

DATE: May 19, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-00951

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 21, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision-security 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 November 18, 2005, after the hearing, Administrative Judge Henry Lazzaro denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: (1) whether the grant of a DoD security clearance in 1993 after Applicant had disclosed his possession of a Brazilian passport to the government satisfied the "official approval" exception to the August 16, 2000 Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I) Memorandum; and (2) whether the August 16, 2000 ASDC3I Memorandum unreasonably and unfairly restricts the operation of the Directive.

The Administrative Judge found that Applicant, who was born in Brazil of Brazilian parents, became a naturalized U.S. citizen as a minor in 1973. Applicant has lived continuously in the U.S. since that date. Applicant was not aware that he was considered by Brazil to be a Brazilian citizen until he sought a visa to travel to that country on his U.S. passport in 1993. He attempted to renounce his Brazilian citizenship, but was told that he was prohibited under Brazilian law from renouncing his Brazilian citizenship. Accordingly the only way he could travel to Brazil was to obtain a Brazilian passport.

The Administrative Judge also found that Applicant applied for and was issued a Brazilian passport in 1993. Since the mid-1990's, Applicant's employment has required him to travel extensively to Brazil and a number of other Central and South American countries. Applicant used his U.S. passport for the vast majority of that travel but used his Brazilian passport for travel to Brazil. He occasionally used his Brazilian passport for travel to other countries for security reasons (with the knowledge of his employer) and to avoid long processing lines in certain South American countries. Applicant renewed his Brazilian passport in February 2003, and it is not set to expire until January 2008. Applicant is aware of the provisions, meaning, and effect of the ASDC3I Memorandum, dated August 16, 2000 (the Money memo). However, he is unwilling to surrender his Brazilian passport because he requires it to visit his aged and ailing father in Brazil. Applicant submitted a request for official approval to possess and use his Brazilian passport to the Under Secretary of

Defense for Intelligence in September 2005. He has received no answer from that request.

On appeal, Applicant maintains that because his employer's security department and the Department of Defense knew about his Brazilian citizenship status in 1992, he was subsequently granted a security clearance, and he has used his Brazilian passport as required by Brazilian law, the actions of the Department of Defense constitutes "deliberate and reasoned approval for me to hold and use my Brazilian passport." This argument lacks merit. There is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). Nor does a prior favorable security clearance decision give rise to a vested right or interest in continued retention of a security clearance. *See, e.g.*, ISCR Case No. 01-21528 at 3 (App. Bd. Jul. 26, 2002). To the extent that Applicant's argument could be construed as raising the question whether DoD is equitably estopped from denying or revoking his security clearance, it is unpersuasive because the federal government is not equitably estopped from denying or revoking access to classified information. *See, e.g.*, ISCR Case No. 96-0461 at 4 (App. Bd. Dec. 31, 1997)(citing federal cases). Therefore, the prior favorable adjudication of Applicant's security eligibility by DoD in 1993 does not entitle Applicant to a continued retention of a security clearance.

The granting of Applicant's security clearance in 1993 and his use of his Brazilian passport prior to a readjudication of his clearance eligibility in 2003 took place under a different version of the Adjudicative Guidelines and prior to the issuance of the ASDC3I memorandum, which provided clarifying guidance to the implementation of the factors enumerated in Guideline C. [\(U\)](#) Given these modifications of the operative guidelines, and inasmuch as the Department of Defense cannot be equitably estopped from denying or revoking an applicant's access to classified information, the actions of DoD prior to the adjudication of Applicant's security clearance in 2003 cannot be charged to its adjudication of his security clearance since that date. Therefore, DoD's pre-2003 posture regarding Applicant's use of a Brazilian passport does not constitute "official approval" of Applicant's use of a foreign passport as contemplated by the ASDC3I memorandum.

On appeal, Applicant argues that the ASDC3I memo precludes the Administrative Judge's ability to consider the government's own published mitigating factors and the whole person concept and as such is an unreasonable and unfair restriction that contradicts the Directive. He also asserts that interpretation of the ASDC3I memo in a way that virtually replaces key provisions of the Directive appears fundamentally flawed.

The Directive limits the Boards's jurisdiction and authority to reviewing security clearance decisions by the Hearing Office Administrative Judges. *See, e.g.*, ISCR Case No. 99-0457 at 5 (App. Bd. Jan. 3, 2001). Nothing in the Directive gives the Board the jurisdiction or authority to pass judgment on the wisdom or desirability of guidance provided by the ASDC3I. Thus, the Board will not entertain Applicant's assertions that the ASDC3I memorandum is unreasonable, unfair or inconsistent with other provisions of the Directive. Additionally, the Board finds no error in the Administrative Judge's reliance on the language contained in ASDC3I memorandum. Administrative Judges are bound to follow agency policy and cannot reargue or dispute agency policy in their rulings or decisions, and cannot apply agency policy in a manner that is contrary to or inconsistent with the plain language of that stated policy.

Order

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The ASDC3I memo, dated August 16, 2000, provides in pertinent part, "The security concerns underlying this guideline [Guideline C] are that the possession and use of a foreign passport in preference to a U.S. passport raises doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. Therefore, consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government."