

DATE: September 3, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09131

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a dual citizen of Venezuela and the United States (US) from birth, exercised his foreign citizenship by using his Venezuelan passport to enter and exit that country on about an annual basis from 1994 to 2001. His use of the foreign passport was not intended as an act of foreign preference, but rather due to the advice of US embassy personnel that he should use his foreign passport to enter Venezuela as that country would not grant a visa to one of its citizens. He has since allowed his Venezuelan passport to lapse and does not intend to renew it, thereby mitigating foreign preference concerns. Potential foreign influence concerns presented by the Venezuelan citizenship of his father and dual citizenship (Venezuela and US) of his sister are mitigated by the permanent relocation of these family members to the US. Clearance is granted.

STATEMENT OF THE CASE

On January 14, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR) to the Applicant. The SOR 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on foreign preference (Guideline C) and foreign influence (Guideline B) concerns.

On January 31, 2003, Applicant responded to the SOR allegations and requested a hearing before a DOHA administrative judge. The case was assigned to me on April 17, 2003. On May 2, 2003, a formal notice was issued scheduling the hearing for May 21, 2003. At the hearing held as scheduled, the Government's case consisted of four exhibits. Applicant submitted four exhibits, entered without objections, and testified on his behalf. A transcript of the hearing was received by DOHA on June 3, 2003.

FINDINGS OF FACT

The SOR alleges foreign preference concerns related to Applicant's exercise of dual citizenship with the US and Venezuela through use of his Venezuelan passport on about an annual basis from 1994 to 2001, and foreign influence concerns presented by the Venezuelan citizenship and/or residency of his parents and sister, and his use of the Venezuelan passport. Applicant denied acting in preference for Venezuela to the US and expressed a willingness to renounce his Venezuelan citizenship "if it is to be a decisive factor in his eligibility for obtaining a secret clearance." He admitted using his Venezuelan passport rather than his US passport to enter Venezuela from 1994 to 2001, but explained his use was on the advice of the US embassy (reiterated before coming to the US for college) that he should use both his passports since Venezuela would not issue a visa for one of its citizens. He added his foreign passport expired in August 2002 and he had no intent to renew it. Applicant admitted his father and sister are Venezuelan citizens (his sister also a US citizen), but denied the potential for foreign influence, citing their residency in the US (father since 2000 and sister since 1992). Applicant's admissions are accepted and incorporated as findings of fact. After a thorough review and consideration of the evidence of record, I make the following additional findings of fact:

Applicant is a 26-year-old mechanical engineer who has been employed by a defense contractor since July 2000. He seeks a secret security clearance for his duties involving systems hardware, systems integration.

Applicant is a dual citizen of Venezuela and the US from birth by virtue of his birth in January 1977 in Venezuela to a US native citizen (his mother) and a Venezuelan naturalized citizen (his father). Applicant's father had emigrated to Venezuela from the People's Republic of China (PRC) at age ten. Applicant's parents met in the US when both were pursuing graduate studies. Following their marriage, they established their home in Venezuela where both subsequently secured teaching positions at separate public universities. Applicant's mother never acquired Venezuelan citizenship, and she ensured that the births of her two children (Applicant and his older sister born in March 1975), were registered with the Consular Service of the United States in Venezuela. Advised by US embassy personnel in Venezuela that Applicant should use a Venezuelan passport to enter and exit Venezuela and a US passport for all other foreign travel, Applicant's mother acquired for him both passports.

As a youth, Applicant traveled with some regularity to the US during summers and holiday breaks to visit his maternal grandmother. He used his Venezuelan passport to exit and then reenter Venezuela based on his understanding that Venezuela would not grant a visa to one of its citizens.

He carried his US passport on these trips, and presented his US passport when entering the US. Applicant attended second grade in the US, as his parents spent the year. After his junior year of high school in Venezuela, Applicant spent the summer of 1993 in the US at an educational institution.

Applicant's sister came to the US in Fall 1992 to pursue undergraduate studies. After she earned her degree, she elected to remain in the US, and as of May 2003 was working as an engineer for a major automobile manufacturer in the US.

On graduating from high school in Venezuela, Applicant elected to pursue his undergraduate degree in the US. Before he departed Venezuela for college in the US in August 1994, Applicant's mother again contacted the US embassy in Venezuela about traveling as a dual citizen. It was reiterated that Venezuela would not grant a visa to one of its citizens, so he should continue to maintain two passports. Applicant was also advised to register with the US Selective Service System, which he did.

From August 1994 to May 2000, Applicant pursued undergraduate and then masters studies in mechanical engineering at a polytechnic university in the US. His parents visited him in the US when he was in college, and Applicant returned to Venezuela approximately annually to see them, usually over the December holiday season, although he also spent some time in Venezuela during the summers of 1995 and 1998. He traveled with both his US and Venezuelan passports, presenting his Venezuelan passport, issued in August 1992, to enter that country. While he was in the US in 1997, he renewed both passports. In May 1997, he was issued a US passport valid for ten years, and in August 1997, his 1992 Venezuelan passport was extended for five years. Applicant used his US passport for pleasure travel to the PRC and Hong Kong in June 1998.

In May 2000, as Applicant was finishing his studies for his M.S. degree in mechanical engineering, he was interviewed

for a potential position with his current employer. Applicant informed the defense firm of his dual citizenship. Advised his dual citizenship with US and Venezuela would not be a problem, Applicant completed a security clearance application (SF 86) in May 2000, which he subsequently executed on starting work for the company in July 2000. On his SF 86, Applicant revealed his and his sister's dual citizenship with the US and Venezuela, his father's Venezuelan citizenship and his parents' Venezuelan residency. He also disclosed his possession of Venezuelan and US passports ("I have dual citizenship with the United States and Venezuela. The Venezuelan passport was required when travelling into Venezuela.").

Circa December 2000, Applicant's father and mother retired from their positions as physics and chemistry professors, respectively, in Venezuela and relocated permanently to the US. Applicant's father receives a pension from his teaching position in Venezuela. They returned to Venezuela temporarily in 2001 to sell their residence, and Applicant visited them there in February 2001, November 2001, and December 2001. Applicant used his US passport to exit Venezuela in February 2001, and to enter and exit Venezuela for the later trip. As reflected in his now expired Venezuelan passport, Applicant used his Venezuelan passport to enter and exit that country for a ten-day visit in November 2001. (U) Applicant used his US passport for his trip in December 2001 as he learned he could enter Venezuela on his US passport for a stay of less than 30 days without a visa.

On February 20, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his foreign connections. Applicant discussed his dual citizenship from birth with Venezuela and the US, and indicated he holds passports from both countries as it makes it easier for him to visit his mother's relatives in the US. Applicant expressed his desire to not surrender his Venezuelan citizenship for sentimental reasons, but he denied any effort to keep his Venezuelan documents up to date.

Applicant's Venezuelan passport expired in August 2002, and he has no intent to renew it. He is willing to renounce his Venezuelan citizenship if it is a "decisive factor" in him obtaining a security clearance, but he has taken no steps to do so. Applicant is not willing to bear arms for Venezuela. He would not volunteer for military service in the US, although would serve if drafted. If asked to take up arms against Venezuela, he is not sure what he would do.

Since Applicant's parents sold their home in Venezuela in late 2001, they have been continuous residents of the US. They do not have any financial assets besides pension benefits in or from Venezuela.

As of May 2003, Applicant telephones his parents once per week and has in-person contact with them a couple of times per year. Applicant has telephone contact with his sister, who is unmarried and working for the US auto manufacturer, at least once per week.

Applicant has two aunts who are resident citizens of Venezuela and a cousin from Venezuela who is currently studying in the PRC. He does not make any effort to contact them, although his aunts visited him on his trips to Venezuela to see his parents.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual

may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. See Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Foreign Preference

E2.A3.1.1. 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.

E2.A3.1.2. Conditions that could raise a security concern and may be disqualifying also include:

E2.A3.1.2.1. The exercise of dual citizenship

E2.A3.1.2.2. Possession and/or use of a foreign passport

E2.A3.1.3. Conditions that could mitigate security concerns include:

E2.A3.1.3.1. Dual citizenship is based solely on parents' citizenship or birth in a foreign country

E2.A3.1.3.4. Individual has expressed a willingness to renounce dual citizenship

Foreign Influence

E2.A2.1.1. The Concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation or pressure.

E2.A2.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A2.1.2.1. 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;

E2.A2.1.3. Conditions that could mitigate security concerns include:

E2.A2.1.3.1. A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States.

Under Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the

Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. *See* Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the following with respect to guidelines C and B:

Guideline C is based on actions taken by an individual that indicate a preference for a foreign country over the United States. (2) A citizen of Venezuela and the US from birth by virtue of his birth abroad to a US citizen, Applicant's status as a dual national is not necessarily indicative of a foreign preference (*see* E2.A3.1.3.1., dual citizenship based on birth in a foreign country as mitigating of foreign preference concerns). However, affirmative acts in exercise of foreign citizenship are potentially security disqualifying, as they may indicate a preference for the foreign country over the US (*see* E2.A3.1.2.1.). The Directive cites specific affirmative behaviors which raise security significant guideline C concerns, including possession and/or use of a foreign passport (*see* E2.A3.1.2.2.). As set forth by the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I) in an August 16, 2000, clarification of the policy guideline pertinent to foreign passports, possession and/or use of a foreign passport raises doubts as to whether a person's allegiance to the US is paramount, and it could also facilitate travel not verifiable by the US. (3) As a youth and continuing through his collegiate years, Applicant held dual passports. After he came to the US for college, he used his Venezuelan passport in preference to his US passport when traveling to Venezuela to visit his parents on at least an annual basis. This constitutes an active exercise of his foreign citizenship, which is potentially disqualifying under E2.A3.1.2.1. and E2.A3.1.2.2. of the adjudicative guidelines.

Applicant credibly explained that his use of the foreign passport was on the direction of US Embassy officials in Venezuela, who indicated he should use his Venezuelan passport to travel to Venezuela as that nation would not issue visas to its citizens. That counsel, originally provided to his mother when she registered his birth with the US Consular Service, was reiterated in conjunction with his pursuit of higher education in the US. Under these circumstances, Applicant could reasonably consider his use of the foreign passport was approved if not officially sanctioned by the US (*see* E2.A3.1.3.3.). Yet in the process of applying for a security clearance, Applicant subsequently learned he could travel on his US passport to Venezuela without a visa for stays of less than 30 days. He was unable to recall specifically how or when he discovered he did not require a visa for short visits ("I'm not really sure exactly how I found out. I started asking my parents because of the security problem." Tr. p. 57), although he indicated it was around the time of his travel to the US in 2001. Assuming Applicant's inquiries were within a few months of his initial travel to Venezuela on his US passport in February 2001, then he knowingly presented his Venezuelan passport in preference to his US passport in conjunction with a ten-day trip to Venezuela in November 2001. Applicant's subsequent entry into Venezuela on his US passport in December 2001 is consistent with his US citizenship, but it does not eradicate the foreign preference concerns raised by his use of the Venezuelan passport that November.

Applicant has expressed a willingness to renounce his Venezuelan citizenship should it be necessary ("a decisive factor") for a security clearance. While willingness to renounce foreign citizenship is mitigating of foreign preference concerns (*see* E2.A3.1.3.4.), such a conditional willingness is not entitled to compelling weight in mitigation, especially when unaccompanied by any concrete action. His failure to take any action is telling of his preference, which is to retain his Venezuela citizenship for sentimental reasons. Since he was raised in Venezuela (albeit with strong connections to the US), it is understandable he would have feelings of affection or even a degree of affiliation for that country.

Although the US Government does not encourage its citizens to retain dual citizenship because of the complications that might ensue from obligations owed to the country of second nationality, the Department of Defense does not require the renunciation of foreign citizenship to gain access. The salient issue is whether Applicant can be counted on to faithfully fulfill the fiduciary obligations associated with being granted a security clearance.

Applicant has not actively exercised his foreign citizenship since 2001. He has allowed his Venezuelan passport to expire, and has no intent to renew it. He has always maintained a strong tie to the US, traveling to the US frequently as a youth on his US passport to see his maternal relatives. Particularly with his parents' permanent move to the US, Applicant's ties to Venezuela are likely to weaken further. He has demonstrated a willingness to comply with the requirements of his US citizenship, which include registering with the US Selective Service System, and is pursuing his career in the US. Applicant is not likely to act in preference to Venezuela or any other foreign country in the future. Accordingly, subparagraphs 1.a. and 1.b. are resolved in his favor.

Under Guideline B, a security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he is bound by affection, influence or obligation are not citizens of the United States or may be subject to duress. Applicant's father is a naturalized Venezuelan citizen, his sister is a dual citizen of Venezuela and the US. Applicant has a close relationship with his parents and sibling. When he was in college, he traveled to Venezuela at least once annually to see his parents. Since their permanent move to the US, Applicant has contact with them once weekly by telephone. He and his sister converse at least once per week. Disqualifying condition E2.A2.1.2.1., 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 must be considered in evaluating Applicant's security suitability.

The security concerns engendered by the foreign citizenship of close family members and associates may be mitigated where it can be determined that the immediate family member(s), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States (*see* E2.A2.1.3.1.). Evidence of record does not indicate that Applicant's family members have ever been agents of a foreign power, or that they are in a position to be exploited by a foreign power. Applicant's father and mother are retired from professorial positions at public universities in Venezuela. His father receives a pension, but there is no evidence of any ongoing personal contact with foreign government officials. They have no assets in Venezuela. Applicant's sister chose to remain in the US after college, and she currently works as an engineer for a major automobile manufacturer in the US. The US residency of Applicant's father and the US residency and citizenship of his sister greatly reduces the risk of vulnerability to coercive or non coercive means of foreign influence. ⁽⁴⁾ A favorable outcome is warranted as to subparagraph 2.a. of the SOR. Since Applicant has resolved not to renew his foreign passport, the risk of any future foreign influence because of contact with Venezuelan officials through the renewal or use of that Venezuelan passport no longer exists. Subparagraph 2.b. is likewise resolved for Applicant.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline C: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Paragraph 2. Guideline B: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. Applicant testified he used his US passport instead of his Venezuelan passport on his last two trips to Venezuela in 2001. (Tr. pp. 30-31). The US passport, entered as exhibit B, bears exit stamps from Venezuela on February 19, 2001, and January 3, 2002, as well as entry stamps into the US on November 26, 2001, and January 3, 2002. His Venezuelan passport (exhibit A) bears stamps from Venezuela dated November 16, 2001, and November 26, 2001, which tends to indicate three trips to Venezuela that year. Applicant was not confronted with this apparent discrepancy, but he later testified he used his US passport on trips taken to Venezuela in February 2001 and December 2001. (Tr. p. 54). There is no indication that Applicant was aware as of late 2001 of the ASDC3I memorandum of August 16, 2000, which makes clear the security concerns surrounding the possession and/or use of a foreign passport.

2. Dual citizenship is recognized by the United States, and a decision to deny or revoke security clearance based solely on one's status as a dual citizen would raise constitutional issues. As the DOHA Appeal Board articulated (ISCR Case No. 99-0454, October 17, 2000), dual citizenship in and of itself is not sufficient to warrant an adverse security clearance decision. Under Guideline C, the issue is whether an applicant has shown a preference through his actions for the foreign country of which he is also a citizen.

3. In his memorandum of August 16, 2000, the ASDC3I stated in pertinent part:

The [Guideline C] specifically provides that 'possession and/or use of a foreign passport' may be a disqualifying condition. It contains no mitigating factor related to the person's personal convenience, safety, requirements of foreign law, or the identity of the foreign country. The only applicable mitigating factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline 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.

4. Not alleged by the Government, Applicant has two aunts who remain resident citizens of Venezuela. While this aunts visited Applicant on his trips back to Venezuela, he does not correspond with them. He has a cousin who is in the PRC studying Chinese, but he does not make an effort to contact her either. (Tr. pp. 37-41).