

DATE: May 13, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 03-07563

## **DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Nygina T. Mills, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant, a dual citizen of Portugal and the United States since he acquired U.S. citizenship in 1982, voted in a Portuguese election in 2001. While he possessed a Portuguese passport until July 2003, he did not use it for travel after becoming a U.S. citizen and has surrendered it to the Portuguese consulate. The Foreign Preference concerns are mitigated by his demonstrated preference for the U.S. and firm resolve not to exercise his foreign citizenship in the future. Clearance is granted.

### **STATEMENT OF CASE**

On August 18, 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).

On September 4, 2003, Applicant executed an Answer to the SOR and requested a hearing before a DOHA Administrative Judge. The case was assigned to me on October 22, 2003, and pursuant to formal notice of that date, a hearing was scheduled for November 20, 2003. At the hearing held as scheduled, the Government and Applicant submitted two exhibits each. Testimony was taken from Applicant and a coworker on his behalf, as reflected in a transcript received December 3, 2003. The record was ordered held open until December 4, 2003, for Applicant to submit signed, authenticated confirmation of his unblemished record at work with regard to security matters (Ex. C), and of his lack of a criminal record (Ex. D). On their timely receipt on December 1, 2003, the documents were marked and entered as noted.

### **RULING ON EVIDENCE**

In his September 11, 2001 statement (Ex. 2), Applicant indicated he possessed a Portuguese passport but had no intent to renew it when it expires. While his possession of a foreign passport was neither alleged by the Government nor addressed at the hearing, policy clarification from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC3I) requires clearance be denied or revoked unless an applicant surrenders his foreign passport or obtains official approval for its use from the appropriate agency of the U.S. government. In response to an order of April 26, 2004, Applicant provided documentation, entered as Applicant Exhibit E, of his surrender on April 30, 2004, of his expired passport to the Portuguese Consulate General.

### FINDINGS OF FACT

The SOR alleges Foreign Preference (Guideline C) concerns because of Applicant's dual citizenship with the U.S. and Portugal, and his active exercise of his foreign citizenship by voting in a Portuguese election in 2001. Applicant admitted the factual allegations, but denied they indicate a preference for Portugal over the U.S. Applicant's admissions are accepted and incorporated as findings of fact. After a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 61-year-old material handler who has worked for the same defense contractor since March 1977. He seeks a Department of Defense confidential security clearance, having held a company-granted confidential security clearance for 26 years until it was revoked in October 2003 on issuance of the SOR.

Applicant was born in Portugal to resident citizens of that nation in 1943. Educated through the fourth grade in Portugal, Applicant served in the Portuguese military (infantry) from June 1964 to September 1967. He then worked for the Portuguese government in anti-smuggling law enforcement for five years.

In February 1968, Applicant married his spouse, a Portuguese citizen as well, in Portugal. That December, a daughter was born to them in Portugal. Sponsored by his spouse's brother, Applicant and his young family immigrated to the U.S. in February 1977. The following month, he began working for his current employer, a defense contractor.

In October 1978, a daughter was born to Applicant and his spouse in the U.S. Settled into life in the U.S., Applicant, his spouse, and his first daughter became U.S. naturalized citizens (Applicant in June 1982, his spouse in September 1985, and his first daughter in January 1986), 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. Applicant's acquisition of U.S. citizenship did not revoke his Portuguese citizenship, and in July 1993 he was issued a Portuguese passport valid to July 2003.

Applicant obtained a U.S. passport and elected to use that passport exclusively for his foreign travel thereafter. Applicant traveled to Portugal on three occasions after he became a U.S. naturalized citizen: for vacation in 1986; to see his father (now deceased) who was ill in October 1996; and to visit his mother in July 2003. All of these trips were on his U.S. passport. [\(2\)](#)

Applicant registered as a voter in the U.S. in 1982 and he has subsequently voted in U.S. elections. As a dual citizen of the U.S. and Portugal, Applicant is eligible to vote in Portugal as well. Over the years, Applicant has received notification by mail of upcoming elections in Portugal. He made no effort to vote in any Portuguese elections until 2001, when he went to the local Portuguese consulate and voted in an election for president of Portugal. Applicant voted even though he was unfamiliar with the candidates, but he did not consider his voting to be an act of foreign preference.

Needing a Department of Defense confidential security clearance to access work areas without an escort, Applicant executed a security clearance application (SF 86) on April 4, 2001. Applicant disclosed thereon his dual citizenship with Portugal and the U.S., and the Portuguese citizenship and foreign residency of his mother and five siblings. He responded "No" to whether he had an active foreign passport within the past seven years, while indicating he had a valid U.S. passport issued December 1994.

On September 11, 2001, Applicant was interviewed by a Defense Security Service (DSS) special agent about his dual citizenship and foreign connections. Applicant acknowledged his status as a dual citizen of Portugal and the U.S., and his possession of a Portuguese passport that he had not used since he acquired U.S. citizenship. He denied any intent to

use it or to renew it on its expiration. (3) Applicant disclosed he had voted in an election for president of Portugal in 2001 through the Portuguese consulate. Applicant maintained he would support the U.S. in any conflict, even against Portugal, and expressed "allegiance and loyalty" to the U.S. over any other country. Applicant indicated he would be willing to renounce his Portuguese citizenship if necessary to maintain a security clearance.

At his hearing in November 2003, Applicant reiterated a willingness to give up his Portuguese citizenship if necessary as he loves his job and the U.S. He regards his voting in the 2001 Portuguese presidential election as "a mistake" and has no intent to vote in a Portuguese election in the future.

On April 30, 2004, Applicant surrendered his Portuguese passport that had expired in July 2003 to the Portuguese Consulate. He informed the Portuguese consular officials that he did not want to renew it because of his U.S. citizenship and employment situation.

Applicant receives no financial assistance or benefits from Portugal. All of his financial assets are in the U.S., but he might inherit a portion of his mother's property in Portugal on her death.

Applicant has been a productive worker for his employer and a law-abiding citizen in his community. He has never been disciplined at work for any security violations.

## **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* § 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 ¶ 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 § 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 ¶ 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.A3.1.2.3. Military service . . . for a foreign country

E2.A3.1.2.8. Voting in foreign elections.

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.A3.1.3.2. Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship;

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 those who testified, 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. <sup>(4)</sup> A citizen of Portugal from birth and of the U.S. since 1982, 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). Applicant's service in the Portuguese infantry, as well as his possession of a Portuguese passport prior to his U.S. naturalization in 1982, do not fall within E2.A3.1.2.1. (exercise of dual citizenship) and do not raise security disqualifying foreign preference concerns (*see* E2.A3.1.3.2. indicators of possible foreign preference occurred before obtaining U.S. citizenship). However, as of his September 2001 interview with a DSS agent, Applicant still had possession of his Portuguese passport ("*When my Portuguese passport reaches its expiration date, I do not intend to renew it.*"). Possession and/or use of a valid foreign passport raises security significant foreign preference concerns (*see* E2.A3.1.2.2.). As set forth by the ASDC3I, possession of a 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. <sup>(5)</sup>

Also of legitimate concern to the Government is Applicant's voting in the 2001 Portuguese presidential election 19 years after he had become a U.S. citizen (*see* E2.A3.1.2.8. voting in foreign elections). Applicant has not adequately explained why he chose to vote in this foreign election when he had not availed himself of previous opportunities and was not familiar with the candidates, although clearly he did not perceive or intend his conduct as an act in preference to Portugal over the U.S.

In mitigation, Applicant now realizes he made a mistake in voting in the Portuguese presidential election, and he has resolved not to vote in any future foreign elections. On being apprised of the requirement to surrender his foreign passport, <sup>(6)</sup> Applicant took immediate steps to comply with the ASDC3I's policy guidance, surrendering his expired foreign passport to the Portuguese Consulate and expressing a credible intent to not renew it. Furthermore, his willingness to renounce his Portuguese citizenship reflects a clear preference for the U.S. In September 2001 and again at his hearing in November 2001, Applicant expressed his willingness to renounce his Portuguese citizenship if necessary to maintain a security clearance (*see* E2.A3.1.3.4., expressed willingness to renounce dual citizenship as potentially mitigating of foreign preference concerns). He has not taken any steps to renounce his foreign citizenship, but his recent surrender of his foreign passport is telling of his preference. While the U.S. Government does not encourage its citizens to remain dual nationals 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 provided there are adequate assurances a dual citizen will not actively exercise or seek rights, benefits, or privileges of that foreign citizenship. Since immigrating to the U.S. in February 1977, he has proven himself to be a law-abiding citizen who takes his responsibility to vote in U.S. elections very seriously. He has a record of security compliance over many years with his current employer. Applicant's actions over the past 27 years overwhelmingly demonstrate his commitment is the U.S. where he has chosen to live and work. SOR subparagraphs 1.a. and 1.b. are resolved in his favor.

### **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

### **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. 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. Applicant's current U.S. passport was issued in December 1994 (Ex. 1), apparently on renewal of an earlier U.S. passport. Applicant has credibly indicated he did not travel on his Portuguese passport after becoming a U.S. naturalized citizen. The Portuguese Consulate confirmed Applicant's Portuguese passport issued in 1993 was not used for any foreign travel.
3. His most recent Portuguese passport was issued on renewal through the Portuguese Consulate in July 1993 (Ex. E). While renewal of a foreign passport as a U.S. citizen has foreign preference implications, Applicant did not use the passport.
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.
5. 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.

6. There is no evidence Applicant was apprised before my order of April 26,2004, of the ASDC3I's August 16, 2000 policy guidance on the possession and/or use of a foreign passport.