

DATE: June 30, 2006

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 04-01143

**ECISION OF ADMINISTRATIVE JUDGE**

**JOHN GRATTAN METZ, JR**

**APPEARANCES**

**FOR GOVERNMENT**

Ray T. Blank, Jr., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's application for, renewal of, and use of a foreign passport after becoming a naturalized U.S. citizen demonstrated foreign preference and was not mitigated where Applicant had neither surrendered the passport nor obtained formal approval for its use. He failed to mitigate the foreign influence concerns raised by his family members residing in Colombia. He deliberately failed to disclose his possession of a valid foreign passport within the last seven years. Clearance denied.

**STATEMENT OF THE CASE**

Applicant challenges the 30 March 2005 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of foreign influence, foreign preference, and personal conduct. <sup>(1)</sup> Applicant answered the SOR on 20 April 2005 and requested a hearing. DOHA assigned the case to me 17 October 2005 and I convened a hearing on 15 November 2005. DOHA received the transcript 28 November 2005.

**FINDINGS OF FACT**

Applicant admitted the factual allegations under Guidelines C and B, but denied the allegations under Guideline E; accordingly, I incorporate his admission as findings of fact. He is a 55-year-old first assistant engineer on a merchant vessel. He has not previously had a clearance. When Applicant completed his clearance application in March 1998, he disclosed his foreign birth, dual citizenship with Colombia, and his foreign relatives. However, he deliberately failed to disclose that he had possessed a valid foreign passport within the last seven years. <sup>(2)</sup> In fact, he had a Colombian passport that had expired in 1996.

Applicant was born in Colombia in April 1950. He was educated there, attended the Colombian Naval Academy from 1966-1970, and served as a naval officer until 1972. He served in the Colombian merchant marine at various times from

1972 to 1981. In September 1981, he married his second wife in the U.S., returned to Colombia, then immigrated to the U.S. as a legal permanent resident in 1982. He became a naturalized U.S. citizen in June 1990. He and his wife divorced in December 1990. He obtained his U.S. passport in March 1991. He renewed it in August 2000.

In 1998, Applicant traveled to Colombia to be with his mother, who had undergone surgery. He traveled on his U.S. passport, but overstayed the period of time he was allowed to remain in Colombia on a foreign passport. The penalty for this would ordinarily be a fine, but when Colombian immigration officials became aware that Applicant was native-born Colombian, they made him get a Colombian passport. That passport is valid until January 2009.

Applicant used his Colombian passport to travel to Colombia twice in 2000. He stopped using it to travel to Colombia because of concerns over his pending security clearance. However, he continues to travel to Colombia on his U.S. passport. He carries his Colombian passport with him, because if he overstays his U.S. visa--which he states has happened about ten times between 2000 and 2005--he just produces his Colombian passport, and officials let him leave the country without paying the fine. Applicant is aware of the security implications of continuing to possess a foreign passport, and has expressed a willingness to surrender his Colombian passport and renounce his Colombian citizenship if he can get his clearance. He has made inquiries of the Colombian Embassy for the procedure, but has not undertaken the process.

Applicant's mother (age 90) and a life-long housewife, a sister (secretary for a medical association), and a brother (architect) are citizens and residents of Colombia. Another brother (medical doctor) is a citizen of Colombia residing in Spain. Applicant's daughter is a dual citizen of Colombia and the United Kingdom, a legal permanent resident of the U.S., and resides in Russia. Applicant's son is a dual citizen of Colombia and the United Kingdom, residing in the United Kingdom.

Colombia recognizes dual citizenship. No Colombian citizen by birth may be stripped of citizenship, and Colombia does not (similar to the U.S.) require its naturalized citizens to renounce their other citizenship. However, Colombia does require its citizens, whether dual citizens or not, to travel to Colombia on their Colombian passports. The U.S. State Department warns U.S. citizens against traveling to Colombia because of violence due largely to narco-terrorism.

Colombia is a constitutional, multiparty republic with important and strengthening ties to the U.S. It has a mixed human rights record, but is not a known collector of U.S. intelligence or economic information.

## **POLICIES AND BURDEN OF PROOF**

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline C (Foreign Preference), Guideline B (Foreign Influence), and Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's

suitability for access in favor of the government.

On 16 August 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (ASD C<sup>3</sup>I) issued a memorandum<sup>(4)</sup> to clarify the application of Guideline C, Foreign Preference, to cases involving possession and/or use of a foreign passport. In pertinent part, the ASD, C<sup>3</sup>I memorandum **"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."** (Emphasis added).

### CONCLUSIONS

The government established a case for disqualification under Guideline C by showing that Applicant obtained an Colombian passport in January 1999, used it to exit Colombia in 1999, used to travel to Colombia twice in 2000, and has continued to use it to exit Colombia when he overstays his U.S. visa. This despite becoming a U.S. citizen in April 1990. His conduct implicates disqualifying conditions (DC) 1 and 2,<sup>(5)</sup> and Applicant has not mitigated the security concerns. Although he has been a dual citizen of Colombia and the United States since his naturalization in April 1990, his Colombian citizenship would possess little security significance if based solely on his birth in Colombia. For his conduct to fall within the security concerns of Guideline C, Foreign Preference, he must have acted in a way to indicate a preference for a foreign nation over the United States. However, inimical intent or detrimental impact on the interests of the United States is not required before the government can seek to deny access under Guideline C. The government has a compelling interest in ensuring those entrusted with this nation's secrets will make decisions free of concerns for the foreign country of which they may also be a citizen.

Applicant potentially met only one of the mitigating conditions (MC) for foreign preference. MC 4 might apply because Applicant has expressed a willingness to renounce his foreign citizenship. Nevertheless, this mitigating factor cannot be fully applied here without Applicant actually renouncing his citizenship because Colombia recognizes dual citizenship, but requires its citizens to use a Colombian passport to travel to Colombia. Unless Applicant renounces his Colombian citizenship, he will always be required to exercise his dual citizenship when he travels to Colombia.

None of the other MCs apply. MC 1 does not apply because Applicant's dual citizenship is not based solely on his birth in Colombia, but is based on his active exercise of dual citizenship after obtaining U.S. citizenship. MC 2 does not apply because all indicators of possible dual citizenship have occurred since Applicant obtained U.S. citizenship. MC 3 does not apply because Applicant's conduct has not been sanctioned by the U.S.

The ASD, C<sup>3</sup>I Memorandum effectively controls the resolution of the foreign preference issue. The memorandum provides that Applicant's past possession and use of his foreign passport can be mitigated only if Applicant surrenders the foreign passport or obtains U.S. Government approval for its use. Applicant has undertaken neither action. Further, the Appeal Board has ruled that even possession of an expired passport does not satisfy the Money Memo requirement for surrender of the passport. *See*, DISCR Case No. 01-24306, September 30, 2003. In addition, Applicant seems likely to continue to travel to Colombia. Therefore, he will use his Colombian passport, consistent with Colombian law, when he travels there. While Applicant has a legal right to maintain his dual citizenship with its attendant benefits and responsibilities, he has not demonstrated that she can be counted on to always act in preference to the United States. I resolve Guideline C against Applicant.

The government established a case for disqualification under Guideline B by demonstrating that Applicant's mother and two siblings are citizens and residents of Colombia.<sup>(6)</sup> However, Applicant's travel to Colombia has no independent security significance under Guideline B. At best, the travel helps establish Applicant's close ties of affection to family, a point not seriously at issue here. Accordingly, I find SOR 2.d. for Applicant. Regarding Applicant's children, both dual citizens of Colombia and the United Kingdom, but residing outside Colombia, the government has presented no information raising security concerns over their citizenships in the United Kingdom, or their respective residences in the United Kingdom or Russia. Accordingly, I find SOR 2.b. and 2.c. for Applicant.

What remains are concerns about Applicant's relatives residing in Colombia, and he failed to meet the relevant mitigating condition under foreign influence. Although neither his mother nor his siblings are agents of a foreign

government, they may be so situated as to provide a point of influence on Applicant, thus not satisfying Mitigating Condition (MC) 1. (7) While there is no evidence that the Colombian government is actively engaged in the collection of U.S. intelligence such that would make Applicant or relatives likely targets for coercion, duress, or influence, the government's evidence explains the links to narco-terrorism that are on-going in Colombia. There are potential efforts to obtain information to thwart U.S. counter-drug operations even though Colombia itself does not collect U.S. economic or intelligence information. I resolve Guideline B for Applicant.

The government established a Guideline E case and Applicant did not mitigate the security concerns. Although Applicant disclosed many aspects of his foreign connections in his clearance application, including his potential dual citizenship based on birth, the failure to disclose the foreign passport cannot be viewed as a mere oversight because a foreign passport potentially discloses an active exercise of foreign citizenship--for example, if used or renewed after acquiring U.S. citizenship. I conclude Guideline E against Applicant.

### **FORMAL FINDINGS**

Paragraph 1. Guideline C: AGAINST APPLICANT

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Paragraph 2. Guideline B: AGAINST APPLICANT

Subparagraph a: Against Applicant

Subparagraph b: For Applicant

Subparagraph c: For Applicant

Subparagraph d: For Applicant

Paragraph 3. Guideline E: AGAINST APPLICANT

Subparagraph a: Against 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 Applicant. Clearance denied.

**John G. Metz, Jr.**

**Administrative Judge**

1. Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).
2. Applicant has given conflicting statements why he failed to disclose his passport. In a December 2002 sworn statement (G.E. 5), he claimed he thought the passport expired in 1995 (actually 1996) and was therefore "not active." By the plain language of the question, Applicant was required to disclose any passport valid anytime after March 1991, which this clearly was. He later (A.E. A, Tr. 44) claimed that he destroyed his original Colombian passport when he became a U.S. citizen in 1990.

3. *See, Department of the Navy v. Egan*, 484 U.S. 518 (1988).
4. The so-called "Money Memo" because it was signed by Arthur L. Money.
5. E2.A3.1.2.1. The exercise of dual citizenship; E2.A3.1.2.2. Possession and/or use of a foreign passport;
6. 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;
7. 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 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.