

KEYWORD: Guideline C

DIGEST: The Board cannot consider new evidence on appeal. Any error the Judge made with regard to Applicant's attitude on his foreign passport was ultimately harmless. Adverse decision affirmed.

CASENO: 14-06346.a1

DATE: 10/28/2015

DATE: October 28, 2015

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In Re: )	
)	
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)	
)	
Applicant for Public Trust Position )	
_____ )	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On February 3, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 28, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Matthew E. Malone denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

### **The Judge’s Findings of Fact**

Applicant was born in Brazil and naturalized a U.S. citizen in the early 2000s, obtaining a U.S. passport at the same time. However, he has continuously used a Brazilian passport, which was still active at the close of the record. He has renewed this passport twice since becoming a U.S. citizen. Applicant has traveled to Brazil annually during the last 10 years, using his Brazilian passport when he does. Until such time as he relinquishes Brazilian citizenship, Applicant’s use of a Brazilian passport saves him money and delays in obtaining the necessary visas.

During his subject interview, Applicant expressed a willingness to renounce his Brazilian citizenship, if required for a public trust position. At the hearing, however, he testified that he did not wish to do this because he can only manage his property and financial interests in Brazil if he is a citizen of that country. Applicant owns a condominium in Brazil and also has a bank account there. After the hearing, Applicant relinquished his Brazilian passport to his company’s facility security officer.

### **The Judge’s Analysis**

The Judge noted evidence that Applicant uses his foreign passport due to large part to the requirements of Brazilian law. However, he concluded that Applicant remained a Brazilian citizen for personal convenience in order the better to manage his financial interests. The Judge stated that, given these interests, it is unlikely that Applicant will travel to Brazil as a U.S. citizen in the foreseeable future. He found Applicant’s relinquishment of his passport to be “a somewhat hollow gesture” (Decision at 5), in that Applicant can be expected to exercise his Brazilian citizenship with regard to travel.

### **Discussion**

In making his argument on appeal, Applicant cites to information from outside the record. We cannot consider new evidence on appeal. Directive ¶ E3.1.29. *See also* ADP Case No. 14-03956 at 3 (App. Bd. Aug. 25, 2015). Applicant contends that the Judge misinterpreted his testimony in which he expressed unwillingness to relinquish his Brazilian passport. Applicant has

a point. He had testified about his perceived need for a Brazilian passport, and the Judge questioned him as to his willingness to surrender the document, which Applicant was reluctant to do. Tr. at 33-41. The Judge cited this colloquy in support of a finding that Applicant was not willing to relinquish his *foreign citizenship altogether*, not simply the passport. However, the Judge’s detailed findings of fact and analysis focused upon the likelihood that Applicant would continue to visit Brazil with a Brazilian passport in order to conduct business affairs in that country. The Judge also discussed some of the complexities Applicant would face were he to renounce his Brazilian citizenship and the convenience of using the Brazilian passport for travel to that country. Accordingly, even if the Judge erred, he would most likely have decided the case in the same way. Therefore, any error is harmless. ADP Case No. 13-01074 at 3 (App. Bd. Aug. 25, 2014).

Applicant contends that the Judge may have interpreted his testimony as displaying a lack of loyalty to the U.S. An adverse decision under the Directive is not a determination as to the loyalty of the applicant. Directive, Enclosure 1, SECTION 7. In this case, the Judge did not find that Applicant had ever displayed disloyalty to the U.S. Rather, he found that Applicant, a U.S. citizen, had exercised certain prerogatives of Brazilian citizenship, raising a concern that he could be tempted to act or make decisions not in the best interests of the U.S. in the future. *See* Directive, Enclosure 2 ¶ 9. The Judge’s ultimate conclusion that Applicant had failed to meet his burden of persuasion as to mitigation of this concern is supportable, based on the record that was before him. *See* Directive ¶ E3.1.15 for the proposition that the applicant bears the burden of persuasion as to obtaining a favorable decision.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. The standard applicable to trustworthiness cases is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) regarding security clearances: such a determination “may be granted only when ‘clearly consistent with the interests of the national security.’” *See, e.g.*, ADP Case No. 12-04343 at 3 (App. Bd. May 21, 2013). *See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*.

### **Order**

The Decision is **AFFIRMED**.

Signed: Michael Ra’anan  
Michael Ra’anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: Jeffrey D. Billett  
Jeffrey D. Billett

Administrative Judge  
Member, Appeal Board

Signed: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board