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

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| In the matter of: | ) | |
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| ---------- | ) | ISCR Case No. 09-03014 |
| SSN: ---------- | ) | |
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| Applicant for Security Clearance | ) | |

## Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

July 29, 2010

## Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding foreign preference. Eligibility for a security clearance or access to classified information is denied.

## Statement of the Case

On October 23, 2008, Applicant applied for a security clearance and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a Security Clearance Application (hereinafter SF 86).[1] On June 4, 2009, the Defense Office of Hearings and Appeals (DOHA) furnished him a set of interrogatories.[2] He responded to the interrogatories on June 19, 2009.[3] On November 30, 2009, DOHA issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding*

[1] Item 4 (SF 86), dated October 23, 2008.

[2] Item 5 (Interrogatories with attached Personal Subject Interview, dated February 13, 2009), dated June 4, 2009.

[3] Item 6 (Applicant's Answers to Interrogatories, dated June 19, 2009).

*Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (hereinafter AG) for all adjudications and other determinations made under the Directive. The SOR alleged security concerns under Guideline C (Foreign Preference), and detailed reasons why DOHA could not make a 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 a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on December 15, 2009. In a sworn, written statement, dated December 28, 2009, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM) was provided to Applicant on March 10, 2010, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on April 6, 2010, but as of June 24, 2010, had not submitted any information or documents. The case was assigned to me on July 8, 2010.

## Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a.(1) through 1.a.(4), and 1.b., of the SOR.

Applicant is a 26-year-old employee of a defense contractor, currently serving as an audio/video technician in the Federal Republic of Germany (Germany),[4] and he is seeking to obtain a security clearance.

### Foreign Preference

Applicant is a dual citizen of the United States and Germany.[5] His father, a native-born U.S. citizen serving with the U.S. Army at the time, married his mother, a native-born German citizen.[6] They had Applicant (born in Germany in 1983), his brother (born in Germany in 1985), and his sister (born in the United States in 1987).[7] Applicant's father retired from the U.S. Army in 2001, and decided to remain in Germany as an employee of a defense contractor.[8] Applicant was raised in Germany,

[4] Item 4, *supra* note 1, at 12.

[5] *Id.* at 7-8.

[6] *Id.* at 8, 20-21.

[7] *Id.* at 6, 22-23.

[8] Item 3 (Applicant's Answer to the SOR), at 6.

and at least since he was 10 years old, he has resided there.[9] The record is silent as to the location of his early schooling, but from September 2001 until June 2004, he attended a vocational, technical, or trade school in Germany, where he served an apprenticeship.[10] He was conscripted into the German Army, and served on active duty in logistics as a supply clerk from July 2005 until April 2006.[11] Commencing in November 2006, Applicant worked for companies in the German private sector.[12] In November 2007, he joined his current employer.[13] He has never married.[14]

Applicant's mother registered his birth with the U.S. State Department in February 1984, and received an FS Form 240, *Consular Report of Birth*.[15] She also obtained a German passport for him when he was an infant.[16] He renewed his German passport in June 2006, and it is due to expire in June 2011.[17] Applicant apparently obtained another German passport in June 2008, and it is due to expire in June 2018.[18] He received his U.S. Passport in September 2001.[19] His "*personalausweis*," or German Identity Card, also referred to as the European Digital Passport, using the same number as that reflected on his passport, was issued in September 2006, and is due to expire in August 2011.[20] The *personalausweis* is sufficient to travel among European Union countries, and is somewhat similar to the U.S. Passport Card, which has limited use between the United States and Canada or Mexico.

In September 2008, Applicant, accompanied by his German girlfriend, traveled to the United States.[21] Because this was the first time she had ever traveled outside of

[9] *Id.*

[10] Item 4, *supra* note 1, at 11, 17.

[11] *Id.* at 16; Item 3, *supra* note 8, at 5.

[12] Item 4, *supra* note 1, at 13-15.

[13] *Id.* at 12. The record is somewhat unclear as to Applicant's actual commencement date with his current employer, for it appears that for varying periods in 2004 (September to October, and November to December); 2005 (January to December), and 2006 (April to August), he may have also worked for his current employer in a variety of positions. *Id.* at 13.

[14] *Id.* at 19.

[15] *Id.* at 7-8. In his e-QIP, Applicant referred to the form as State Department Form 240, *Report of Birth Abroad of a Citizen of the United States*.

[16] Item 5, *supra* note 2, at 2.

[17] *Id.*

[18] Item 7 (Letter from Applicant's Facility Security Officer (FSO), subject: *Foreign Passport Destruction*), dated May 19, 2009.

[19] Item 4, *supra* note 1, at 8.

[20] Item 3, *supra* note 8, at 4. It should be noted that when Applicant had his Answer to the SOR notarized, he used his German Identity Card as his identification.

[21] Item 5, *supra* note 2, at 2.

Germany, and did not wish to process through U.S. immigration alone, Applicant used his German travel documents rather than his U.S. passport, when he entered the United States.[22] He also used it upon returning to Germany.[23] The SOR alleges that Applicant used his "*reisepass*" in lieu of his U.S. passport,[24] and Applicant admitted doing so. A German *reisepass* is actually the German passport, not another separate document. Applicant's German passport (the one issued in June 2008) was destroyed by his FSO on May 19, 2009.[25] The record is silent regarding the status of the German passport issued in June 2006.

Applicant exercised his right to vote as a German citizen in German elections in every election since being eligible to do so, including the election in about 2002 or 2003, and intends to continue voting in German elections so long as he resides in Germany.[26] He does so because he pays German taxes and wants to influence the German parties to spend his tax money in a manner most beneficial to him.[27] He has never voted in a U.S. election.[28]

As of February 2009, Applicant and his German girlfriend intended to move into an apartment together in Germany in May 2009.[29] He purchased the apartment and has a mortgage with a German bank.[30] He also has checking and savings accounts with the German bank.[31]

In February 2009, Applicant stated a willingness to renounce his German citizenship, but had not done so.[32] He claimed his "loyalty lies with the U.S." and that he is free from any conflicting allegiances or potential coercion.[33]

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[22] Item 3, *supra* note 8, at 5.

[23] Item 5, *supra* note 2, at 2.

[24] SOR ¶ 1.a.(2).

[25] Item 7, *supra* note 13.

[26] Item 5, *supra* note 2, at 2.

[27] Item 3, *supra* note 8, at 6.

[28] Item 5, *supra* note 2, at 2.

[29] *Id.* at 3.

[30] *Id.* at 4.

[31] *Id.*

[32] *Id.* at 2.

[33] *Id.*

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."[34] As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[35]

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."[36] The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.[37]

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This

[34] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[35] Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

[36] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

[37] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, "security clearance determinations should err, if they must, on the side of denials."[38]

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."[39] Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

## Analysis

### Guideline C, Foreign Preference

The security concern relating to the guideline for Foreign Preference is set out in AG ¶ 9:

> 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.

The foreign preference guideline notes several conditions that could raise security concerns. Under AG ¶ 10(a), "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" is potentially disqualifying. This includes but is not limited to: AG ¶ 10(a)(1), "possession of a current foreign passport;" AG ¶ 10(a)(2), "military service or a willingness to bear arms for a foreign country;" AG ¶ 10(a)(4), "residence in a foreign country to meet citizenship requirements;" and AG ¶ 10(a)(7), "voting in a foreign election." AG ¶¶ 10(a)(1), 10(a)(2), and 10(a)(7) have been established.

The Government argued the applicability of AG ¶ 10(a)(4), but there is no evidence to support that argument. Applicant is a dual citizen of the United States and Germany because his German native-born mother, married to his U.S. native-born

[38] *Egan*, 484 U.S. at 531

[39] *See* Exec. Or. 10865 § 7.

father, a member of the U.S. Army stationed in Germany, gave birth to him in Germany. He resided in Germany because that was where his parents resided, and there is no evidence that, as a dual citizen of the United States and Germany, he had to continue residing in Germany to "meet citizenship requirements." AG ¶ 10(a)(4) does not apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from foreign preference. AG ¶ 11(a) applies if "dual citizenship is based solely on parents' citizenship or birth in a foreign country." Under AG ¶ 11(b), the disqualifying condition may be mitigated where "the individual has expressed a willingness to renounce dual citizenship." Also, AG ¶ 11(e) may apply if "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated." As noted above, Applicant's dual citizenship occurred because of the location of his birth in Germany to parents who were citizens of the United States (his father) and Germany (his mother). AG ¶ 11(a) applies. While Applicant has expressed a willingness, in February 2009, to renounce his German citizenship, to date, there is no evidence that he has done so. I recognize that the actual act of renunciation is not required under the AG. Nevertheless, under the facts and circumstances of this case, I conclude that AG ¶ 11(b) only partially applies.

The issue regarding Applicant's *personalausweis* and *reisepass* is much more complex. One German passport was issued in June 2006, and it is due to expire in June 2011. The record is silent regarding the status of that particular German passport. Another German passport was issued in June 2008, and it was due to expire in June 2018, but was destroyed by his FSO on May 19, 2009. His *personalausweis* was issued in September 2006, and is due to expire in August 2011.

Dual citizenship, alone, is not automatically a security concern. However, when a dual citizen obtains a foreign passport and chooses to use his or her foreign passport in lieu of his or her U.S. passport, the security concern appears. In this instance, because of the multiple German passports, and the uncertain status of all but one of his German documents, AG ¶ 11(e) only partially applies.

**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) the 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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

There is some evidence in favor of mitigating Applicant's foreign preference. Applicant is a dual citizen of the United States and Germany because of the citizenship of his German native-born mother and his U.S. native-born father, a member of the U.S. Army stationed in Germany, and his birth in Germany. Aside from an unspecified relatively brief period in the U.S., Applicant has resided in Germany with his family because that was where they reside. He has expressed a willingness to renounce his German citizenship and had a German passport destroyed. He is currently employed by a U.S. federal contractor.

The disqualifying evidence under the whole-person concept is more substantial. While the circumstances of his birth and the acquisition of German citizenship were circumstances beyond his control, Applicant continued to exercise the rights, privileges, and obligations of German citizenship. He obtained and used German passports and identity documents in lieu of U.S. documents, even when entering the U.S. He served on active duty with the German military. He voted in German elections. The record is silent regarding voting in U.S. elections. He was educated in German schools and employed by German companies. He owns a German apartment. In essence, Applicant is a German who, solely by virtue of his father's citizenship, happens also to be a U.S. citizen. (*See* AG ¶ 2(a)(1), AG ¶ 2(a)(2), AG ¶ 2(a)(3), AG ¶ 2(a)(4), AG ¶ 2(a)(5), AG ¶ 2(a)(6), AG ¶ 2(a)(7), and AG ¶ 2(a)(9).)

Overall, the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his foreign preference.

## 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:

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| Paragraph 1, Guideline C: | AGAINST APPLICANT |
| Subparagraph 1.a.(1): | Against Applicant |
| Subparagraph 1.a.(2): | Against Applicant |
| Subparagraph 1.a.(3): | Against Applicant |
| Subparagraph 1.a.(4): | Against Applicant |
| Subparagraph 1.b.: | For 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. Eligibility for access to classified information is denied.

ROBERT ROBINSON GALES
Administrative Judge