DATE: November 1, 1999

In Re:

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

Applicant for Security Clearance

ISCR Case No. 99-0372

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esquire, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On August 9, 1999, 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 4, issued a Statement of Reasons (SOR) to the Applicant that 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 a clearance should be granted, denied or revoked.

On August 13, 1999, Applicant responded to the allegations set forth in the SOR, and elected to have a hearing before a DOHA Administrative Judge. The case was assigned to me for resolution on September 7, 1999. On September 16, 1999, a Notice of Hearing was issued, setting the matter for September 30, 1999, on which date the hearing was conducted.

At the hearing, the Government did not call any witnesses, but offered four exhibits. These exhibits were marked for identification as Government's Exhibits (GX) 1 - 4. Both parties stipulated to the admissibility of all four exhibits and they were added to the case record. Applicant preferred to be questioned by Department Counsel rather than testifying on his own behalf. Applicant offered 10 exhibits. These were marked for identification and, without objection by Department Counsel, were admitted into evidence as Applicant's Exhibits (AX) A - J. The transcript was received at DOHA on October 25, 1999.

The Government opposes the Applicant's request for a security clearance, based on the four allegations set forth in the attached SOR, specifically two allegations under Criterion C (Foreign Preference) (SOR 1.a. and 1.b.) and two allegations under Criterion B (Foreign Influence) (SOR 2.a.

and 2.b.). In evaluating the evidence, in addition to the general guidelines found in Section F.3 of the Directive, I considered the following points: (1) whether the evidence supports each and every SOR allegation; (2) whether the

evidence comes within one or more of the Foreign Preference and Foreign Influence guidelines in the Directive at Enclosure 2; (3) whether the evidence establishes a nexus or connection with Applicant's security clearance eligibility; and (4) whether Applicant has established mitigation and/or extenuation as to any or all of the allegations.

FINDINGS OF FACT

After a thorough review and analysis of Applicant's response to the SOR, in which he "admits" all four allegations; all the hearing testimony and exhibits from both parties; and closing arguments by both parties as to how the record evidence should be viewed, I make the following findings of fact:

FOREIGN PREFERENCE (CRITERION C)

SOR 1.a. - alleges that Applicant "exercises dual citizenship[(1)] with the United States [U.S.] and the foreign country of his birth (FC). Applicant's response to the SOR admits this allegation is true, and it is otherwise supported by the record evidence. Applicant has FC citizenship by reason of his birth in FC in 1948 (Transcript (Tr) at 51). He has U.S. citizenship by reason of his naturalization in 1986, after having moved to the U.S. in 1979. Applicant left FC for two reasons. Firstly, while residing in FC in the late 1970s, he encountered a woman of FC origin he had known prior to her moving to the U.S. about six years earlier and who had returned to FC for a visit. They decided to get married. Secondly, he wanted to leave FC because of his dislike for its communist system (Tr at 26, 27).

SOR 1.b. - Applicant possesses a FC passport that he obtained in 1991 at a FC consulate in the U.S. Since moving to the U.S. in 1979, he has returned to FC several times on business (Tr at 27, 28) or on vacation (Tr at 28). While on a business trip to FC in 1990, Applicant discovered he had a previously unknown daughter living in FC, born in 1976 to a FC girlfriend he dated as a youth. He reached an agreement with the daughter's mother that he adopt her and take her back to the U.S., where she could obtain a better education and take advantage of the better economic situation in the U.S. (Tr at 31). The daughter will be eligible to apply for U.S. citizenship next year and intends to do so (Tr at 55).

It is noteworthy that Applicant sought legal advice about the adoption from a U.S. law firm. He was informed that "it would be much harder [to carry out the adoption] and a much longer process to get [the daughter] adopted as a United States citizen than as a [FC] citizen" He was advised to obtain a FC passport (Tr at 31, 33). Applicant had not asked for or obtained a FC passport while in the U.S. from 1979 to 1991 because it had not "been necessary" and because he "could not go to [FC] because he could be held there," he might be taken into custody and "held forever," because of the work he was doing in the U.S. (Tr at 32). In 1990, he went back because the "system had changed" and he "was no longer afraid of being held there" (Id.).

After obtaining the FC passport in 1991, Applicant returned to FC and began the adoption proceedings, using a FC attorney. The adoption process took three years and required two trips to FC, in 1993 and 1995. On each occasion, Applicant used his U.S. passport to enter and leave FC (Tr at 34). He used the newly obtained FC passport in the context of the adoption proceedings because doing so facilitated the process (Tr at 29 and 34). He made the FC court aware he was also a U.S. citizen (Tr at 34, 35). In addition, he used the FC passport for short shopping trips to an adjacent country while in FC, because it was more convenient to cross the border that way (Tr at 35, 52). People with FC passports were generally scrutinized less than those with U.S. passports. Applicant still possesses the FC passport but has not used it for any other purposes (Tr at 29 and 35).

Applicant has not returned to FC since 1995, but plans to do so on vacation for about three weeks in December 1999 and January 2000 (Tr at 36). He intends to use his U.S. passport and not his FC passport because "it is a burden" to do so" (Tr at 37). His primary reason is to visit the FC parents of his adopted daughter's boyfriend/fiance. The young man moved from FC to the U.S. in 1998 to attend college and is living in Applicant's home (Tr at 37 - 39). Both the daughter and the young man expect to graduate soon, get married, and to reside in another U.S. state. "The boy's parents don't know [Applicant], would like to meet him, and have arranged a New Year's party in Applicant's honor (Tr at 39).

Applicant is willing to renounce his FC citizenship and to give up his FC passport, "if it is necessary because I don't really need it" (Tr at 29).

CRITERION B (FOREIGN INFLUENCE)

SOR 2.a. - As alleged in the SOR, Applicant's mother, father, daughter, and two sisters are citizens of FC. Applicant's father and mother and father moved to the U.S. in 1990 and 1995, respectively, and live near Applicant. According to Applicant, his parents have been unable to obtain U.S. citizenship because of their ages (mid-70s (Government Exhibit (GX) 1) and inability to speak English (Tr at 40). They have been granted "permanent residence" (Id. and 53).

Applicant has a 50-year-old brother who lives in Chicago (Tr at 41 and GX 1 at Item 14). Two of his three sisters live in the U.S., near Applicant. One is a "permanent resident' and the other is here on a "conditional permit," pending receipt of her "green card" (Tr at 42 and GX 1 at Item 14). The sisters' older children all attend U.S. universities (Tr at 43). Applicant's own natural and adopted daughters also attend U.S. universities (Tr at 45).

SOR 2.b. - Applicant has a third sister who *was* a citizen of FC, but who resides in another country (GX 1 at Item 14). In his response to the SOR allegation 2.b., Applicant "admits" his third sister *is* a FC citizen. However, in his hearing testimony, Applicant stated that she has renounced her FC citizenship (and paid the $1,200 fee) and has only the citizenship of the other European country in which she has been living since leaving FC many years ago (Tr at 53, 54). As of the hearing date, this third sister and her family had received green cards and were preparing to move to the U.S. to take up permanent residence (Tr at 45). Applicant has been helping his family financially and to "settle in" to life in the U.S. (Tr at 43). All family members in the U.S. have sought or are seeking U.S. citizenship (Tr at 53) and are working or are in business (Tr at 56) or in school (Tr at 43, 45).

I also make the following findings of fact:

Applicant wanted to leave FC because he "hated communism from the beginning." His parents raised him "in that spirit" (Tr at 45). While there, he never held any political office or took part in any political organization (Id.). He had nothing positive to say about the present situation in FC, particularly when compared to the U.S. (Tr at 48, 50, 51). Applicant has voted in every U.S. election since becoming a citizen (Tr at 49, 50).

Applicant and his wife divorced in 1983. He never remarried. When he lived in FC, he did not vote in any FC elections. He served in the FC military from 1967 to 1970, as part of his university requirements. It was not "regular service," but a combination of students and computer technicians who were "supposed to act as technical staff in the army" (Tr at 44). Because this happened long before he became a U.S. citizen, such service does not suggest any foreign preference for FC over the U.S., as is suggested by Department Counsel in his closing argument (Tr at 61)

The only relatives of Applicant still residing in FC are "distant cousins," who are farmers. There has been no contact for 20 years and there "is no common subject to talk about at his point"

(Tr at 40). None of the family members who left FC intend to ever return (Id.). Applicant has no business ties to FC (T at 47) and the only family property remaining in FC is a farm worth about $10,000. He and his four siblings are the likely heirs, so his share would be about $2,000 (Tr at 50). Applicant has immersed himself in American society by hard work and taking care of his family. He has documented his business activities, including a hotel in which he has a net worth of about $1.5 million (Tr at 56, 57 and Applicant's Exhibit (AX) A - J). Applicant owns three houses in his home state, with equity of about $350,000 and a 401(k) plan valued at about $125,000. He is presently starting a new business (Tr at 57). He has demonstrated a history of accomplishment with his U.S. employers involving sensitive military and commercial aviation (Tr at 59).

He is aware that violation of security clearance responsibilities would have a direct and immediate negative effect in the following areas: professional risk; loss of U.S. citizenship; jail; confiscation of whatever he has; and the possible adverse effect on his two daughters now attending U.S. universities. He knows that FC is now part of a military alliance in which the U.S. is also a member, but that does not change his feelings (Tr at 59, 60). Applicant contends he is a confirmed capitalist (Tr at 60) and his accomplishments support that claim.

POLICIES

The adjudication process established by DoD Directive 5220.6 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, as amended by Change 4, sets forth specific adjudicative guidelines that must be carefully considered according to the pertinent criterion in making the overall common sense determination required. In addition, each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (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 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.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above 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 specific adjudicative guidelines to be most pertinent to this case:

FOREIGN PREFERENCE (CRITERION C)

The preface to this criterion states that: "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:

E.2.A3.1.2.1. The exercise of dual citizenship;

E.2.A.3.1.2.2. Possession and/or use of a foreign passport;

E.2.A.3.1.2.3. Military service or a willingness to bear arms for a foreign country;

Conditions that could mitigate security concerns include:

E.2.A.3.1.3.1. Dual citizenship is based solely on parents' citizenship or birth in a foreign country.

E.2.A.3.1.3.2. Indicators of possible foreign preference (e.g., foreign military service)

occurred before obtaining United States citizenship;

E.2.A.3.1.3.4. Individual has expressed a willingness to renounce dual citizenship.

FOREIGN INFLUENCE (CRITERION B)

The preface to this criterion states that a "security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation, *are not* citizens of the United States *or may* be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of foreign countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure."

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

E.2.A.2.1.2.1. An immediate family member, 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;

E.2.A.2.1.2.8. A substantial financial interest in a foreign country or business;

Conditions that could mitigate security concerns:

E.2.A.2.1.3.1. A determination that the immediate family members(s), *spouse, father, mother, sons, daughters, brothers, sisters)* 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;*

E.2.A.2.1.3.3. Contact and correspondence with foreign citizens are casual and infrequent;

E.2.A.2.1.3.5. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that 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.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for a security clearance may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability on the part of an Applicant. These concerns include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An Applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the Applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an Applicant's admissions or by other evidence) and establishes conduct that creates security concerns 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 conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. When 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 he or she is nonetheless security worthy. As noted by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates security clearance determinations should err, if they must, on the side of denials." As I understand the Court's rationale, doubts are to be resolved in favor of the Government.

CONCLUSIONS

FOREIGN PREFERENCE (CRITERION C)

The underlying premise behind the Foreign Preference guidelines is that actions taken by an applicant that tend to show a preference for another country (generally but not necessarily a country in which an applicant has dual citizenship with the U.S.) raise the possibility that the applicant may be prone to provide information or make decisions that are harmful to the interests of the U.S. Indeed, DOHA case precedence supports this premise. It stands to reason, therefore, that the absence of such actions by a dual citizen may tend to show a preference for the U.S., rather than another country. I have considered, therefore, whether the evidence produced by the Government demonstrates action by Applicant tending to show that he has a preference for FC vis-a-vis the U.S.

As to SOR 1.a. - there is no question that Applicant exercises dual citizenship with FC solely because of his birth in that country and because of his naturalization in the U.S. Likewise, as to SOR 1.b., there is no question that Applicant has possessed a FC passport since 1991. The evidence shows:

a. Applicant at all times, has used his U.S. passport to enter and leave the U.S. *and* FC;

b. Applicant immigrated to the U.S. in 1979 and became a U.S. citizen in 1986. He obtained a FC passport in 1991 on the advice of U.S. legal counsel and for the specific and sole purpose of facilitating the adoption of a previously unknown daughter through the FC legal system. Even when traveling to FC on several occasions to participate in adoption-related proceedings, he used his U.S. passport to enter and leave FC. He made FC legal authorities aware he was a U.S. citizen;

c. The only other occasions when he used his FC passport was when he was in FC and enter and left a country adjacent to FC on short shopping trips.

Based on the record evidence, I conclude that nothing Applicant has done demonstrates a preference of any kind for FC over the U.S. His *exercise* of FC citizenship and his *obtaining and use* of the FC passport (GX 3) was the result of legal advice obtained for the purpose of facilitating the adoption of his FC daughter, with the cooperation of the daughter's FC mother, to whom Applicant had never been married. The evidence compels the conclusion that Applicant acted under legal advice and for his convenience in handling a specific legal matter of personal concern to him, rather than out of any preference for FC. Indeed, since the legal action was successful and the daughter adopted, living in the U.S., and about to apply for U.S. citizenship, whatever concerns there may have been about his 1991 - 1995 conduct have now been minimized by the passage of time and no further use of the FC passport or taking advantage of his FC citizenship.

Specifically, I conclude that SOR 1.a. has been mitigated by the fact that Applicant's FC citizenship is based solely on his parents' FC citizenship at the time of his birth and his having been born in FC. In addition, Applicant's military service in FC occurred many years prior to his moving to the U.S. and becoming a U.S. citizen. Thus, no preference for FC over the U.S. can be established

since he had no legal connection to the U.S. at the time. Lastly, Applicant has expressed a willingness to renounce his FC dual citizenship,[(2)] as is required by Mitigating Condition (MC) E.2.A.3.1.3.4.

As to SOR 1.b., I conclude Applicant's conduct in obtaining and using the FC passport in the period from 1991 to 1995 for the purpose of facilitating the adoption of his daughter demonstrates paternal affection rather than any preference for FC. His lack of any subsequent use of the FC passport supports the premise that Applicant views himself as an American and can be relied upon to continue to act that way.

FOREIGN INFLUENCE (CRITERION B)

Under Criterion B, denial or revocation of a clearance can be based on the existence of relationships, but the fact of the relationship should be considered with evidence showing that the nature and circumstances of relationship raise a risk that improper influence might be exerted and that an applicant might respond to the influence by acting contrary to the interests of the United States. It is the identity and position of the other person and the nature and scope of the relationship that is most important in determining suitability for access to the nation's secrets.

The language of SOR 2.a. ane 2.b. is misleading, incomplete and outdated. Applicant's mother and father remain citizens of FC, but they have been residing in the U.S. for a number of years as resident aliens, with their age and inability to learn English as the only barrier to their obtaining U.S. citizenship. His brother, adopted daughter, and two sisters are also residing in the U.S.. as permanent aliens, with the intention to apply for U.S. citizenship as soon as their five-year waiting periods expire. The third sister, is now a citizenship of another European country (traditionally neutral or friendly to the U.S.). She is no longer a citizen of FC. She is preparing to move to the U.S. with her family. Based on the above and the entire record, I determine that all of the family members named on SOR 2.a. are not agents of a foreign power *and are not 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.* The fact that all of the cited individuals are now

or soon will be residing in the United States makes the risk even more unlikely.

I am impressed with Applicant's obvious affection for the U.S. and his appreciation for what this country has allowed him to accomplish. I am also impressed by the care he has lavished on his family, bringing each of them to the U.S., and helping them financially with housing, jobs and education. He has worked for many years on U.S. military programs involving aircraft and missiles, and his work has been to the defense and financial advantage of the United States (Tr at 57 - 59). Applicant's financial and ideological/philosophical ties to the U.S. are strong and growing. His explanations demonstrate that no danger exists of his acting adverse to this county and its principles.

While Department Counsel argues Applicant's dual citizenship subjects him to the influence of FC, in addition to being evidence of his preference for that country, these arguments are general and can apply to anyone who holds dual citizenship. Department Counsel did a creditable job of developing the record beyond the language and contents of the SOR and supporting exhibits. However, the fully developed record lacks any substantial evidence, direct or indirect, that a risk exists that Applicant is likely to act adversely to United States interests. I conclude that Applicant's activities have not demonstrated any preference for FC nor is their any substantial evidence that Applicant is likely to be influenced by FC to take any action adverse to United States interests.

FORMAL FINDINGS

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

CRITERION B (Foreign Influence) For the Applicant

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

CRITERION C (Foreign Preference) For the Applicant

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. 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.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. The term "exercises" can have several meanings. It can mean simply being in the status of having more than one citizenship at the same time or it can mean doing things, i.e., conduct, under the aegis or authority of the separate citizenships. Under the facts of the present case, Applicant "exercised" his dual citizenship under either definition.

2. In the context of Applicant's strong financial condition, his explanation that he did not see any reason to spend the $1,200 fee up to now suggests a certain frugality, but I do not find any present security significance, considering his many and close ties to the U.S. and the lack of any parallel ties to FC.