DATE: December 12, 1997

In Re:

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

Applicant for Security Clearance

ISCR Case No. 97-0356

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Pro se

STATEMENT OF THE CASE

On July 1, 1997, 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, amended by Change 3, February 13, 1997, issued a Statement of Reasons (SOR) to 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 Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. The SOR is attached. Applicant filed his Answer to the SOR on July 9, 1997.

The case was received by the undersigned on July 11, 1997. A notice of hearing was issued on July 15, 1997, and the case was heard on September 15, 1997. The Government and Applicant submitted documentary evidence.(1) Testimony was taken from Applicant and one witness. The transcript was received on September 22, 1997.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The issue raised by the SOR is foreign preference (Criterion C - whether an individual's actions indicate a preference for a foreign country over the United States, and whether these actions may make him prone to provide information or make decisions that are harmful to the interests of the United States). Applicant's response to the SOR shall be incorporated by reference to the Findings of Fact.(2)

Applicant is 33 years old and employed as a program manager for a defense contractor. He seeks a secret level clearance.

Applicant has dual citizenship with the United States and a foreign country. Applicant became a citizen in the foreign country by birth on October 23, 1964. (GE #1; Tr. 25) He was admitted as a political refugee to the United States in 1984 by the Immigration and Naturalization Service (INS) because of his strong disagreement with the ideological form

of government in his homeland. Applicant became a naturalized United States citizen in January 1991. (GE #3)

While Applicant's current position is not to maintain dual citizenship because he filed a petition to renounce his foreign citizenship on September 4, 1997, his position cannot be blindly accepted, but must be weighed and balanced against all the documentary and testimonial evidence. A close examination of the record reveals substantial inconsistencies between GE #2 (sworn statement dated April 7, 1997), Applicant's response to the SOR dated July 9, 1997, and Applicant's testimony at the hearing on September 15, 1997. These inconsistencies, when evaluated either individually or together, have a negative impact on Applicant's credibility, and, in turn, warrant a finding that Applicant desires to maintain homeland citizenship.

In his sworn statement (GE #2) dated April 7, 1997, Applicant stated he had foreign country citizenship because he was born the in the foreign country. He voted in his homeland elections from time to time because of his opposition to the type of foreign government. He wanted to exercise his voting right in the future because he interpreted his vote to be a contribution to the democracy in his homeland. Even in his response to the SOR dated July 9, 1997, Applicant noted the sentimental value his homeland citizenship meant to him and would only surrender his foreign country's citizenship if required to obtain a security clearance. Yet, approximately two months later in September 1997, Applicant testified he never had any preferences to the foreign country (Tr. 25), and lost interest in the politics of his homeland. In addition, he claimed that he had to renounce his citizenship by operation of law in January 1991 when he took the oath to become a naturalized citizen. (Tr. 28) Later in his testimony, he noted he had never been asked before to renounce his foreign citizenship. (Tr. 44) Still, later in his testimony, he indicated that a petition renouncing his homeland citizenship which he did file on September 4, 1997 - AE-A)was not a perfunctory procedure and could take about two months because the petition had to be processed in the courts of his homeland. (Tr. 33)[(3)] The different and inconsistent positions regarding retention of his foreign citizenship or conditionally surrendering his citizenship, support a finding of Applicant's plan to maintain homeland citizenship.

Applicant testified he was still only a resident of the U.S. from 1989 to January 1991 when he voted in only two elections of his homeland. (Tr. 24) When he voted in those elections, he was living in the U.S. and the U.S. sanctioned each vote. (Tr. 24) Yet, his sworn statement (GE #2) reflects Applicant voted in elections of his homeland "from time to time...."[(4)] When asked for his definition of the phrase 'from time to time,' Applicant first indicated 'twice,' then said 'occasional,'[(5)] then stated he meant to use the word 'twice.' (Tr. 61-65) Given the uncomplicated words used in the phrase 'from time to time,' Applicant's confusing explanation is simply not credible in view of Applicant's age, his education (he is a college graduate), and residence in the U.S. for the last 13 years, or thereabouts. (GE #1)

Also, Applicant stated (GE #2) his desire to vote in foreign country elections in the future because he considered his vote a contribution to democracy in his homeland. Yet, approximately three months later in his response to the SOR in July 1997, Applicant indicated he did not intend to vote because it is illegal and he lost interest in the politics of his homeland. Then, at the hearing Applicant stated he never had any preference for his homeland, and his votes in 1989 and 1991 were only protest votes. (Tr. 25, 26) It is extremely difficult to understand how quickly Applicant lost interest in voting and his homeland politics in only three to five months after he unequivocally stated his future intention to vote as a contribution to democracy in his homeland. The change of position regarding his future voting intentions weaken Applicant's credibility even more and clearly support a finding Applicant plans to vote in future elections of his homeland.

Applicant's undermined credibility regarding his desire to maintain foreign citizenship and to vote in future elections, places a cloud over other uncontroverted testimony about his links or relationships to his homeland.[(6)]

Applicant's supervisor, who participated in the hiring of Applicant and has supervised him for the past eleven months, has a high regard for Applicant because of his trustworthiness and excellent work product, which according to his supervisor, translates to dedication to the national interest. (Tr. 68)

Applicant would not bear arms on behalf of his foreign country against the United States. (Tr. 52)

POLICIES

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Foreign Preference (Criterion C)

Factors Against Clearance:

1. the exercise of dual citizenship;

2. possession and/or use of a foreign passport;

4. accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country;

6. using foreign citizenship to protect financial or business interests in another country;

7. seeking or holding political office in the foreign country;

8. voting in foreign elections.

Factors for Clearance:

1. dual citizenship is based solely on parents' citizenship or birth in a foreign country;

2. indicators of possible foreign preference;

3. activity sanctioned by the United States;

4. individual has expressed a willingness to renounce dual citizenship.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 2-1 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; and, (8) the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must establish all the factual allegations under foreign preference (Criterion C) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection must be shown between an

applicant's adverse conduct and his ability to effectively safeguard classified information, objective or direct evidence is not required. Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance. As noted by the Supreme Court in *Department of the 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."

CONCLUSIONS

The Government's case of foreign preference rests on Applicant's sworn statement in April 1997, indicating his intention to maintain his foreign country citizenship (subparagraph 1a) for sentimental reasons, and planning to vote in future elections of his homeland, as representative of his contribution to democracy in his homeland (subparagraph 1b). Having reviewed all of the evidence, both unfavorable and favorable, and the specific policy factors against clearance and the factors for clearance, I conclude Applicant's conduct demonstrates a preference for a foreign country over the United States, and he may be prone to provide information or provide decisions that are harmful to the interests of the United States.

There are nine factors against clearance which are to be considered when assessing foreign preference. Next, there are four factors for clearance which should be considered to determine whether foreign preference concerns have been mitigated. There is no standard method or formula for applying the factors against clearance or factors for clearance, and no one factor is more or less important than any other factor. Lastly, application of the factors depends the facts and circumstances of each case, and whether the documentation or testimony pertinent to each factor, is credible. For example, one of the factors for or against clearance, may not apply because the documentation is not credible or because the testimony is not credible. In assessing credibility of testimony, I must carefully examine: (1) whether that testimony makes sense and/or is reasonable; (2) whether the testimony is supported (or contradicted) by other intrinsic or extrinsic sources, e.g., documents or testimony of other witnesses; and, (3) how the person presents the testimony it, e.g., whether he is sweating or nervous when he testifies.

I conclude this case against Applicant because of his poor credibility, arising from contradictory and inconsistent statements he provided throughout the security clearance investigation to conceal his preference for dual citizenship and voting in elections of his homeland. In April and July 1997, Applicant explained his affinity for the foreign country because of his opposition to the type of government and the sentimental value. Applicant's rather sudden change of position at the hearing in September 1997, raises significant doubts about whether Applicant has truly relinquished his feelings about his foreign country.

As discussed in the Findings of Fact, Applicant's contradictory explanations about occasionally voting in elections of his homeland, damages the credibility of his testimony about paying taxes, past employment, owning property, having business or inheritance interests in his homeland, and the number of visits to his homeland

Applicant's dual citizenship is founded on his birth in the foreign country, but Applicant has exercised his dual citizenship through voting in the elections of his homeland from time to time. Although those elections were sanctioned by the U.S. in the late 1980s and early 1990s, Applicant has tried unsuccessfully to conceal the fact he has continued to vote occasionally. While Applicant has expressed a willingness to renounce his dual citizenship, the official renunciation did not come until September 4, 1997 when he filed the petition for renunciation. The recent change of position over the last three to five months, raises serious doubts about the depth of his resolve in renouncing dual citizenship. If he had been forthright about his recent actions taken in renouncing his citizenship instead of offering ambiguous and contradictory explanations about his foreign citizenship and his voting in foreign elections, then at least his credibility may have weighed in his favor. However, because of Applicant's suspect credibility, Applicant's evidence in mitigation is insufficient in demonstrating: (1) he has no preference for a foreign country over the United States; and, (2) that he will not be prone to provide information or make decisions that are harmful to the interests of the United States.

FORMAL FINDINGS

Having weighed and balanced the specific policy factors with the general policy factors (whole-person concept), Formal

Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (Foreign Preference): AGAINST THE APPLICANT.

a. Against the Applicant.

b. 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.

Paul J. Mason

Administrative Judge

1. The Government exhibits shall be marked as 'GE' followed by the number of the exhibit; Applicant's exhibits shall be marked by 'AE' and the corresponding alphabetical letter.

2. In his response to the SOR, Applicant denied subparagraphs 1a, and explained, "I hold [foreign country] citizenship because I was born in [foreign country] and it only represents a sentimental value to me." Applicant then noted if he was required to relinquish his foreign country citizenship, he would contact the foreign country consulate and inquire further. In response to subparagraph 1b, Applicant denied he planned to vote in future elections of his homeland. He voted in only one election of his homeland when he was a permanent resident of the United States and his passport was still valid.

3. He filed his petition renouncing foreign citizenship on September 4, 1997. (AE-A)

4. In his July 9, 1997 response to the SOR, he claimed he voted in only one foreign election.

5. Only when I volunteered the generally accepted definition of the phrase, did Applicant change his testimony. However, there is little doubt from Applicant's overall testimony on this issue, that he was very resistant to accepting the definition. He then offered other testimony to try to explain what he supposedly wanted to say. His explanations are after the fact rationalizations of the fact that Applicant occasionally voted in elections of his homeland and wanted to vote in the future.

6. The credibility of Applicant's uncontroverted but unsupported testimony about being a law student when he departed his homeland in 1984 (Tr. 40), about not having been employed in his homeland, about never paying taxes or owning property, about never owning a business or having inheritance interests (Tr. 57), and about the use of his domestic or foreign passport in travels to his homeland in 1992 and 1996, (Tr. 51), and why he did not relinquish the passport until he filed his petition to renounce his foreign citizenship in September 1997 (Tr. 32), is weakened by his after-the -fact and contradictory explanations of his real desire to maintain citizenship in his homeland.