

KEYWORD: Foreign Preference

DIGEST: Applicant, a Brazilian native, became a United States (U.S.) naturalized citizen in 1976. In 1998, she reapplied for her Brazilian citizenship, which was restored to her that November, and subsequently acquired a Brazilian passport in February 2000. After being apprised of the requirement to surrender her foreign passport or obtain official U.S. government approval for its use, Applicant tried three times to surrender her foreign passport to the Brazilian consulate, with her passport being accepted only after she damaged it rendering it invalid for travel. The Foreign Preference concerns are mitigated by her demonstrated preference for the U.S. and starting the process to renounce her Brazilian citizenship. Clearance is granted.

CASE NO: 02-26087.h1

DATE: 05/28/2004

DATE: May 28, 2004

In Re:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-26087

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Esq., Department Counsel

FOR APPLICANT*Pro Se***SYNOPSIS**

Applicant, a Brazilian native, became a United States (U.S.) naturalized citizen in 1976. In 1998, she reapplied for her Brazilian citizenship, which was restored to her that November, and subsequently acquired a Brazilian passport in February 2000. After being apprised of the requirement to surrender her foreign passport or obtain official U.S. government approval for its use, Applicant tried three times to surrender her foreign passport to the Brazilian consulate, with her passport being accepted only after she damaged it rendering it invalid for travel. The Foreign Preference concerns are mitigated by her demonstrated preference for the U.S. and starting the process to renounce her Brazilian citizenship. Clearance is granted.

STATEMENT OF CASE

On August 14, 2003, the Defense Office of Hearings and Appeals (DOHA) 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. ⁽¹⁾ 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) because of her acquisition of a Brazilian passport, alleged use of that passport in preference to her U.S. passport to travel to Brazil in 1998, and travels to Brazil in 1995 and 1998.

On August 24, 2003, Applicant executed an Answer to the SOR and requested a hearing before a DOHA Administrative Judge if her explanations did not alleviate the Government's concerns. The case was assigned to me on November 14, 2003, and pursuant to formal notice of that date, a hearing was scheduled for December 12, 2003. At the hearing held as scheduled, the Government submitted six exhibits. Applicant testified on her behalf, as reflected in a transcript received

December 23, 2003, and submitted two exhibits. The record was ordered held open until January 5, 2004, to allow Applicant a second attempt to surrender her foreign passport to the Brazilian consulate.

RULING ON EVIDENCE

By facsimile on December 17, 2003, Applicant furnished documentation of her intentional destruction of her foreign passport making it invalid for travel, as confirmed by the Brazilian consulate. The Government having filed no objection or other response, the documentation was marked and admitted as Exhibit C.

FINDINGS OF FACT

DOHA alleges Foreign Preference (Guideline C) concerns because of Applicant's dual citizenship with the U.S. and Brazil, her active exercise of her foreign citizenship by obtaining a Brazilian passport in April 1998 and use of that passport to travel to Brazil in 1998, and her travel to Brazil in 1995 as well as 1998. Applicant admitted her dual citizenship, as she reacquired her Brazilian citizenship in November 1998. With her Brazilian passport not issued to her until February 2000, she could not have used it in preference to her U.S. passport to enter Brazil in 1998. Applicant explained that her travels to Brazil in 1994 (not 1995) and 1998 were to visit family members who were dying. After a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following findings of fact:

Applicant is a 49-year-old maintenance worker who has been employed by the same defense contractor since February 1983. She seeks a Department of Defense confidential security clearance for her duties.

Applicant was born in Brazil in 1954 to resident citizens of that nation. Raised in Brazil to age 15, she immigrated to the U.S. in 1969 where she completed school. In March 1976, Applicant became a U.S. naturalized citizen, taking an oath to renounce all foreign allegiances, to support and defend the U.S. Constitution and its laws, and to bear arms or noncombatant service or civilian service on behalf of the U.S. if required. Since Brazil did not recognize dual citizenship, she was required to give up her Brazilian citizenship.

In October 1976, Applicant married a Brazilian citizen in the U.S. and they had two children born to them in the U.S. in 1982 and 1985. In April 1988, Applicant obtained her U.S. passport, valid for ten years. She traveled to Brazil on her U.S. passport to visit family members, including in August 1994 to visit her sister who was dying of cancer. That U.S. passport was cancelled on issuance to her of a new U.S. passport in April 1998, also valid for ten years.

Planning a trip to visit relatives in Brazil that summer, Applicant and her Brazilian citizen spouse went to the Brazilian consulate in May 1998, Applicant to obtain a visa to travel to Brazil on her U.S. passport and her spouse to obtain his Brazilian passport. Noting her Brazilian birth, consular officials asked Applicant why she did not have a Brazilian passport. When Applicant responded that she was a U.S. citizen and therefore no longer a citizen of Brazil, she was informed Brazilian laws had been changed to recognize dual citizenship and that she could apply for restoration of her Brazilian citizenship. With the intent of eventually obtaining a Brazilian passport to ease travel to Brazil (no need for a visa), Applicant filed the application.

In early June 1998, Applicant was granted her visa for entry to Brazil on her U.S. passport, valid for five years. That summer, she went to Brazil on her U.S. passport, primarily to see her mother. Her mother died in August 1998 after Applicant had returned to the U.S.

Applicant's Brazilian citizenship was restored to her in November 1998. In February 2000, she obtained a Brazilian passport valid for five years. She never used the passport as she has not made any trips to Brazil since 1998.

In conjunction with her application for a confidential security clearance, Applicant executed a security clearance application (SF 86) on September 7, 2001. Applicant disclosed her dual citizenship with Brazil and the U.S., and her possession of valid U.S. and Brazilian passports both reportedly issued to her in April 1998. Applicant added that she possesses a Brazilian passport because of frequent travel to Brazil, and she listed pleasure trips to that country in 1995 (sic) and 1998. (2) Applicant also disclosed the Brazilian citizenship and residency of three of her seven siblings still living.

On December 17, 2001, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about her dual citizenship and possession of a Brazilian passport. Applicant denied the exercise or acceptance of any rights, privileges, or benefits of her foreign citizenship in preference to her U.S. citizenship. Not having reviewed any of her travel documents before her interview, Applicant mistakenly told the agent she obtained her Brazilian passport "in approximately 1998" solely for the purpose of easing travel to Brazil to see relatives. She indicated she used the Brazilian passport on a trip to Brazil in 1998, failing to recall that her foreign passport was not issued to her until February 2000. Applicant denied any intent to use this passport on foreign travel to countries other than Brazil and maintained she would be willing to renounce her dual citizenship if required to retain her position with her employer.

On August 14, 2003, DOHA issued an SOR to Applicant alleging Foreign Preference concerns. In its forwarding correspondence, DOHA referenced as an attachment a copy of the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASD3I) memorandum issued August 20, 1999, clarifying the Foreign Preference guideline as to the possession and/or use of a foreign passport, making it clear security clearance must be denied where an applicant has a foreign passport unless the use/possession has been officially approved by the U.S. Government. ⁽³⁾ On October 15, 2003, Department Counsel faxed a copy of the ASD3I memorandum to Applicant as she could not recall having seen it.

Applicant went to the Brazilian consulate in October 2003 and attempted to surrender her foreign passport, telling consular officials that she could not obtain a security clearance needed for her employment because of the passport. Applicant was informed by consular officials that under Brazilian law, she could not return her passport for cancellation unless she had already formally requested a suspension of her Brazilian citizenship rights and the request had been accepted by the Brazilian Ministry of Justice. Applicant obtained a letter from the Consulate General of Brazil documenting the requirement for surrender of the passport and sent a copy of it to the Government.

Informed by Department Counsel that actual surrender of the foreign passport was required, Applicant returned to the consulate on December 2, 2003, and requested of consular officials that they void the passport. They refused to accept the passport and told her the only way to surrender it was to formally renounce her citizenship. Applicant formally requested a suspension of her citizenship rights and her request was forwarded by the consulate to the Brazilian Ministry of Justice.

In a letter dated December 2, 2003, the Deputy Consul indicated the process usually takes several months to be concluded as it requires the approval, signature, and publication by the Federal Government of Brazil. Only then would the Consulate General of Brazil be legally authorized to cancel Applicant's Brazilian passport.

As of her hearing on December 12, 2003, the renunciation of her Brazilian citizenship had not yet been approved. Applicant expressed reluctance to destroy her foreign passport because she was uncertain of the legality should she do so. She offered to surrender the foreign passport to the U.S. Government for retention or destruction. Applicant was given until January 5, 2004, to demonstrate compliance with the Department of Defense policy on the possession or use of a foreign passport as clarified by the ASDC3I. On December 17, 2003, Applicant went to the Brazilian consulate with her Brazilian passport which had been damaged so as to render it invalid for travel, as confirmed by the consulate in a letter of that date.

Having emigrated from Brazil as a teen, Applicant never registered to vote in Brazil. She has no intent of moving to Brazil or of accepting any benefit, right or privilege from Brazil in the future.

Applicant has no financial assets in Brazil. Her connections are limited to family members who reside there (three siblings and her mother-in-law).

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* Â§ 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in Â¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 Â§ 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive Â¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Considering the evidence as a whole, I find 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.

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 Guideline C:

Guideline C is based on actions taken by an individual that indicate a preference for a foreign country over the United States. ⁽⁴⁾ A resident of the U.S. since age 15, Applicant became a U.S. naturalized citizen in March 1976, knowing she would lose her native Brazilian citizenship. Married a few months later to a Brazilian citizen in the U.S., Applicant raised her family here and has worked for more than 20 years for the same defense contractor. When she traveled back to Brazil, it was on U.S. passports issued in 1988 and on renewal in 1998. She obtained the necessary visas to enter Brazil on her U.S. passport, including in 1998 when she learned she could reacquire her Brazilian citizenship due to a

change in Brazilian law. With the eventual intent of obtaining a Brazilian passport so she would not have to go through the process of obtaining a visa when he wanted to travel to see her relatives, especially her mother who was elderly and ill, Applicant applied for Brazil citizenship which was granted in November 1998. 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), but her voluntary reacquisition of her native citizenship as an adult after more than 20 years living and working in the U.S. raises security significant Foreign Preference issues (*see* disqualifying factor E2.A3.1.2.1. *The exercise of dual citizenship*, especially where she accepted a benefit of her Brazilian citizenship).

With the death of her mother in August 1998, Applicant ostensibly no longer had the same need to be ready to travel to Brazil on perhaps very short notice. Yet when her spouse went to the Brazilian consulate in 2000 to obtain his passport, she decided to apply for her Brazilian passport as it would obviate the need for her to obtain a visa for future travel to Brazil. Even though she has never used the Brazilian passport issued in February 2000 and never intended to use it to enter any country other than Brazil, possession of a valid foreign passport raises doubt as to whether the person's allegiance to the U.S. is paramount and could facilitate foreign travel unverifiable by the U.S. As noted by the ASDC3I, personal convenience is not a mitigating factor. Disqualifying condition E2.A3.1.2.2. *Possession and/or use of a foreign passport* must be considered as well.

In mitigation of the Foreign Preference concerns, Applicant testified credibly she did not understand that her dual citizenship and possession of a foreign passport presented any risk to her employer or security. On being apprised of the requirement to surrender her foreign passport, Applicant acted promptly and attempted to surrender it to the Brazilian consulate. After the Consulate refused to take it, she returned a second time, asking consular officials to void it so as to render it invalid. Told all she could do was renounce her foreign citizenship, she filed her application for renunciation. Willingness to renounce dual citizenship is mitigating of Foreign Preference concerns (*see* E2.A3.1.3.4.) and it reflects a preference for the U.S., but ASDC3I guidance requires the denial of a clearance where an Applicant possesses a valid foreign passport.

At her hearing, Applicant offered her foreign passport to the Government for retention until the Brazilian Ministry of Justice had acted on her request to renounce her Brazilian citizenship or for destruction if that would cure. With the U.S. Government not authorized to retain possession of or to destroy a Brazilian legal document, Applicant was given yet another chance to surrender foreign passport. Five days after her hearing, she presented her damaged Brazilian passport to Brazilian consular officials. Documentation from the consulate confirms that the document is no longer valid for travel; it does not indicate that the Consulate took possession of the damaged passport.

In his policy clarification, the ASDC3I did not indicate what acts would be sufficient to constitute surrender of a foreign passport sufficient to alleviate the Foreign Preference concerns raised by its possession and/or use. The DOHA Appeal Board has addressed the issue of surrender. In ISCR Case No. 01-01295, decided December 13, 2001, the Board referring to an earlier decision stated:

Surrender of a foreign passport involves returning it to the issuing authority or whatever other person or entity is

authorized by law to accept surrender of a foreign passport. *See* ISCR Case No. 99-0480 (November 28, 2000) at p. 8. Therefore, the ASDC3I memorandum is not satisfied by an offer to: (a) destroy a foreign passport; (b) place a foreign passport in escrow with the security department of a defense contractor; or (c) give a foreign passport to DOHA or another department of the United States government.

Applicant did more than offer to return her passport to the Consulate. She attempted more than once to physically turn over possession of the travel document to Brazilian consular officials and eventually resorted to rendering the passport invalid as proof of her good faith. Under the circumstances, her presentation of the damaged Brazilian passport to the consulate is the functional equivalent of a surrender, whether or not the Brazilian officials took possession of the now invalid travel document. Assuming the concerns underlying the possession and/or use of a foreign passport are as identified by the ASDC3I (raises doubts about primary allegiance and the risk of unverifiable travel), Applicant has alleviated those concerns. Her application to renounce her foreign citizenship shows a clear preference for the U.S., and there is no risk of travel on the damaged passport. There are adequate assurances Applicant will not actively exercise or seek rights, benefits, or privileges of foreign citizenship in the future. Her connections to Brazil (family members residing there) are significantly less than her ties to the U.S. where she chose to make her life. Applicant testified convincingly that she does not really know Brazil, as she came to the U.S. at a young age, went to school and made friends here. Favorable findings are returned as to subparagraphs 1.a., 1.b., 1.c., and 1.d. of the SOR.

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

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: 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. Clearance is granted.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of 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).
2. In her Answer, Applicant indicated the first trip was instead in 1994 to visit her sister who was dying of cancer.
3. In his memorandum of August 16, 2000, the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I) stated, in pertinent part:

The purpose of this memorandum is to clarify the application of Guideline C to cases involving an applicant's possession or use of a foreign passport. The Guideline specifically provides that "possession and/or use of a foreign passport" may be a disqualifying condition. It contains no mitigating factor related to the applicant'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. 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.