

DATE: November 18, 2005

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-00951

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a dual citizen of Brazil and the United States who is required by Brazilian law to use a Brazilian passport to enter that country. He is unwilling to surrender his Brazilian passport because he needs it to visit his aged and ailing father who resides in Brazil. Accordingly, Applicant is unable to mitigate the foreign preference security concern that exists in this case. Clearance is denied.

STATEMENT OF THE CASE

On June 21, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline C (foreign preference). Applicant submitted a response to the SOR that was received by DOHA on July 5, 2005, requested a hearing, and admitted all SOR allegations while providing clarifications to and explanations of the facts alleged and denying those facts created a security concern.

The case was assigned to me on August 10, 2005. A notice of hearing was issued on September 7, 2005, scheduling the hearing for September 22, 2005. The hearing was conducted as scheduled. The government submitted 11 documentary exhibits that were marked as Government Exhibits (GE) 1-11, and admitted into the record without objection. Applicant testified, called one witness to testify on his behalf, and submitted eight documentary exhibits that were marked as Applicant's Exhibits (AE) 1-8, and admitted into the record without objection.

The record was held open to allow Applicant time to submit additional documentation in support of his position. Applicant submitted three additional documents that were marked as AE 9-11, and admitted into the record without objection. The transcript was received by DOHA on October 6, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, testimony, and exhibits, I make the following findings of fact:

Applicant is a 48-year-old married man who has been continuously employed by defense contractors since September 1986, presently as a senior staff engineer. (2) He obtained a bachelor of science degree in 1982, and a master of science degree in 1992, both with a major in electrical engineering. He is considered to be vital to his employer, and a key contributor to its designs, products, and programs. He is deemed to be entirely trustworthy, and an individual who displays the highest standards of ethics and integrity. (AE 2)

Applicant was born in Brazil in September 1957. His parents were Brazilian citizens and emigrated with Applicant and his older sister from Brazil while Applicant was an infant. Applicant's parents became naturalized U.S. citizens in June 1973, and Applicant, then still a minor, acquired U.S. citizenship as a result. Applicant was issued a certificate of citizenship by the United States, as opposed to a certificate of naturalization, because he acquired his citizenship derivatively from his parent's naturalization. Applicant has lived continuously in the U.S. since his parents first immigrated to this country while he was a child.

Applicant served on active duty in the United States Air Force from May 1982 until November 1986, and attained the rank of Captain. He possessed a top secret security clearance while in the Air Force, and has maintained a secret clearance at all times since being released from active duty. There have never been any complaints or allegations made alleging he has mishandled or otherwise risked compromising classified information.

Applicant has been married to a United States citizen since November 1983. He and his wife have six children, four daughters ages 19, 17, 13, and 9, and two sons ages 15 and 7. Applicant resides with his wife, children, and mother, who is divorced from his father. Applicant's father remarried and returned to reside in Brazil with his new wife sometime in about the mid-1980s.

Applicant was not aware that he was considered by Brazil to be a Brazilian citizen until he sought a visa to travel to that country on his U.S. passport in 1993. (GE 4) He attempted to renounce his Brazilian citizenship in order to obtain the visa, but was informed that because he had been a minor when he acquired U.S. citizenship, and it had been his parent's decision for him to obtain U.S. citizenship, that he was prohibited under Brazilian law from renouncing his Brazilian citizenship. (GE 4) Accordingly, the only way he could travel to Brazil was to obtain a Brazilian passport. (3)

Applicant applied for and was issued a Brazilian passport in 1993, notified his employer of his dual citizenship status, and the employer relayed that information onto the Defense Industrial Security Clearance Office by letter dated May 11, 1993. (AE 4) A further requirement under Brazilian law for Applicant to obtain and use a Brazilian passport was that he register as a reservist in the Brazilian military, which he did. However, he was then able to pay approximately \$70.00 to the Brazilian government to have himself exempted from actual service in the Brazilian military.

Since approximately the mid-1990s, Applicant's employment has required him to travel extensively to Brazil (4) and a number of Central and South American countries, in addition to countries in the Far East and elsewhere. Applicant used his U.S. passport for the vast majority of that travel. However, as required by Brazilian law, he used the Brazilian passport for travel to Brazil. Applicant also used the Brazilian passport on several occasions for travel to other countries for security reasons based upon the advice of security experts employed by his company. Applicant further used the Brazilian passport on a couple of occasions to enter a South American country in order to avoid long processing waits that were not encountered by persons possessing a passport issued by South American countries.

Applicant's original Brazilian passport was scheduled to expire in March 2003. He renewed the Brazilian passport in February 2003, and that passport will not expire until January 2008. Applicant is fully aware of the provisions, meaning, and effect of the ASD(C3I) Memorandum, dated August 16, 2000 (the Money memo). However, he is unwilling to surrender the Brazilian passport because he requires it to be able to visit his aged and ailing father in Brazil. Applicant, understanding the increased concern that is caused by his use of the Brazilian passport to enter countries in addition to Brazil, has strongly stated he will never again use the passport for that purpose.

Applicant submitted a request for official approval to possess and use his Brazilian passport to the Under Secretary of

Defense for Intelligence on September 7, 2005. (AE 5) He received a response to that request by letter dated September 23, 2005, informing him that it was deemed inappropriate for the Under Secretary to intercede in his case because of the pendency of this decision. He was further advised, if necessary, to exercise his appeal rights following adjudication of his case. (AE 11)

Applicant's father owns a home in Brazil. Applicant has been appointed as nominee to the interests of a trust his father has established with regard to that real estate solely to comply with applicable Brazilian law for estate planning purposes. Applicant has no personal or equitable ownership interest in the property and is bound to follow all directions given to him by the trustee as they pertain to the real estate. (AE 7)

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline C, pertaining to foreign preference, with its respective DC and MC, is most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁵⁾ The government has the burden of proving controverted facts.⁽⁶⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽⁷⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽⁸⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁹⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽¹⁰⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹¹⁾

No one has a right to a security clearance⁽¹²⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹³⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹⁴⁾

CONCLUSION

Under Guideline C, 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.

Disqualifying Condition (DC) 1: *The exercise of dual citizenship* and DC 2: *Possession and/or use of a foreign passport* are acts that demonstrate a foreign preference. Applicant is a dual citizen of the U.S. and Brazil, and has exercised his Brazilian citizenship by obtaining and using a Brazilian passport to enter Brazil and other South American countries after he became a U.S. citizen. However, the evidence clearly demonstrates Applicant is a totally loyal U.S. citizen who possesses and uses a Brazilian passport solely to comply with Brazilian legal requirements that will allow him to visit his ailing father and carry out the business interests of his defense contractor employer.

Applicant registered for service as a reservist with the Brazilian military. However, this was done solely to comply with Brazilian law and enable him to obtain and retain a Brazilian passport. He promptly paid a nominal fee to the Brazilian government to obtain exemption from actual service with the Brazilian military, has emphatically declared that his sole allegiance is to the United States, and that he would be unwilling to serve in the Brazilian military if ever actually called for duty. (GE 3). Further, Applicant actually honorably served in the U.S. Air Force, attaining the rank of Captain.

Under these circumstances, I do not find DC 3: *Military service of a willingness to bear arms for a foreign country* applicable in this case. Finally, Applicant's nominal interest in the real estate owned by his father does not create any independent foreign preference concern.

Applicant's Brazilian citizenship is solely the result of his parent's citizenship. He was not even aware he was a Brazilian citizen until he attempted to obtain a visa to travel there on his U.S. passport in 1993 when he was about 35 years old. He immediately attempted to renounce his Brazilian citizenship, and has since continued to express a willingness to do so. (AE 9) Mitigating Conditions (MC) 1: *Dual citizenship is based solely on parents' citizenship or birth in a foreign country*; and MC 4: *Individual has expressed a willingness to renounce dual citizenship* apply.

Applicant would be able to mitigate the foreign preference security concerns that exist in this case except for the ASD(C3I) Memorandum, dated August 16, 2000 (the Money memo) that mandates that, "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."

Applicant currently retains and is unwilling to surrender his Brazilian passport. Although he has sought official approval to possess and use his Brazilian passport, that approval has not as of this time been granted. Thus, he has failed to mitigate the security concern caused by his acquisition, use, and retention of a Brazilian passport. He has failed to mitigate the foreign preference security concern, and Guideline C is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline C: Against Applicant

Subparagraphs a-d: Against Applicant

Subparagraph e: For Applicant

Subparagraph f: For 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 is denied.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Applicant's employment has remained constant since September 1986, however, the ownership of the business has changed several times during that time.
3. AE 3, U.S. Department of State, *Consular Information Sheet, Brazil*, current as of September 15, 2005, confirms that U.S. citizens who also possess Brazilian nationality will not be issued Brazilian visas and must instead obtain a Brazilian passport to enter and depart Brazil.
4. Applicant would routinely visit with his father while in Brazil on behalf of his employer.
5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
6. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
7. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

8. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
9. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
10. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
11. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
12. *Egan*, 484 U.S. at 528, 531.
13. *Id* at 531.
14. *Egan*, Executive Order 10865, and the Directive.