DATE: March 20, 1998

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In Re:

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

Applicant for Security Clearance

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ISCR Case No. 97-0764

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Michael H. Leonard, Esq., Department Counsel

**FOR APPLICANT**

***Pro Se***

## 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 3), issued a Statement of Reasons (SOR), dated December 4, 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on foreign preference (criterion C) concerns related to Applicant's exercise of dual citizenship to resolve foreign financial interests, his use of a foreign passport, and possible foreign military obligations.

On December 23, 1997, Applicant responded to the allegations set forth in the SOR and requested a hearing. The case was assigned accordingly to this Administrative Judge on January 22, 1998, and on January 28, 1998, a hearing was scheduled for February 25, 1998. At the hearing held as scheduled, two Government exhibits and forty-one Applicant exhibits were admitted into evidence. Testimony was taken from Applicant, his father-in-law and his current supervisor on his behalf. A transcript of the hearing was received by DOHA on March 10, 1998.

## 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 38 year old senior development engineer who has been employed by company A, a defense contractor, since December 1996. He seeks a Secret security clearance for his duties there.

Applicant was born in May 1959 to resident nationals of foreign (european) country B. A citizen by birth of foreign country B, Applicant spent less than four years there before he and his family moved to an african nation. In July 1966, Applicant and his family came to the United States because of his father's employment with a major international

institution. At the time of his entry on a G-4 (non-resident alien) visa, Applicant presented a valid passport issued by foreign country B in June 1964.

Resident in the United States for the next thirteen years, Applicant attended from September 1966 to May 1979 a private institution designed for foreign language speaking nationals where he received a bilingual education (in his native tongue and english). Applicant became involved in the local United States community as an active Boy Scout from 1971 to 1976 and over the years his grades in english were often better than his grades in his mother language.

At age 20, Applicant in September 1979 moved back to foreign country B to pursue engineering studies as his schooling there was free but for a nominal enrollment fee. From November 1980 to February 1986, he was enrolled as a student in a foreign country B technological institute. He made twelve visits back to the United States during that time. In early February 1986, he was awarded his diploma in electrical engineering, which is equivalent to a master's degree in that discipline. As a citizen resident of foreign country B during this period, Applicant had a compulsory military obligation which he fulfilled by service in the infantry first as a private and then as a gun commander from 1980 to 1985. He has no future military obligation to foreign country B.

Desirous of becoming a permanent resident of the United States, Applicant came to this country in January 1986, after his graduate studies were completed but prior to the award of his diploma. His intent was to secure a job offer from a United States employer who would certify that the company was unable to find a qualified United States citizen for the position. He entered this country on a valid foreign country B passport. After having sent out some 150 applications for employment, Applicant in May 1986 was offered a position as an associate engineer with a United States firm (company C). The Immigration and Naturalization Service approved his application for entry as a G-4 non-immigrant and in late June 1986, he was issued a visa good for a period of two years. Twelve days later, Applicant commenced employment with the United States company in this country as an associate engineer.

In September 1986, Applicant retained legal counsel to pursue permanent United States residence third labor certification and third preference petitions. In August 1988, Applicant was granted permanent residency status. Although he was employed at the time as an implementation engineer with company C in the United States, Applicant had to return to foreign country B to obtain a visa. He entered the United States then in August 1988 as a legal permanent resident.

In September 1990, Applicant married a United States citizen in the United States. All her immediate family members are United States citizens and residents. Circa April 1991, Applicant and his spouse purchased their current home. Not able to apply for naturalization until five years from the date of permanent residency status, Applicant filed his application two days past the required waiting period. He became a naturalized United States citizen in June 1994, swearing allegiance to the United States and intending to exercise the rights and privileges afforded thereby. Twelve days later he obtained a United States passport. A dual citizen of the United States and foreign country B, Applicant continued to maintain a valid foreign country B passport as well. Five days before his United States passport was issued, his foreign country B passport, which was scheduled to expire in September 1994, was extended to September 1999. Since his naturalization, Applicant has traveled to foreign country B once, this being in July 1996 on a thirteen day trip. He presented his foreign country B passport on entry to that nation for convenience as the line at the airport for foreign country B citizens was shorter. Over the November/December 1996 time frame, Applicant traveled to a nation in the eastern hemisphere for fourteen days. He presented his United States passport on entry to that foreign state. Although his preference would be to renew his foreign country B passport when it expires, Applicant is willing to cease use and allow his foreign passport to expire if required to obtain a security clearance.

Applicant's paternal grandfather, a resident national of foreign country B, deceased in September 1989, leaving four legal heirs: two sons, one of whom is Applicant's father, and two granddaughters, these being the issue of a third son who had predeceased. Under the terms of his grandfather's will, the six grandchildren (Applicant, his two siblings and a cousin as appointed heirs and two cousins as legal heirs) jointly inherited in October 1989 a 25 percent share of their grandfather's estate consisting of a twelve acre tract of land in foreign country B.[(1)] In 1990, Applicant opened a savings bank account in foreign country B to aid in making payments such as tax on his share of the inherited property. With Applicant working and residing in the United States, he relied on his uncle in foreign country B to handle his obligations with respect to the inheritance.

In an effort to dissolve the "heirs community" and distribute to each heir his or her share of Applicant's grandfather's estate, the family commissioned a study of the tract of land in September 1995. The northern portion of the estate, zoned residential, was considered feasible for partial development. More than half of the estate is zoned agricultural. Whereas land zoned agricultural could be obtained only by persons intending to operate a farm themselves and the land was subject to price controls, the valuation expert determined it would be difficult to distribute this portion of the property among the heirs. Gross proceeds from development were estimated by the valuation expert as 4.7 million in foreign country B currency, which at the current exchange rate is $3.1972789 million, of which Applicant stands to inherit 4.17% or $133,326.53 US (not accounting for costs associated with the development or taxes).[(2)] In the event the heirs community was able to sell the portion zoned agricultural for an estimated 5.9 million, Applicant would realize an additional $167,367.34 US gross.[(3)] The family decided to develop the 8,750 square meters which was buildable, selling the land in small parcels with the proceeds to be distributed among the heirs according to inherited share. To that end, the heirs community entered into a contract in October 1997 with a foreign country B firm to build a road on the property, including sewer system. Work was scheduled to begin in mid November 1997 with completion no later than the end of February 1998. In October 1997, Applicant received from a family in foreign country B a preliminary offer to purchase a lot. By February 1998, the heirs had received five offers for lot purchase.

Applicant intends to get out of the heirs community as soon as practicable.[(4)] Applicant continues to maintain his foreign country B bank account because it makes payments on the foreign country B estate easier. The existing balance of the account as of the end of 1997 is 12,026 in foreign country B currency or $8,180.00 US. He complies with the requirement to report his foreign bank account on his federal income tax return.

Applicant's financial interests in the United States include his residence, individual retirement accounts, stocks and mutual funds. Even accounting for the $167,367.34 Applicant could receive if the agricultural portion of the foreign tract is sold, his financial interests in the United States exceed those in foreign country B.

Applicant intends to remain in the United States. He is active in his local community, having been appointed in July 1997 to serve as a voting member of the town finance committee.

Applicant continues to maintain dual citizenship because it is easier to resolve the foreign country B financial and property ownership issues. Applicant would prefer not to renounce his foreign citizenship until the estate has been settled, but would be willing to do so on resolution of his inheritance. He does not intend to exercise or accept rights, privileges or benefits offered by foreign country B in preference to the United States and has not registered with the foreign consulate or embassy to obtain benefits.

Applicant's immediate family members (mother, father and two siblings) reside in the United States. While his mother and siblings became naturalized United States citizens in October 1994, his father remains a foreign country B national but he intends to retire in the United States, and has purchased property here.

An outstanding performer during his first year at company A, Applicant proved his technical ability beyond his employer's expectations. Applicant's supervisor was so pleased with Applicant's performance that he recently submitted Applicant for promotion to principle engineer. Applicant has handled sensitive company proprietary information appropriately on the job. He requires a Secret clearance to perform his duties as a satellite engineer on "important" Department of Defense projects.[(5)]

## 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 a willingness to bear arms for a foreign country

Conditions that could mitigate security concerns include:

(2) indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship

(3) activity is sanctioned by the United States

(4) individual has expressed a willingness to renounce dual citizenship

* * *

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." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the Applicant.

## 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, this Judge concludes the following with respect to criterion C:

Criterion C is based on actions taken by an individual which indicate a preference for a foreign country over the United States. A citizen of foreign country B from birth, Applicant spent the formative years of his youth in the United States because of his father's position with an international organization. Applicant attended both elementary and high school in a private institution in the United States designed to educate those whose native tongue was a certain european language. Raised bilingually, Applicant's english grades were more often than not better than those earned in his mother language and he immersed himself in the local United States culture, becoming active in boy scouting. Notwithstanding his claims that he wanted to become a Untied States citizen for most of his life, Applicant returned to foreign country B in September 1979 where over the next six years, he accepted the benefits (free graduate education) and fulfilled the obligations (compulsory military service) of his foreign citizenship.

However, with the intention of gaining permanent residency, Applicant moved back to the United States in January 1986 in the hope of securing employment with a United States firm which would certify it had been unable to hire a qualified United States employee. In June 1986, he officially entered the United States on a G-4 non-immigrant visa but was granted permanent residency status two years later. Two days after expiration of the mandatory five year waiting period, he applied for U.S. naturalization. Since his naturalization in June 1994, he has been a dual citizen of the United States and foreign country B and possessed valid passports issued by both nations. Although he was not required for naturalization to renounce his foreign citizenship, his retention of a valid foreign country B passport and use of that passport to enter foreign country B in 1996 instead of his United States passport constitute affirmative acts in exercise of his foreign citizenship which raise legitimate questions as to whether he can be counted on to place the United States interests paramount. Applicant's exercise of dual citizenship (DC 1.), his possession and use of his foreign passport (DC 2.) and his service in foreign country B's military (DC 3.) are potentially security disqualifying under the adjudicative guidelines pertaining to foreign preference.

Applicant also has substantial financial interests in foreign country B by virtue of his status as heir to a 4.17% of his grandfather's estate. Excluding taxes and costs associated with development, Applicant could receive a windfall of more than $300,000.00 US. Using foreign citizenship to protect financial interests in another country may make one prone to render decisions inimical to the interests of the United States.[(6)] While Applicant has admitted to active exercise of his foreign country B citizenship because it eases transactions involving his inheritance, there is no evidence that he is required to maintain his foreign citizenship to realize his share or that his costs (to include taxes) are less because of that citizenship. Instead, Applicant's maintenance of his foreign citizenship is primarily for the purpose of facilitating distribution of the estate. Inasmuch as Applicant is not retaining his foreign citizenship *to protect* a foreign financial asset, DC 6. is not applicable.[(7)] However, Applicant's retention of dual citizenship for convenience in handling estate matters does fall within DC 1 (exercise of dual citizenship).

Under the Directive, Applicant's service in the foreign military is mitigated as it occurred before he became a naturalized United States citizen (MC 2). He has satisfied his military obligations and has not expressed a willingness to bear arms for foreign country B in the future. While Applicant inherited a 1/24 share of his grandfather's estate before he became a United States citizen, his continued exercise of dual citizenship for convenience in dealing with his inheritance precludes favorable application of MC 2. to this indicator of foreign preference. Similarly, a citizen solely of foreign country B until June 1994, Applicant also had a foreign B passport before his U.S. naturalization. Yet, his use of his foreign passport to enter that nation in July 1996, after he had become a naturalized United States citizen and was in possession of a valid United States passport, raises security concerns which are likewise not mitigated under MC 2.

Whereas Applicant was not required to relinquish his foreign citizenship or benefits afforded thereby when he became a United States naturalized citizen, his exercise of dual citizenship is not illegal and in that sense is viewed as sanctioned

by the United States. Conduct potentially indicative of foreign preference may still be of security concern despite its legality if it increases the risk of an individual making decisions influenced by needs, desires or aims of a foreign nation. Applicant has a common motivation of convenience in both continuing his foreign citizenship for ease in resolving his inheritance and in presenting the foreign country B passport. While he exhibited a tendency to act out of self-interest in that he did not want to wait in line at the foreign country B airport in July 1996, this Administrative Judge finds little probability, if any, that he will act in preference for a foreign country, to include foreign country B, over the United States. In his travels to a nation in the eastern hemisphere in November/December 1996, Applicant presented his United States passport when he could have presented a valid foreign country B passport. Even more importantly, Applicant has indicated he would not renew his foreign passport if it is of concern to the United States.[(8)] With respect to his substantial foreign country B financial interests, Applicant did not seek to obtain overseas assets. The expected financial windfall comes rather at the understandable bequest of a close family member and not due to any desire on Applicant's part to retain foreign property. Circumstances surrounding the estate such as local zoning restrictions have delayed the sought for resolution. He and the other heirs have sought dissolution of the heirs community as soon as practicable, and to that end, have pursued construction of a road through the northern tract which would enable development and hence sale of the real estate. Although he continues to maintain a bank account in foreign country B, there is no evidence that he plans on depositing his inherited share of any proceeds from development into that account. Applicant testified credibly to his desire to take his share of the inheritance to the United States where he could do something with it. The current balance of the foreign country B account is $8,180.00, which is substantially less than the $44,533.00 he has in a savings account with a United States banking institution. This foreign account, moreover, was opened prior to his United States naturalization and kept only to make payments related to his share of the estate.

Although Applicant has been a United States citizen for little more than three and a half of his 38 years, his actions since January 1986 have been consistent with his stated intent to establish his life in the United States. In addition to pursuing permanent legal residency in 1986 and naturalization only two days after he became eligible, Applicant married a United States citizen in September 1990. In April 1991, they purchased the home where they presently reside. Concerned and involved in his local community, Applicant was recently appointed a voting member of the town finance committee after serving two years as a non-voting member. Consistently employed by United States firms in this country since July 1986, he is desirous of continuing his defense-related work with company A for the contributions he can make to this country. Applicant has expressed a willingness to renounce his foreign citizenship, although he would prefer to retain his dual citizenship until his inheritance is resolved. On balance, the security concerns engendered by Applicant's ongoing, active exercise of dual citizenship are overcome by substantial evidence of affirmative action reflecting rather a preference for the United States. Subparagraphs 1.a., 1.b. and 1.c. are resolved in his favor.

## 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: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the 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 or continue a security clearance for Applicant.

**Elizabeth M. Matchinski**

**Administrative Judge**

1. Applicant's share is a sixth of a quarter of the estate.

2. Applicant estimates actual receipt of approximately $100,000.00 US as his total inherited share. (Transcript p. 85).

3. Applicant does not regard this southern portion as an asset given the opinion of the valuation expert that the agricultural laws and price controls make it difficult to distribute.

4. Applicant testified that sale of his share to the other heirs was not feasible since they do not have the financial resources. (Transcript pp. 101-02). He testified credibly to his desire to dispose of the property as quickly as feasible so that he could bring the assets to the United States where he could "do something with them." (Transcript p. 72).

5. Applicant's supervisor indicated it would be difficult to replace Applicant due to the short supply of satellite engineers and Applicant's proven technical ability and that "severe impacts" will be experienced without Applicant's continued support. (Applicant Ex. MM; Transcript p. 113). In support of his contention that it would be difficult to replace him, Applicant presented a list of employment opportunities currently available in company A (Applicant Ex. NN) and information on an employee referral bonus offered by company A where the employee receives $3,000.00 if the professional engineer he or she referred is hired by the company (Applicant Ex. OO). The DOHA Appeal Board has held that an applicant's contributions to the defense industry (*See* ISCR Case No. 96-0710 dated June 20, 1997) and his value to his employer (*See* ISCR Case No. 96-0454 dated February 7, 1997) are not relevant or material to his security eligibility.

6. See DC 6. (using foreign citizenship to protect financial or business interests in another country) of the policies pertaining to foreign preference.

7. In closing argument, Department Counsel conceded that using foreign citizenship to protect financial interests in another country might not be applicable. The Government presented no evidence that Applicant is required to maintain his foreign citizenship to receive his inherited share or that his share would be diminished were he solely a citizen of the United States. Nonetheless, Department Counsel argues for the applicability of DC 6. on the basis of Applicant maintaining dual citizenship to conduct his financial interests overseas. While Applicant clearly is exercising dual citizenship for the ease in conducting transactions involving his inheritance, DC 6. refers only to use of foreign citizenship to protect financial interests.

8. Applicant indicated in his closing argument the Government could collect his foreign passport at the hearing if it so chose. (Transcript p. 127). Closing argument is not evidence. Yet, his stated position is consistent with his expressed willingness to allow his foreign country B passport to expire.