

DATE: September 13, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-11807

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant has been a dual citizen of Brazil and the United States since 1999. She has a current Brazilian passport and intends to retain the passport and her citizenship due to family matters. She has traveled to Brazil on her Brazilian passport since obtaining her American passport and has extensive family ties, as well as financial interests, there. Adverse inference is not overcome. Clearance is denied.

STATEMENT OF THE CASE

On January 24, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on February 11, 2002, and requested a hearing. The case was received by the undersigned on March 13, 2002, and a Notice of Hearing was issued on March 21, 2002.

A hearing was held on April 19, 2002, at which the Government presented four documentary exhibits. Testimony was taken from the Applicant, who also submitted one exhibit. The transcript was received on April 29, 2002.

FINDINGS OF FACT

The Applicant is 52, married and has a Doctorate in Computer Science. She is employed by a defense contractor as a computer scientist, and she seeks to obtain a DoD security clearance in connection with her employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline C - Foreign Preference). The Government alleges in this paragraph that the Applicant is ineligible for clearance because she has acted in such a way as to show a preference for another country over the United States.

The Applicant was born in Brazil in 1949. She has lived permanently in the United States since 1975. (Transcript at 23.) The Applicant became a naturalized American citizen on October 28, 1999. The Applicant obtained a United States passport on November 17, 1999. (Government Exhibit 3 at 1.) She is a dual citizen of the United States and Brazil because of her birth in Brazil.

The Applicant also has a valid Brazilian passport, which she last renewed in 1994, and which will expire in 2004. (Government Exhibit 3.)

Since she became an American citizen, the Applicant has traveled on both her American and Brazilian passports. The Applicant uses her American passport for all trips other than those to Brazil, where she uses her Brazilian passport. The Applicant's parents, who live in Brazil, are elderly and ailing. She explained that it would be difficult and time-consuming for her to use her American passport to travel to Brazil. Given the condition of her parents' health, she feels that it is essential that she retain her Brazilian passport for travel to Brazil. (Transcript at 18-20, Government Exhibit 2 at 3-4.) Since she became an American citizen in 1999, she has used her Brazilian passport five times to travel to Brazil out of convenience. She was also due to travel to Brazil on her Brazilian passport in June 2002. (Transcript at 27-28.) SOR paragraph 1.c. also alleges that trips made to Brazil in 1992, 1994, 1996, 1997 and 1998 have security significance. Given the fact that these trips all occurred before the Applicant became an American citizen, I find that they do not.

The Applicant was sent a copy of the Memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence dated August 16, 2000, with the subject, "Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline." ("Money Memorandum.") (Government Exhibits 4.) In response the Applicant stated that she would not be willing to return her passport to the Brazilian government as long as her parents are alive. In my opinion, the Applicant fully understood the possible impact of this determination. (Transcript at 29-34.)

The Applicant also remains a dual citizen of Brazil and the United States. Because of various estate and monetary issues, she does not intend to revoke her Brazilian citizenship at this time. (Transcript at 37-41.)

Guideline B - (Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because she has immediate family members or people to whom she may be bound by affection or obligation who are not citizens of the United States, or may be subject to duress.

The Applicant's parents and three of her siblings live in Brazil and are Brazilian citizens. Her father, who is 89, is a retired state legislator in Brazil. According to the Applicant, none of her relatives currently work for the Brazilian government in any capacity.

The Applicant maintains a bank account in Brazil. She must be a Brazilian citizen to maintain this account. The amount of money in this account is slight and she uses it primarily to pay for the health care of an elderly aunt. (Transcript at 38-39.)

Mitigation. The Vice President of Technology for the Applicant's employer submitted a letter on her behalf. (Applicant's Exhibit A.) He states that she is a "loyal, hard worker, and an above-average contributor."

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance

determinations. These factors should be followed in every case according to the pertinent criterion. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline B (Foreign influence)

Conditions that could raise a security concern:

- (1) An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country;
- (3) Relatives, cohabitants, or associates who are connected with any foreign government;
- (8) A substantial financial interest in a country, or in any foreign-owned or -operated business that could make the individual vulnerable to foreign influence.

Conditions that could mitigate security concerns include:

(None of the stated conditions have application in this case.)

Guideline C (Foreign preference)

Conditions that could raise a security concern:

- (1) The exercise of dual citizenship;
- (2) Possession and/or use of a foreign passport;
- (6) Using foreign citizenship to protect financial or business interests in another country.

Conditions that could mitigate security concerns include:

(None of the stated conditions have application in this case.)

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress

i. The likelihood of continuation or recurrence."

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be a dual citizen or have foreign connections that may be evidence of untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of showing that the Applicant is a dual citizen of Brazil and the United States, that she retains and uses a Brazilian passport after becoming an American citizen in preference to her US passport, that she has extensive foreign connections and that she retains Brazilian citizenship in order to protect various financial interests in Brazil. The Applicant, on the other hand, has not mitigated any of the allegations.

The Applicant has a family situation that, in her opinion, keeps her from either revoking her Brazilian citizenship or returning her Brazilian passport. Her decision to retain the passport and citizenship is not made lightly. However, the Money Memorandum requirements do not allow a distinction to be made because of potential family emergencies. In addition, she has expressed an intention to retain her Brazilian citizenship for financial purposes. Finally, she has traveled to Brazil on her Brazilian passport five times since becoming an American citizen. Guideline C is found against the Applicant.

Turning to Guideline B, the Applicant has not mitigated this allegation. She has close and continuing relationships with her family members in Brazil. Her father is a retired state legislator, so the impact of Disqualifying Factor 3 is somewhat lessened, but not eliminated. In addition, the Applicant is using her Brazilian citizenship to protect current and potential financial interests in that country. The amount in question is not large but, under the circumstances in this case, is still of security significance. Guideline B is found against the Applicant.

The Applicant has made what she believes to be the best decision for her and her family by retaining her Brazilian citizenship and passport. That may well be true. However, the current security rules do not allow her to have a security clearance. On balance, it is concluded that the Applicant has not successfully overcome the Government's case opposing her request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: Against the Applicant.

Subparagraphs 1.a. through 1.c.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subparagraphs 2.a. through 2.e.: Against the Applicant.

DECISION

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

Wilford H. Ross

Administrative Judge