



**Republic of the Philippines
SECURITIES AND EXCHANGE COMMISSION
SEC Bldg. EDSA, Greenhills, Mandaluyong City**

OFFICE OF THE GENERAL COUNSEL

10 August 2010
SEC-OGC Opinion No. 10-25
Re: Directors with Dual
Citizenship; Qualifications
of Directors and Corporate
Officers

Atty. Ricardo C. Atienza
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3747 Gomez Subdivision
Ligtasan, Tarlac City

Sir:

This refers to your query dated 4 March 2010, in relation to your function as counsel and Corporate Secretary of AVESTA REALTY INC. ("AVESTA"), a corporation engaged in the real estate business. You have requested the opinion of the Commission on the following:

- 1) Whether stockholders of a corporation who are concurrently directors of a corporation may continue in their position as directors of the corporation, considering that they are Filipino-American citizens, "possessed with dual citizenship;" and
- 2) Whether they can be elected as officers of the corporation, such as President /Chairman or Secretary.

Section 5 of the Constitution provides that "Dual allegiance of citizens is inimical to the national interest and shall be dealt with by law." However, the 1986 Constitutional Commission preferred to leave the matter of dual citizenship to ordinary legislation,¹ inasmuch as citizenship once lost, may be reacquired either by naturalization or by repatriation or by a direct grant by law.²

Thus, Republic Act No. 9225 (R.A. No. 9225), known as the "Citizenship Retention and Re-acquisition Act of 2003" was approved on August 29, 2003. It provides:

¹ I RECORD 190-191, 233 cited in J.G. Bernas, S.J. The 1987 Constitution of the Republic of the Philippines: A Commentary 575 (1996)

² J.G. Bernas, S.J. The 1987 Constitution of the Republic of the Philippines: A Commentary 573 (1996), citing Commonwealth Act No. 63, Sections 2,3,4.

" xxx Section 2. *Declaration of Policy* - It is hereby declared the policy of the State that all Philippine citizens of another country shall be deemed not to have lost their Philippine citizenship under the conditions of this Act.

Section 3. *Retention of Philippine Citizenship* - Any provision of law to the contrary notwithstanding, natural-born citizenship by reason of their naturalization as citizens of a foreign country are hereby deemed to have re-acquired Philippine citizenship upon taking the following oath of allegiance to the Republic:

"I _____, solemnly swear (or affirm) that I will support and defend the Constitution of the Republic of the Philippines and obey the laws and legal orders promulgated by the duly constituted authorities of the Philippines; and I hereby declare that I recognize and accept the supreme authority of the Philippines and will maintain true faith and allegiance thereto; and that I imposed this obligation upon myself voluntarily without mental reservation or purpose of evasion."

Natural born citizens of the Philippines who, after the effectivity of this Act, become citizens of a foreign country shall retain their Philippine citizenship upon taking the aforesaid oath.xxx"

We assume that the stockholders and directors of AVESTA were Filipino citizens ("natural born citizens of the Philippines") who lost their citizenship by assuming American citizenship, but who, in conformity with R.A. No. 9225, took the oath prescribed therein, and thus "retained their Philippine citizenship." Therefore, they are *Filipino citizens* within the contemplation of R.A.No. 9225.

In view of the foregoing,

1) The stockholders of AVESTA who are concurrently directors of a corporation may continue in their position as directors of the corporation, provided they comply with the requirements for directors under Section 23 of the Corporation Code:

"Sec. 23. The board of directors or trustees. — Unless otherwise provided in this Code, the corporate powers of all corporations formed under this Code shall be exercised, all business conducted and all property of such corporations controlled and held by the board of directors or trustees to be elected from among the holders of stocks, or where there is no stock, from among the members of the corporation, who shall hold office for one (1) year until their successors are elected and qualified. (28a)

Every director must own at least one (1) share of the capital stock of the corporation of which he is a director, which share shall stand in his name on the books of the corporation. Any director who ceases to be the owner of at least one (1) share of the capital stock of the corporation of which

he is a director shall thereby cease to be a director. Trustees of non-stock corporations must be members thereof. A **majority of the directors** or trustees of all corporations organized under this Code must be **residents of the Philippines.**" (Emphasis supplied)

2) They may also be elected as officers of the corporation, such as President/Chairman or Secretary, provided that they comply with the requirements of Section 25 of the Corporation Code on officers of corporations.

"Sec. 25. Corporate officers, quorum. — Immediately after their election, the directors of a corporation must formally organize by the election of **a president, who shall be a director**, a treasurer who may or may not be a director, a **secretary who shall be a resident and citizen of the Philippines**, and such other officers as may be provided for in the by-laws. Any two (2) or more positions may be held concurrently by the same person, except that no one shall act as president and secretary or as president and treasurer at the same time.

The directors or trustees and officers to be elected shall perform the duties enjoined on them by law and the by-laws of the corporation. Unless the articles of incorporation or the by-laws provide for a greater majority, a majority of the number of directors or trustees as fixed in the articles of incorporation shall constitute a quorum for the transaction of corporate business, and every decision of at least a majority of the directors or trustees present at a meeting at which there is a quorum shall be valid as a corporate act, except for the election of officers which shall require the vote of a majority of all the members of the board.

Directors or trustees cannot attend or vote by proxy at board meetings."

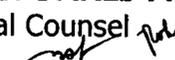
It shall be understood that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases whether of similar or dissimilar circumstances. If, upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Please be guided accordingly.

Very truly yours,



VERNETTE G. UMALI-PACO

General Counsel 

corporation or partnership at least 60% of the capital stock or capital, respectively, of which belong to Filipino citizens, all of the said shares shall be recorded as owned by Filipinos. But if less than 60%, or say, only 50% of the capital stock or capital of the corporation or partnership, respectively, belongs to Filipino citizens, only 50,000 shares shall be counted as owned by Filipinos and the other 50,000 shares shall be recorded as belonging to aliens."

Under the above-quoted SEC Rules, there are two cases in determining the nationality of the Investee Corporation. The first case is the 'liberal rule', later coined by the Commission as the **Control Test** in its 30 May 1990 Opinion, and pertains to the portion in said Paragraph 7 of the 1967 SEC Rules which states, '*(s)hares belonging to corporations or partnerships at least 60% of the capital of which is owned by Filipino citizens shall be considered as of Philippine nationality.*' Under the liberal Control Test, **there is no need to further trace the ownership of the 60% (or more) Filipino stockholdings of the Investing Corporation since a corporation which is at least 60% Filipino-owned is considered as Filipino.**³

The second case is the Strict Rule or the **Grandfather Rule Proper** and pertains to the portion in said Paragraph 7 of the 1967 SEC Rules which states, "*but if the percentage of Filipino ownership in the corporation or partnership is less than 60%, only the number of shares corresponding to such percentage shall be counted as of Philippine nationality.*" Under the Strict Rule or Grandfather Rule Proper, **the combined totals in the Investing Corporation and the Investee Corporation must be traced (i.e., "grandfathered")** to determine the total percentage of Filipino ownership.⁴

In other words, the **Grandfather Rule** or the second part of the SEC Rule **applies only** when the 60-40 Filipino-foreign equity ownership is in doubt (i.e. **in cases where the joint venture corporation with Filipino and foreign stockholders with less than 60% Filipino stockholdings [or 59%] invests in other joint venture corporation which is either 60-40% Filipino-alien or 59% less Filipino**). **Stated differently, where the 60-40 Filipino-foreign equity ownership is not in doubt, the Grandfather Rule will not apply.**⁵

In two (2) of its most recent opinions on the qualification of corporations to own lands⁶, the Commission applied the Control Test and dispensed with further inquiry into the ownership of the shareholders in both investing and investee corporations. This is because it was clearly established that the participating corporations are 60% owned by Filipino citizens.

Applying the foregoing, particularly the Control Test, MLRC is deemed as a Philippine national because: (1) sixty percent (60%) of its outstanding capital stock

³DOJ Opinion No. 020, Series of 2005.

⁴Ibid.

⁵Ibid.

⁶SEC-OGC Opinion No. 07-22 dated 7 December 2007; and SEC-OGC Opinion No. 03-08 dated 15 January 2008.

entitled to vote is owned by a Philippine national, the Trustee; and (2) at least sixty percent (60%) of the ERF will accrue to the benefit of Philippine nationals.

Still pursuant to the Control Test, MLRC's investment in 60% of BFDC's outstanding capital stock entitled to vote shall be deemed as of Philippine nationality, thereby qualifying BFDC to own private land.

Further, under, and for purposes of, the FIA, MLRC and BFDC are both Philippine nationals, considering that: (1) sixty percent (60%) of their respective outstanding capital stock entitled to vote is owned by a Philippine national (i.e., by the Trustee, in the case of MLRC; and by MLRC, in the case of BFDC); and (2) at least 60% of their respective board of directors are Filipino citizens.

That MLRC and BFDC shares are classified into (1) common shares -- which are generally entitled to vote -- and (2) redeemable preferred voting shares, with different par values, is of no moment. It is now settled that the test for compliance with the nationality requirement is based on the total outstanding capital stock irrespective of the amount of the par value of the shares.⁷

Thus, we confirm your position.

This opinion is based solely on the facts disclosed in the query and relevant solely to the particular issues raised therein. It shall likewise be understood that the foregoing shall not be used in the nature of a standing rule binding upon the Commission in other cases or upon the courts.⁸ If, upon investigation, it will be disclosed that the facts relied upon are different, this Opinion shall be rendered void.

Please be guided accordingly.

Very truly yours,



VERNETTE G. UMALI-PACO
General Counsel

⁷SEC Opinion No. 49-04 dated 22 December 2004; SEC Opinion No. 30-06 dated 21 September 2006; SEC-OGC Opinion No. 07-22 dated 7 December 2007; and SEC-OGC Opinion No. 03-08 dated 15 January 2008.

⁸Paragraph 7, SEC Memorandum Circular No. 15, Series of 2003.