undermined by his use of his foreign country A passport on return trips to that nation after he had established residency in the United States.