



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



In the matter of: )  
)  
) ADP Case No. 14-05940  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Eric H. Borgstrom, Esq., Department Counsel  
For Applicant: *Pro se*

09/02/2015

**Decision**

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant is a citizen of South Africa by birth, of the United Kingdom by descent, and of the United States by naturalization. Foreign preference concerns raised by his possession of South African and United Kingdom passports are mitigated by his surrender of those foreign passports to his facility security office for the duration of his employment. He has considerable ties to the United States. I am persuaded that he can be counted on to act in U.S. interests. Position of trust granted.

**Statement of the Case**

On December 8, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline C, Foreign Preference, and explaining why it was unable to grant him eligibility for a public trust position. The DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant responded to the SOR on January 12, 2015, and he requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On April 21, 2015, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant Applicant eligibility for a public trust position. I delayed scheduling the hearing on request of the Applicant, who had a trip planned for late May 2015. On July 23, 2015, I scheduled a hearing for August 19, 2015.

At the hearing, five Government exhibits (GEs 1-5) were admitted without objection. The Government also withdrew SOR 1.c of the SOR. Applicant submitted several documents with his Answer, which were returned to him at his hearing for possible submission. They were marked and entered collectively without objection as Applicant exhibit (AE) A. A second exhibit was entered as AE B. Applicant also testified, as reflected in a transcript (Tr.) received on August 27, 2015.

### **Findings of Fact**

The amended SOR alleges under Guideline C, foreign preference, that Applicant exercises dual citizenship by possessing an active South African passport issued in September 2006 and valid until September 2016 (SOR ¶ 1.a), and by possessing an active United Kingdom (U.K.) passport issued in May 2012 and valid until June 2022 (SOR ¶ 1.b). Applicant provided a detailed response to the SOR in which he admitted the allegations, but denied the inference of foreign preference. He cited several facts and circumstances as indicative of a clear preference for, and commitment to, the United States. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 47-year-old native citizen of South Africa (AE A), who seeks to provide consulting services to a U.S. defense agency. He acquired U.K. citizenship by descent. His parents, both U.K. native citizens, moved to South Africa sometime after the birth of his older brother in 1965. Applicant's parents registered his birth at the British Consulate in South Africa. (GEs 1, 2, Tr. 17.) Applicant has a younger brother as well. Both brothers are dual citizens of the United Kingdom and South Africa. As of April 2014, Applicant's mother and brothers were residing in the United Kingdom. His father was living in Australia. (GE 1.)

Applicant attended high school and college in South Africa, earning his bachelor's degree in December 1990. He was conscripted into the South African Defense Force and served from July 1991 to June 1992, at the rank of private as a clerk in a personnel division. Applicant was married to his first wife, a South African native citizen, from December 1990 to July 1997. He purchased a condominium in South Africa around June 1991. He sold that condominium for \$20,000 and bought a house in South Africa around January 1993 for \$40,000. A year later, Applicant moved to another city in South Africa, so he sold that house and bought another for \$50,000. Applicant voted in a general election in South Africa in April 1994, but has not otherwise exercised any foreign voting rights. (GEs 1, 2; Tr. 20.)

In May 1998, at age 30, Applicant entered the United States on an H1-B1 (nonimmigrant worker) work visa. (AE A; Tr. 18.) He closed his bank account and sold his home in South Africa when he moved to the United States. In August 1999, Applicant had a son, who was born in the United States. Applicant pays child support to his son's mother, who is a U.S. resident citizen. (GEs 1, 2.)

Applicant and his current spouse, also a native of South Africa, married in July 2000 in South Africa. She has a son from a previous marriage, who was born in South Africa in September 1995. Before joining Applicant in the United States, she sold a condo in South Africa that she had owned since 1995. In August 2000, Applicant and his spouse bought their present residence in the United States. They have two children, who were born in the United States in August 2001 and May 2007. (GE 1; AE A.)

From May 2001 to March 2008, Applicant consulted for a U.S. company. (GE 1.) He renewed his employment authorization in the United States and then pursued legal residency. (AE A.) When he was not at a client site, he worked remotely from his home in the United States. (GE 1.) On June 17, 2004, Applicant was granted authorization for parole of an alien into the United States, which allowed him to depart from and return to the United States while awaiting adjudication of his immigrant application. On February 26, 2005, Applicant was granted U.S. permanent residency. (AE A.)

In April 2008, Applicant was hired by a company close to his home. Applicant traveled abroad on several occasions, for approximately five days each time, to attend internal business meetings and workshops over the next five years. All foreign travel between April 2007 and September 2011 was on his South African passport, which he renewed on September 12, 2006, for another 10 years. (GEs 1, 2, 5; AE B.) In September 2011, Applicant traveled to the United Kingdom with his family to visit his brother and mother. (GE 2.)

On May 15, 2012, Applicant was issued a U.K. passport, which is not scheduled to expire until June 14, 2022. (GEs 1, 2; AE B.) Applicant has not traveled on this U.K. passport. (GEs 1, 2.) Applicant was a U.S. permanent resident when he acquired his U.K. passport. (GE 1.) He had previously used a U.K. passport, but cannot recall the dates or locations of travel, or even the date of issuance of the expired passport. (GE 2.)

Applicant, his spouse, and his stepson became naturalized U.S. citizens on July 6, 2012. (AE A; Tr. 18, 21-22.) Applicant was issued his U.S. passport on July 17, 2012. (GE 3.) His spouse obtained her U.S. passport on July 19, 2012. U.S. passports were issued for their two U.S.-born children on July 26, 2012. Applicant's stepson acquired his U.S. passport on September 11, 2012. (AE A.)

Applicant traveled abroad on business for his employer in August 2012, October 2012, March 2013, and May 2013, using his U.S. passport. (GE 1; Tr. 19-20.) In May 2013, Applicant resigned from his employment to start his own business. Since June 2013, he has been a self-employed consultant. (GEs 1, 2.)

On April 11, 2014, Applicant completed and certified to the accuracy of an Electronic Questionnaire for Investigations Processing (e-QIP). Applicant was under contract to a consulting firm (company X) for management consulting services at a defense agency, and he completed the e-QIP for a position of trust. He fully disclosed his foreign citizenships, his possession of current U.K., U.S., and South African passports, his foreign travel, and the foreign citizenships of family members. He reported that his spouse and stepson were dual citizens of the United States and South Africa. (GE 1.)

On May 12, 2014, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant volunteered that he continues to hold South African and British citizenship for no specific reason other than historical related to his birth and heritage. Applicant denied the acceptance of any foreign benefits from South Africa or the United Kingdom, or that he maintained his foreign citizenships to protect any foreign financial interests. While he had voted in a South African general election for its presidency and the House of Representatives in April 1994, he was no longer eligible to vote because he does not reside in South Africa. Applicant detailed his military service for South Africa from July 1991 to June 1992, and indicated that he had no further military service obligation. Applicant expressed a willingness to renounce his foreign citizenships, citing his allegiance to the United States. He also expressed a willingness to relinquish his foreign passports because he has no need for them. (GE 1.)

As of May 19, 2015, Applicant had surrendered possession of his U.K. and South African passports to the “managing principal” at company X for the duration of his contract with the firm. (AE B; Tr. 22.) The “managing principal” serves as facility security officer for the company. (Tr. 22.) Applicant understands that if he asks for return of either or both of his foreign passports, it could have negative implications for his eligibility to occupy a public trust position. (Tr. 23.)

As of August 19, 2015, Applicant had taken no steps to renounce his South African or U.K. citizenship. His contract position could end at any time, and he did not want to make a decision that could possibly have an impact on his family in the future. (Tr. 24.) Applicant’s preference is to retain his foreign citizenships. Applicant surrendered possession of his foreign passports after Department Counsel explained to him that surrender was not synonymous with renunciation. He is willing to use his U.S. passport exclusively for foreign travel for as long as he holds a position of trust. (Tr. 27-28, 31.)

Applicant’s spouse is a self-employed dance instructor. (GE 2.) She earned her Bachelor of Arts degree in dance education in June 2009 from a U.K. institution. As of April 2014, she had a scholarship for an approved program of study toward her Master of Arts in liberal studies from a public college in the United States. (AE A.)

Applicant has developed considerable expertise as a consultant in supply chain management. He presented 22 character reference letters, including 19 from individuals

with knowledge of his work over the years.<sup>1</sup> Applicant is known for his technical knowledge, the exceptional quality of his work, his excellent communications and relationships with customers and team members, his leadership abilities, his creativity, and his trustworthiness and reliability. (AE A.)

## **Policies**

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) The standard that must be met for assignment to sensitive duties is that, based on all available information, the person’s loyalty, reliability, and trustworthiness are such that assigning the person to sensitive duties is clearly consistent with national security. (See Regulation ¶ C8.2.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.

When evaluating an Applicant’s suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the Adjudicative Guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available reliable information about the person, past and present, favorable and unfavorable. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion to obtain a favorable trustworthiness decision.

A person who seeks access to sensitive information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk

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<sup>1</sup> Applicant identified 23 individuals on the list of his character references. A personal reference letter identified in the list was not included in the letters submitted in AE A. AE A contains two copies of the 22 reference letters.

the Applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information. See Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline C—Foreign Preference**

The security concern relating to the guideline for foreign preference is articulated in AG ¶ 9:

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.

Applicant is a citizen of his native South Africa from birth, of the United Kingdom by descent, and of the United States by choice. Retention of foreign citizenship acquired from birth out of respect for one's ethnic heritage, for example, is not disqualifying in the absence of an exercise of a right, privilege, or obligation of that citizenship. Mitigating condition AG ¶ 11(a), "dual citizenship is based solely on parents' citizenship or birth in a foreign country," covers his acquisition of his citizenship with South Africa and with the United Kingdom. As a dual citizen of South Africa and the United Kingdom, he renewed his South African passport in September 2006 and his U.K. passport in May 2012. Mitigating condition AG ¶ 11(c), "exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor," applies to the renewal of his foreign passports. However, after Applicant acquired his U.S. citizenship and passport in July 2012, he continued to retain possession of current South African and U.K. passports. He has not used those foreign passports since his U.S. naturalization, but there is a risk of unverifiable travel as long as he possesses a valid foreign passport. Concerns of foreign preference are raised by possession of a valid foreign passport under AG ¶ 10(a)(1):

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport.

When Applicant was interviewed by the OPM investigator on May 12, 2014, he expressed willingness to renounce his foreign citizenship because his allegiance is to the United States, and he resides in the United States. He also indicated that he was willing to relinquish his foreign passports because he did not need them. A willingness to renounce dual citizenship can be mitigating of the foreign preference concerns under AG ¶ 11(b). However, Applicant has taken no steps toward renunciation. To the

contrary, his admitted preference is to retain his foreign citizenships with South Africa and with the United Kingdom, not knowing what the future will bring. AG ¶ 11(b) does not apply.

To address the DOD's concerns about his possession of valid foreign passports, Applicant has surrendered his foreign passports to the company sponsoring him for a public trust position. The delay in surrendering his foreign passports was credibly explained by his failure to understand that he had an alternative acceptable to the DOD that did not require renunciation of foreign citizenship. AG ¶ 11(e), "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated," applies in mitigation of the foreign preference concerns.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).<sup>2</sup> The analysis in Guideline C is incorporated in my whole-person analysis. However, some factors warrant additional comment.

Applicant's choice to retain his South African and U.K. citizenships notwithstanding, he has chosen to live and pursue his own consulting business in the United States. Before coming to the United States on an H1-B1 visa in 1998, he divested himself of all foreign financial interests. He has used his expertise in supply chain management to benefit U.S. companies and now a defense agency. He has used his U.S. passport exclusively for foreign travel since his naturalization. His recent surrender of custody of his South African and U.K. passports ensures that any future travel will be on his U.S. passport for as long as he holds a position of trust, and it is evidence of his willingness to comply with DOD requirements. Under the whole-person concept, I am persuaded that it is clearly consistent with the national interest for Applicant to occupy a public trust position.

### **Formal Findings**

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

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<sup>2</sup> The factors under AG ¶ 2(a) are as follows:

- (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;
- (9) the likelihood of continuation or recurrence.

Paragraph 1, Guideline C: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: Withdrawn

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

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Elizabeth M. Matchinski  
Administrative Judge