



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-16726
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Gregg Cervi, Esquire, Department Counsel  
Paul DeLaney, Esquire, Department Counsel

For Applicant: *Pro Se*

July 28, 2008

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant completed a Standard Form 86 Security Clearance Application (SF-86), dated October 5, 2004. On November 29, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline C (Foreign Preference). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised Adjudicative Guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

In a response dated February 8, 2008, Applicant, who resides and works primarily in Europe, answered the SOR allegations by admitting all four allegations raised. She also presented information to be considered in mitigation. The case was ultimately assigned to me on May 27, 2008. Because of her travel schedule, Applicant

initially requested that the hearing not be held in June 2008. That request was granted. A subsequent request for another extension was denied and a video-teleconference hearing was set on June 25, 2008, for July 10, 2008. At Applicant's request, an amended notice of hearing was issued on June 27, 2008, moving the hearing by video-teleconference to July 2, 2008, in a neighboring European country. In requesting this change, Applicant waived the 15-day notice requirement.<sup>1</sup>

The hearing took place as scheduled. Department Counsel submitted three exhibits (Ex.), accepted into the record as Exs. 1-3 without objection. Applicant submitted six exhibits, accepted as Exs. A-F without objection. No witnesses were called. Applicant was given ten (10) days to submit any additional documents. The transcript (Tr.) was received on July 14, 2008. On July 7, 2008, Government Counsel submitted a written response to my order for additional information concerning the significance of a U.S. citizen's registration in a foreign country under a European passport. On July 10, 2008, a document dated July 9, 2008, was emailed and accepted into the record as Ex. G without objection. Department Counsel submitted a timely rebuttal on July 16, 2008. The record was closed on July 18, 2008. Based upon a review of the case file, exhibits, and testimony, security clearance is denied.

#### **Administrative Notice**

The Government submitted materials regarding the registration of American and European citizens in Austria and in Poland. I requested such information to supplement the record and assist in my evaluation of SOR allegation 1.b (*You are currently registered in Poland and Austria under your German passport*). The proffered materials included foreign documents explaining the foreign national registration procedures in those countries. I accept the five documents as Exs. 4-8 and grant the Government's motion to take Administrative Notice of them.

#### **Findings of Fact**

Applicant is a 63-year-old manager who has worked for the same defense contractor for approximately 26 years. During that time, she has held numerous positions within the U.S. Government, including the military. In 1977, she became a U.S. naturalized citizen based on her 1974 marriage to an American military officer. She also received a U.S. passport in 1977, which she has since maintained and which is currently valid through 2018. During their marriage, they often went back and forth between the US. and Europe. The couple ultimately divorced in 1992. Applicant continued in her work abroad, although it was restricted to German assignments. Most of her travel was between Germany and the U.S.

In 1995, however, Applicant sought and obtained a German passport, based on her status as a German citizen. She obtained the German passport "for the

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<sup>1</sup> Tr. 8-9.

convenience and for the facilitation of” her foreign work travel.<sup>2</sup> After it was received, however, she was given assignments in Central and Eastern Europe.<sup>3</sup> Her German passport was renewed in 2004 and is valid through 2014. By virtue of her German passport, she can take advantage of the open European borders created by the Schengen Agreements and the expedited European Union (E.U.) passport lines.<sup>4</sup> She acknowledges that she can visit the same countries with her U.S. passport, but states: “it’s just much easier” with the German passport.<sup>5</sup> “I have a very heavy workload and I am traveling all the time and sometimes I don’t know where I was last week and everything that makes it easier for me would be certainly appreciated. . . .”<sup>6</sup> Getting Visas is often easier as a German with a German passport. She is registered in Austria and Poland under her German passport.<sup>7</sup>

Applicant does not vote in Germany, nor does she own property there. She receives no benefits from Germany, except for the passport. She concedes she may be eligible for some form of Social Security-like retirement for some employment held as a student and shortly before she moved to the U.S., but is not sure if under three years of employment would qualify her for any Government payments.<sup>8</sup> Other than business trips or visits to her parents, she has no ties other ties to Germany except a small savings account with a few hundred Euros.<sup>9</sup> The majority of her life is spent on the road between business trips to various European cities. “[I]t’s kind of a unique situation and may be hard for somebody from the outside to understand, but my job requires traveling all the time.”<sup>10</sup> Her travel is extensive and almost constant.<sup>11</sup> Although she owns an apartment in Austria, she is only there about every third weekend or on stopovers between trips.<sup>12</sup> She is not an Austrian citizen, only a resident.<sup>13</sup>

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<sup>2</sup> Tr. 31.

<sup>3</sup> Tr. 32.

<sup>4</sup> Tr. 33-35.

<sup>5</sup> Tr. 34.

<sup>6</sup> Tr. 75.

<sup>7</sup> Tr. 49, 45.

<sup>8</sup> Tr. 35-36.

<sup>9</sup> Tr. 55.

<sup>10</sup> Tr. 38.

<sup>11</sup> Tr. 46-49.

<sup>12</sup> Tr. 38.

<sup>13</sup> Tr. 42.

During the hearing, Applicant expressed her intent to maintain her dual-citizenship with Germany and to continue using her German passport to facilitate her work travel within Europe. She also cited to European legal advice concerning her use of a German passport to facilitate her work permit in Poland.<sup>14</sup> Acknowledging Applicant's heavy work travel, she was encouraged to discuss her continued use of a foreign passport in view of these proceedings with corporate counsel or her security officer while the record was kept open for an additional 10 days.<sup>15</sup> Before the record was closed, Applicant submitted a letter in which she requested I "consider an exception to the DoD policy" concerning her use of a German passport.<sup>16</sup> She stressed "I believe it remains without debate that the use of a European passport during my frequent travels . . . significantly facilitates the [extensive] traveling. . . . Changing my passport now would require redoing my existing registrations. Also the ownership of my apartment [in Austria] is based on my German passport."<sup>17</sup> She concludes by stating: "At this time, I cannot fully evaluate the complexity of changing this and the problems that could arise from switching all these registration to a US passport."<sup>18</sup> The remainder of the document stresses the good relations between Germany, her loyalty to the U.S., her integrity, and her many years of work in the defense industry.<sup>19</sup>

## Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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<sup>14</sup> Ex. B (Letter of July 2, 2008); see also Ex. G (Letter of July 9, 2008).

<sup>15</sup> Tr. 77-78.

<sup>16</sup> Ex. G (Letter of July 9, 2008). The undersigned lacks the authority to grant waivers or exceptions to DoD policy.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> I take administrative notice of the solid relationship between the U.S. and Germany, and find Applicant is both loyal to the U.S. and a diligent employee.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”<sup>20</sup> The burden of proof is something less than a preponderance of evidence.<sup>21</sup> The ultimate burden of persuasion is on the applicant.<sup>22</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>23</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>24</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>25</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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<sup>20</sup> See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>21</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>22</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Executive Order 10865 § 7.

## Analysis

Based upon consideration of the evidence, I find the following AG C — Foreign Preference to be the most pertinent to the evaluation of the facts in this case: Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the appropriate sections below.

The concern regarding foreign preference is that when an individual acts in such a way as to indicate a preference for a foreign country over the U.S., then she may be prone to provide information or make decisions that are harmful to the interests of the U.S.<sup>26</sup> Conditions that could raise a security concern and may be disqualifying include exercise of any right, privilege, or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member.<sup>27</sup> At the time the SOR was issued, Applicant possessed a valid, current German passport, which she obtained or renewed after becoming a U.S. citizen and which she has continued to use to facilitate travel within Europe. This current and continued use is sufficient to give rise to Foreign Preference Disqualifying Condition (FP DC) AG ¶ 10(a)(1) (*possession of a current foreign passport*). Similarly, her use of that passport to identify herself as a German citizen in obtaining Visas, apartment ownership, work permits and registrations while entrusted with a U.S. security clearance gives rise to FP DC AG ¶ 10(b) (*action to acquire or obtain recognition of a foreign citizenship by an American citizen*). With such disqualifying conditions raised, the burden shifts to Applicant to explain or mitigate the security concerns raised under this guideline.

Applicant is correct that her dual citizenship with Germany, an important U.S. ally, is based on her birth in that country. That fact initially raises Foreign Preference Mitigating Condition (FP MC) AG ¶ 11(a) (*dual citizenship is based solely on parents' citizenship or birth in a foreign country*). Here, however, her dual citizenship goes beyond her place of birth and extends to her retention and use of a German passport. Moreover, Applicant has not expressed a willingness to renounce her dual citizenship. Although such renunciation is not required, this fact makes FP MC AG ¶ 11(b) (*the individual has expressed a willingness to renounce dual citizenship*) inapplicable.

Applicant has reconstructed her professional life in Europe based on her German citizenship to the extent she has purchased a home base abroad, received foreign work permits, obtained Visas, and traveled as a citizen of a E.U country. The reason for these representations was purely a matter of expeditiousness and ease, based primarily on foreign legal advice as to which passport would best facilitate various foreign processes without due consideration of the requirements expected of those entrusted with protected U.S. information. Given the opportunity to consult counsel and reconsider her continued active use of a foreign passport, Applicant chose to continue predicating her various foreign credentials on her German passport rather

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<sup>26</sup> AG ¶ 9.

<sup>27</sup> AG ¶ 10(a).

than transfer those credentials to her U.S. passport. The reason cited was convenience. Although the possession of a U.S. security clearance does not preclude dual-citizenship or the existence of a foreign passport, *per se*, the representation that one is a foreign national and the active use of a foreign passport in lieu of a U.S. passport poses genuine security concerns. Because she continues to actively use her German passport in such manner in lieu of her U.S. passport, FP MC ¶ 11(e) (*the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated*) does not apply.<sup>28</sup>

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and this "whole person" concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole person" factors noted above. Applicant is a highly credible, straight-forward, and pleasant woman who is obviously devoted to her work and her profession. She is a mature woman literally devoting her life to her job and finding fulfillment in her accomplishments. Her loyalty to this country is neither under attack nor an issue. Because she is so diligent with her work, she has created a chaotic travel schedule which understandably makes her want to cut corners or make life easier where she can. Consequently, when told by foreign counsel some aspects of working abroad would be more easily facilitated by using her German passport, she took the advice without consideration of the guidelines pertaining to security clearances. Moreover, she continues to use her E.U. passport to facilitate travel within Europe.

U.S. citizenship does not preclude such exercise of dual citizenship, *per se*. Possession of a U.S. security clearance, however, requires more than U.S. citizenship and loyalty. With it comes numerous other obligations and standards of conduct above that expected from an average citizen, the majority of which involve matters of judgment, reliability, and trustworthiness. While there is nothing about Applicant to suspect she would be disloyal to the U.S. or its interests, possession of a security

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<sup>28</sup> See, e.g., ISCR Case Number 06-25201 (App. Bd. Oct. 31, 2007).

clearance requires an unequivocal and demonstrable preference for the U.S. which Applicant's current work and travel practices do not reflect. Applicant, herself, acknowledges that she chose to predicate her apartment ownership, registrations, and other matters on her German passport in lieu of her U.S. passport. She also admits that even now her German passport can be substituted with her U.S. passport in all its current applications, but she declines to make those changes as a matter of inconvenience. That is her choice. Convenience, however, is not a mitigating factor under the guideline.<sup>29</sup> Consequently, foreign preference security concerns are not mitigated.

I considered all the facts of record and the "whole person" concept. I further note that although there is no basis in the record to question Applicant's character or integrity, the DOHA Appeal Board has determined that even good people can pose security risks.<sup>30</sup> Based on these facts, I conclude it is not clearly consistent with national security to grant Applicant a security clearance. Clearance is denied.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline C:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Clearance is denied.

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ARTHUR E. MARSHALL, JR.  
Administrative Judge

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<sup>29</sup> "The negative security significance of acts indicative of a foreign preference is not negated or diminished merely because an applicant engages in those acts for personal reasons or for personal convenience. See, e.g., ISCR Case No. 99-0295 (Oct. 20, 2000) at p. 4; ISCR Case No. 98-0252 (Sept. 15, 1999) at p. 8." ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

<sup>30</sup> ISCR Case No. 01-26893 (App. Bd. Oct. 16, 2002), at 8.