



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**

In the matter of:)
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[NAME REDACTED]) ADP Case No. 14-06346
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Applicant for Position of Trust)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

08/28/2015

Decision

MALONE, Matthew E., Administrative Judge:

Applicant, a naturalized U.S. citizen since September 2000, renewed his Brazilian passport in 2011. He did so to facilitate travel to and from Brazil and to make it easier to manage his property and banking interests there. After the hearing, he relinquished his foreign passport to his company's facility security officer. However, Applicant continues to express his concern that representing himself as a U.S. citizen will, by operation of Brazilian law, complicate and make more expensive the management of his foreign interests. He did not mitigate the trustworthiness concerns raised by his exercise of foreign citizenship in preference to his U.S. citizenship. Applicant's request for eligibility to occupy a position of trust is denied.

Statement of the Case

On June 11, 2014, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain eligibility for an ADP I/II/III position¹ for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Department of Defense (DOD) were unable to determine that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust.²

On February 3, 2015, DOD issued Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise trustworthiness concerns addressed through the adjudicative guideline (AG)³ for foreign preference (Guideline C). Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on May 4, 2015, and I convened a hearing on May 28, 2015. Department Counsel for the Defense Office of Hearings and Appeals (DOHA) presented Government Exhibits (Gx.) 1 and 2.⁴ Applicant testified and presented Applicant's Exhibit (Ax.) A. I also granted his request to hold the record open so he could submit additional relevant information. DOHA received the hearing transcript (Tr.) on June 8, 2015. The record closed on June 19, 2015, when I received Ax. B. All exhibits were admitted without objection.

Findings of Fact

Under Guideline C, the Government alleged that in June 2011, Applicant, a naturalized U.S. citizen since 2000, renewed his Brazilian passport for five years (SOR 1.a); and that since becoming a U.S. citizen, Applicant has used his Brazilian passport to travel to and from Brazil (SOR 1.b). Applicant admitted these allegations.

It was also alleged that as of the date the SOR was issued, Applicant continued to possess a valid Brazilian passport (SOR 1.c). This allegation is redundant to SOR 1.a and 1.b, as it adds nothing new in the way of substantive information underlying the DOD adjudicators' decision. SOR 1.c is resolved for the Applicant. In addition to the facts established by Applicant's admissions, and based on all available information, I make the following findings of fact.

Applicant is 59 years old and is employed as a capacity and performance engineer by a defense contractor, a position that requires eligibility for a position of trust.

¹ As defined in Chapter 3 and Appendix 10 of DOD Regulation 5200.2-R, as amended (Regulation).

² Required by the Regulation, as amended, and by DOD Directive 5220.6, as amended (Directive).

³ The adjudicative guidelines were implemented by DOD on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

⁴ The Government's Exhibit List is included in the record as Hearing Exhibit (Hx.) 1.

His employer supports management of the health care system used by members of the military, and Applicant must be found suitable to be entrusted with related personally identifiable information (PII). He was hired for that position in May 2014 after a three-month period of unemployment. He was previously employed as a consultant vice president of a nationally-known U.S. bank from May 2003 until February 2014, when he was laid off due to a reduction in force. (Gx. 1)

Applicant was born and raised in Brazil. He immigrated to the United States in 1983 and has lived here continuously since then. He obtained U.S. citizenship in September 2000 and obtained a U.S. passport at that time. Before he was naturalized here, Applicant continuously maintained a Brazilian passport, which is valid for five years. He renewed his Brazilian passport at least twice after becoming a U.S. citizen, most recently in June 2011. (Answer; Gx. 1; Gx. 2)

In 2003, Applicant bought a condominium in Brazil for about \$70,000. It is now worth between \$300,000 and \$400,000, and Applicant rents it out through a worldwide on-line booking service. Applicant also maintains a bank account in Brazil. The current balance is estimated at about \$5,000. Applicant uses those funds to pay condo fees and other expenses associated with his property there. (Gx. 1; Gx. 2; Ax. A; Tr. 21 - 22, 25, 31 - 32)

Applicant has traveled to Brazil at least annually in the last ten years and he has used his Brazilian passport when entering and leaving Brazil. He uses his U.S. passport for all other travel. While it is not impossible to travel to Brazil using a U.S. passport, Applicant would incur additional costs and delays in obtaining the necessary visas for travel to Brazil. Further complicating his situation is the fact that he is still a Brazilian citizen. Under Brazilian law, the fact that he has been naturalized as a U.S. citizen does not, by itself, negate his Brazilian citizenship. For Applicant to renounce his Brazilian citizenship, there is a separate application he must complete and submit to the Brazilian government. As a Brazilian citizen, whenever Applicant enters or leaves Brazil, he must produce a Brazilian passport. (Answer; Gx. 1; Gx. 2; Tr. 25 - 26)

During a subject interview with a government investigator in August 2014, Applicant expressed a willingness to renounce his Brazilian citizenship if required for a public trust position. However, at his hearing, Applicant explained that he does not wish to renounce his foreign citizenship because he can only manage his property and financial interests in Brazil if he is a Brazilian citizen. Applicant has plans to travel to Brazil at the end of the year and in 2016 for the summer Olympics. (Gx. 2; Tr. 33 - 41)

After the hearing, Applicant relinquished his Brazilian passport to his company's facility security officer (FSO). The FSO has advised that, should Applicant request the return of his Brazilian passport, the government will be notified through an adverse information report in the Joint Personnel Adjudication System (JPAS). (Ax. B)

Policies

Positions designated as ADP I/II/III are classified as “sensitive positions.”⁵ In deciding whether a person should be assigned to an ADP position, it must be determined that his or her loyalty, reliability, and trustworthiness are such that it is “clearly consistent with the interests of national security” to do so.⁶ The Regulation also requires that DOD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made.⁷

The Directive requires that each decision be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁸ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

(1) The nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt

⁵ Regulation, ¶ C3.6.15.

⁶ Regulation, ¶ C6.1.1.1.

⁷ Regulation, ¶ C8.2.1.

⁸ Directive. 6.3.

about an applicant's suitability for access should be resolved in favor of the Government.

Analysis

Foreign Preference

Available information is sufficient to support the factual allegations at SOR 1.a - 1.c. Applicant continues to exercise dual citizenship through the use of his Brazilian passport instead of his U.S. passport. These facts raise a trustworthiness concern addressed at AG ¶ 9, as follows:

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.

More specifically, available information requires application of the disqualifying conditions at AG ¶¶ 10(1) (*possession of a current foreign passport*) and 10(5) (*using foreign citizenship to protect financial or business interests in another country*). Applicant uses his foreign passport, in part, because Brazilian law requires him to do so as he is still a Brazilian citizen. At the same time, he remains a Brazilian citizen for personal convenience when he travels to Brazil, and for business reasons related to his ownership and management of his condo and bank account there. Thus, his renewal and use of his passport is not entirely due to the demands of foreign law.

I have also considered the mitigating conditions at AG ¶¶ 11(b) (*the individual has expressed a willingness to renounce dual citizenship*) and 11(e) (*the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated*). Applicant expressed a willingness to renounce his Brazilian citizenship during his subject interview. However, at his hearing, he made clear that he needs that citizenship to own and manage his interests in Brazil. It is unlikely, therefore, that he will travel to Brazil as a U.S. citizen in the foreseeable future. Additionally, Applicant plans to travel to Brazil at least twice in the next year.

I conclude from the foregoing that his relinquishment of his passport is a somewhat hollow gesture and that Applicant will continue to exercise his Brazilian citizenship in preference to his U.S. citizenship with respect to his travel to Brazil. Neither of the pertinent mitigating conditions apply, and Applicant has not mitigated the trustworthiness concerns raised by his exercise of dual citizenship.

I have evaluated the facts and have applied the appropriate adjudicative factors under Guideline C. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Specifically, I note Applicant was forthright and candid in his testimony. He is a mature, responsible businessman and he understands the effects of the Government's policy in this matter. A commonsense assessment of all information bearing on Applicant's foreign citizenship as it relates to his foreign financial interests and his travel plans shows that doubts remain about his willingness or ability to

act in the best interests of the United States in preference to Brazil. Because protection of the national interest is the principal goal of these adjudications, those doubts must be resolved against the Applicant.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline C:	AGAINST APPLICANT
Subparagraphs 1.a - 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the interests of national security for Applicant to occupy a position of trust. Applicant's request for ADP eligibility is denied.

MATTHEW E. MALONE
Administrative Judge