



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-02301
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

December 12, 2008

Decision

WESLEY, Roger C., Administrative Judge:

History of Case

On August 11, 2008, 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, 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 granted, continued, denied or revoked.

Applicant responded to the SOR on August 20, 2008, and requested a hearing. The case was assigned to me on September 23, 2008, and was scheduled for hearing on November 14, 2008. A hearing was held on November 14, 2008, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of two exhibits; Applicant relied on one witness (himself) and no exhibits.

The transcript (R.T.) was received on November 24, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility to access classified information is granted.

Procedural Rulings and Evidentiary Issues

Before the close of the hearing, Applicant requested leave to consider retention of his Mexican passport and citizenship and document his surrender or destruction of his passport and relinquishing of his Mexican citizenship should he make the decision to do so (R.T., at 49-50). For good cause shown, Applicant was granted 10 days to November 26, 2008 to supplement the record. The Government was afforded three days to respond. Within the time permitted, Applicant supplemented the record with a faxed cover letter confirming his decision to surrender his Mexican passport, documented receipt of his surrendered Mexican passport by his employer's facility security officer (FSO), and a letter confirming his ownership of a small home in Mexico and inheritance expectancy, together with his expressing willingness to consider renouncing his Mexican citizenship. Department counsel did not object to these post-hearing submissions. Applicant's post-hearing exhibits were admitted and considered as exhibits A through C.

Summary of Pleadings

Under Guideline C, Applicant is alleged to (a) be a dual citizen of the U.S. and Mexico, (b) accept and maintain Mexican citizenship, (c) possess a valid Mexican passport that does not expire till 2015, (d) be unwilling to surrender or destroy his Mexican passport, and (d) own a condominium in Mexico, including the land on which it is situated.

For his answer, Applicant admitted two of the allegations in the SOR with explanations (i.e., his dual citizenship status, his Mexican passport possession, and his condominium ownership). He denied the remaining three allegations.

Findings of Fact

Applicant is a 38-year-old employee of a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Applicant's background

Applicant was born in the U.S. to parents of Mexican citizenship. His mother at the time had a resident alien card that enabled her to live and work in the U.S. (see ex. 4). Not working or living in the U.S. at the time of Applicant's birth, she traveled to the U.S. in 1970 for Applicant's birth to ensure he would be a U.S. citizen (R.T., at 39-40). Shortly after Applicant was born, he and his mother returned to Mexico to live (see exs. 2 and 4; R.T., at 39-40).

As a primary student in Mexico, Applicant encountered early problems with his enrollment because of his U.S. citizenship. To resolve the concerns of Mexican school authorities, Applicant's father applied for Mexican citizenship in behalf of Applicant, who at the time was just 13 years of age (see ex. C). Through his father's efforts, Applicant was naturalized as a Mexican citizen in 1983, and issued a Mexican passport in about 1985 at the age of 15 (ex. 4; R.T., at 42).

When Applicant reached the age of 16 (in 1986), he went to live with his grandmother in the U.S., while he finished his schooling across the border in Mexico (see exs. 2 and 4; R.T., at 27). After finishing his secondary education, he enrolled in a U.S. university (R.T., at 40). He has maintained his Mexican citizenship to date (R.T., at 41). His Mexican passport was renewed in 1995, and again in 2005 (R.T., at 28); it is not due to expire until 2015.

Applicant is unmarried and has no children (ex. 1). He has a brother and sister (see ex. 1). Both Applicant and his sister were given green cards in 1978 by the INS, and Applicant and his sister were later naturalized as U.S. citizens, along with their brother (see exs. 1 and 4). Why Applicant's U.S. citizenship by birth in the U.S. was not recognized by the INS and U.S. State Department is not explained.

By virtue of his birth to parents of Mexican citizenship in the U.S. and subsequent naturalization as a Mexican citizen, Applicant is a dual citizen of Mexico and the U.S. His mother passed away in November 2005 (see ex. 2). His father, his brother, and his brother's wife all reside in Mexico. Applicant stays in touch with his father and brother on a regular basis (see ex. 2). By contrast, his sister resides in the U.S.

While Applicant remains committed to the U.S. and its valued principles, he has been reluctant to renounce his Mexican citizenship (ex. 2). By giving up his Mexican citizenship, he fears he would have to dispose of the Mexican condominium he purchased in 2002, and risk the forfeiture of his inheritance of his parent's home in Mexico after his father passes away (ex. 2; R.T., at 48-49). This is something he has not wanted to do. Applicant regularly visits his family in Mexico and stays in his Mexican condominium on these visits.

Applicant has never been followed (to his knowledge) on his visits to Mexico, should such a situation occur, he would definitely report it to his supervisor, FSO, and the FBI (see ex. 2, at 4). No members of his family have been subjected to coercion or duress by Mexican authorities (see ex. 2).

Applicant has never used his Mexican passport to travel to Mexico, and uses it strictly for identification purposes when asked by Mexican authorities (R.T., at 28, 43). His assurances are corroborated by his documented Mexican passport (see ex. 3). Previously, Applicant indicated that he did not want to surrender his Mexican passport (not due to expire until 2015). After an opportunity to reconsider his decision, he indicated at hearing a willingness to surrender his Mexican passport (R.T., at 28-33) and consider renouncing his Mexican citizenship. Afforded an opportunity to surrender

his Mexican passport after the hearing, he documents its surrender to his employer's FSO (exs. A and B). He also provided post-hearing documentation of his willingness to consider renouncing his Mexican citizenship (see ex. C).

Applicant has no business or financial interest in Mexico besides his condominium and inheritance expectancy and has no plans to invest in the country. He has never voted in a Mexican election or served in Mexico's military. He has no debts or obligations to Mexico or any foreign country. And he has accepted no educational, medical, or other economic or political fiscal benefits from Mexico (save for his primary school training and home ownership) that required his use of his Mexican citizenship. He does expect to inherit his parent's residence in Mexico, along with his brother and sister, when his father passes away (R.T., at 46). He values this property at somewhere between \$150,000 and \$200,000 (R.T., at 27, 44-45). He assures his allegiance lies with the U.S., and he would never do anything to hurt U.S. security interests (R.T., at 47-48).

Country Status of Mexico

Mexico is the most populous Spanish-speaking country in the world, and a country that has made considerable strides in improving access to education and literacy rates over the past few decades (see ex. 5: *Background Note: Mexico*, U.S. Department of State, at 2 (April 2008)). Mexico is a constitutional democracy that completed a number of important reforms in its freedom of information laws and criminal justice system under current President Felipe Calderon (*id.*, at 4). Mexico's oil and gas interests are operated by a state-owned constitutionally established monopoly (Pemex), and Mexico is a principal supplier of both crude oil and gas to the U.S. Its relations with the U.S. are as important as they are complex. A stable, democratic, and economically prosperous Mexico is fundamental to U.S. political, economic and security interests. Illustrative of the important state-to-state trade relations between these two neighbours is their NAFTA partnership. Illustrative of the reinforcement of their strategic ties is the Security and Prosperity Partnership, they forged (along with Canada) in 2005 (see *id.*, at 6).

To be sure, travel warnings are in place for U.S. citizens travelling in Mexico. Drug-related wars between criminal organizations seeking control of the major narcotics trade that continues to rage along the U.S.-Mexico border have created heightened risks for U.S. citizens residing or travelling in Mexico (see *Travel Alert, Mexico*, U.S. Department of State, at 2 (April 2008)). Despite stepped up efforts by the Mexican government to combat border violence with deployed military troops in various border regions, U.S. citizens are still advised to exercise caution when residing or travelling in unfamiliar areas of Mexico (*id.*, at 2).

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by

administrative judges in the decision making process covering DOHA cases. These Guidelines require the administrative judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the administrative judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the administrative judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Foreign Preference

The Concern: 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. See Adjudicative Guidelines (AG), ¶ 9.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of

establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant presents as a U.S. citizen by birth who became a naturalized citizen of Mexico through his father, who had Mexican citizenship by birth. Aside from receiving primary school benefits, owning a condominium and inheritance expectancy, and possessing a Mexican passport (which he uses for identification purposes only when traveling to Mexico for family visits), Applicant has never exercised any active indicia of dual citizenship with Mexico. Claiming his principal affections lie with the U.S., he, nonetheless, retained his Mexican passport and citizenship, his Mexican condominium ownership, and his inheritance expectancy.

Dual citizenship concerns necessarily entail allegiance assessments and invite critical considerations over acts indicating a preference or not for the interests of the foreign country over the interests of the U.S. The issues, as such, raise concerns over Applicant's preference for a foreign country over the U.S.

By virtue of his naturalized citizenship in Mexico through his father of Mexican birth and citizenship, Applicant was endowed with Mexican citizenship, which could be renounced by his expressed intention or actions. This, Applicant has never done, out of concern he would be required to dispose of his Mexican condominium and risk the forfeiture of his inheritance expectancy. He does say that he is currently willing to consider renouncing his Mexican citizenship.

Since becoming a naturalized Mexican citizen as a young minor, Applicant has taken no actions and exercised no Mexican privileges that can be fairly characterized as active indicia of dual citizenship, save for (a) his receipt of primary schooling in Mexico, (b) his limited use of his Mexican passport for identification purposes when entering and exiting Mexico, (c) his ownership of his Mexican condominium, and (d) his retention of an inheritance expectancy. He has not voted in Mexican elections or served in the Mexican military. He has accepted no preferential educational, medical or other benefits from Mexico since becoming a naturalized Mexican citizen (save for his primary schooling, passport use, home ownership, and inheritance expectancy). Nor has he ever performed or attempted to perform duties, or otherwise acted so as to serve the interests of Mexico in preference to the interests of the U.S. since becoming a Mexican citizen.

Because Applicant received primary schooling benefits in Mexico, possessed and used his Mexican passport and owns a Mexican condominium in Mexico, the Government may apply disqualifying condition (DC) ¶ 10(a) of AG ¶ 9, "exercise of any right, privilege or obligations of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

- (1) possession of a current foreign passport;

- (2) military service or a willingness to bear arms for a foreign country;
- (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
- (4) residence in a foreign country to meet citizenship requirements;
- (5) using foreign citizenship to protect financial or business interests in another country;
- (6) seeking or holding political office in a foreign country;
- (7) voting in a foreign election."

However, Applicant's residence time in Mexico has been limited to his early childhood years when he was subject to his parents' guidance and control, and his brief family trips since he returned to the U.S. to permanently reside in 1986. He claims no intention to make Mexico his permanent residence. So, at least as to any privileges he may have enjoyed in attending Mexican primary schools as a minor under his parent's guidance and control, he may take some advantage of MC ¶ 11 (c), "exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor."

By relinquishing his Mexican passport, and expressing his willingness to renounce his Mexican citizenship, Applicant has complied with the mitigation requirements of MC ¶ 11 (e), "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated," of AG ¶ 18. And while his surrendering his Mexican passport to his FSO does not automatically mitigate any past use of the passport to enter and exit Mexico, his recited limited use of the passport is insufficient by itself to demonstrate Applicant's preference for Mexico over the U.S. Moreover, since Applicant has also expressed his willingness to consider renouncing his Mexican citizenship, he may invoke the mitigation benefits of MC ¶ 11 (b), "the individual has expressed a willingness to renounce dual citizenship" as well.

Failure to satisfy a mitigating condition may, of course, be taken into account when assessing an applicant's overall claim of extenuation, mitigation, or changed circumstances, but may not be turned into a disqualifying condition. See ISCR Case No. 01-02270 (Appeal Bd. Aug. 29, 2003). That Applicant may wish to keep his Mexican citizenship out of concern for protecting his condominium ownership and inheritance expectancy in the country is not sufficient reason by itself to preclude him from mitigating security concerns over his holding dual citizenship and property interests in Mexico.

