

DATE: June 29, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-02877

## DECISION OF ADMINISTRATIVE JUDGE

**ROGER C. WESLEY**

### APPEARANCES

#### FOR GOVERNMENT

Melvin A. Lowery, Department Counsel

#### FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant, who is a U.S. citizen by birth and dual citizen fo Brazil solely by virtue of his parents' birth in the country, and who applied for and obtained a Brazilian passport for use in traveling back and forth to Brazil to visit his family members residing in the country, fails to absolve himself of preference concerns, despite his being a U.S. citizen by birth and his having no identified financial interests in Brazil. Because Applicant's immediate and extended family members who reside in Brazil and the U.S. (Applicant's spouse) are not shown to be either agents of a foreign government or potentially vulnerable to pressure or coercion, security risks associated with foreign influence are mitigated. Clearance is denied.

### STATEMENT OF CASE

On August 17, 2005, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance, and recommended referral to an administrative judge for determination whether clearance should be granted or continued.

Applicant responded to the SOR on August 24, 2005, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on November 22, 2005. Applicant was afforded 30 days in which to respond to the FORM. Applicant did not respond to the FORM. The case was assigned to me January 6, 2006.

### SUMMARY OF PLEADINGS

Under Guideline C, Applicant is alleged to (a) exercise dual citizenship with Brazil and the U.S. and (b) possess a Brazilian passport, as of May 2005, that was issued in January 2002, and is not scheduled to expire before January 2007.

Under Guideline B, Applicant is alleged (a) to have a sister who is resident of Brazil, (b) to have a mother-in-law and brother-in-law who are citizens and residents of Brazil, (c) to have approximately three of his aunts, three of his uncles, and seven of his cousins who reside in Brazil, and (d) to have traveled to Brazil in at least December 2000, December 2002, December 2003, and December 2004.

For his response to the SOR, Applicant admits each of the allegations. He provides no explanations.

### **FINDINGS OF FACT**

Applicant is a 33-year old senior specialist engineer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant was born in the U.S. and is a U.S. Citizen by birth. He was raised by his Brazilian parents in Brazil for most of his life. Specifically, he resided in Brazil from 1973 through 1982 and from 1984 through 1999 (items 4 and 5).

Both of Applicant's parents hold Brazilian citizenship and reside in the U.S. Because his parents were citizens of Brazil at the time of his birth, Applicant became entitled to Brazilian citizenship through his parents regardless of his U.S. citizenship by birth. Applicant has and continues to maintain dual citizenship with Brazil.

Applicant received his undergraduate training in Brazil in 1999 while a resident of Brazil. He worked for a Brazilian company between 1996 and July 1999 to supplement his income while a university student. Applicant immigrated to the U.S. in 1999 and studied advance engineering at a recognized American university. He received his masters degree from this same university in March 2001 (*see* item 4).

Applicant has immediate and extended family members, as well as friends, residing in Brazil. To facilitate travel back and forth to Brazil to visit his family members and friends, he obtained a Brazilian passport in February 2002 (ex. 4). He used the passport to travel to Brazil and back to see his immediate and extended family members and friends in December 2000, December 2002, December 2003, and December 2004.

Applicant married in 1999 while he was still a student in Brazil. W is of Brazilian descent and has family members who are citizens and residents of Brazil. His wife is a U.S. resident with U.S. resident alien status who resides with Applicant in the U.S.; she retains her Brazilian citizenship and has no known intention of seeking U.S. citizenship.

Applicant has expressed no intention of surrendering his Brazilian passport and assures he has no intention of relinquishing his Brazilian citizenship (*see* ex. 8). He indicates he is not currently employed by any Brazilian agencies, has no property in Brazil, has not voted in any Brazilian elections, has not served in the Brazilian military, and has no professed loyalty to any government other than the U.S. (*see* items 5, 6 and 8).

Applicant maintains regular contact with his immediate family members who are citizens and residents of Brazil (*i.e.*, his sister, mother-in-law, father-in-law, three aunts, and three uncles). He also maintains regular contact with seven of his cousins and nine friends, all of whom maintain Brazilian citizenship and residence (*see* exs. 6 and 7).

Applicant has had no contact with the Brazilian government, and to the best of his knowledge, none of his immediate or extended family members have had any relationship with Brazilian officials or agents, with the exception of one of his uncles (*see* exs. 5 and 6). This uncle is retired from the Brazilian navy and is currently in his 70s. Applicant does not know whether this uncle has any contact with Brazilian government officials or agents.

True enough, Applicant provides few background details about his family members. While he himself may have no knowledge of any familial relationships or contacts with Brazilian officials or agents, possibilities exist that all or some of them may have worked for or had contact with Brazilian government officials in the past or present. Absent information in the file to establish some likelihood of familial relationships or contacts with Brazilian government officials or agents, Applicant's disclaimers are enough to demonstrate the absence of any realistic likelihood of such relationships and/or contacts.

Brazil is a charter member of the Organization of American States and an historical economic trading partner of the U.S. Brazil has a democratic government and is generally reputed to be committed to the rule of law and the upholding of human rights. The FORM does not contain any State Department publications addressing the economic/political status and human rights record of Brazil.

## **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2..2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Foreign Preference**

*The Concern:* 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.

### **Foreign Influence**

*The Concern:* A security risk may exist when an individual's immediate family, including co-habitants, and other persons to whom he or she may be bound by affection, influence, or are obligation *are not* citizens of the United States *or may* be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

### **Burden of Proof**

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

## CONCLUSIONS

Applicant presents as a conscientious senior specialist engineer for a defense contractor who after being born in the U.S., was raised in Brazil, before immigrating to the U.S. in 1999 to pursue his graduate education. Claiming the need for a Brazilian passport to facilitate his visits to Brazil to see his immediate and extended family members, he applied for and obtained a Brazilian passport in 2002.

Dual citizenship concerns necessarily entail country allegiance assessments and invite critical considerations over acts indicating a preference or not for the interests of the foreign country over the interests of the U.S. In a different vein, the continued residence of his immediate family members (his sister) and extended family members and friends, as well as his wife's immediate family members, in Brazil raises potential concerns about their being vulnerable to future pressure or duress that could result in the compromise of classified information. The issues, as such, raise concerns over Applicant's preference for a foreign country over the U.S. and the potential for members of Applicant's immediate and extended family and friends being placed at risk to pressure or duress to induce Applicant to divulge classified information he might be privy to.

### **Foreign Preference**

By virtue of his birth in the U.S. to parents of Brazilian descent and citizenship, Applicant was endowed with Brazilian citizenship through his parents. This citizenship could not be lost except by express renunciation, approved by the Brazilian government, which Applicant has never visibly explored. To the contrary, four years ago he applied for and received a Brazilian passport (an active exercise of dual citizenship). He has since used the passport on at least four occasions to travel back and forth to Brazil on family-related matters and has pledged to retain it. Risks of his being taken hostage behind Brazilian lines and denied the customary diplomatic intercession made available to U.S. citizens traveling on U.S. passports cannot be discounted, even without the availability of country threat risks assigned Brazil by the U.S. State Department.

Historically, the Appeal Board has tended to blur convenience/force of law distinctions when appraising legal necessity passport usage in multiple return to country situations (as here). *See* ISCR Case No. 99-0424 (February 8, 2001); ISCR Case No. 99-0254 (February 16, 2000). Exercise of choice to take out and retain his Brazilian passport out of desire to preserve his options when traveling to Brazil to see his family and friends is itself a voluntary election, not a submission to legal compulsion. By applying for and obtaining a Brazilian passport, Applicant displayed a conscious preference for Brazil, even if it was for perfectly logical and understandable reasons: wanting to see his immediate and extended family members and friends.

So, even Applicant's limited exercise of dual citizenship is sufficient under the facts of this case to invoke Disqualifying Condition (DC) E2.A3.1.2.1 (*The exercise of dual citizenship*) and E2.A3.1.2.2 (*Possession and/or use of a foreign passport*) of the Adjudicative Guidelines for foreign preference. Further DoD policy clarifications have made the use and/or possession of a foreign passport a *per se* basis for denying or suspending a security clearance under the clarifying provisions of the memorandum of August 16, 2000 authored by the Asst SecDef for C3I ("the ASDC3i memorandum") (*see* item 9), unless the foreign passport is surrendered, or the Applicant obtains official approval for its use from the appropriate agency of the U.S. Government. Nothing in the ASDC3i memorandum on foreign passports indicates that possession of a foreign passport may be extenuated or mitigated by an applicant's showing of personal inconvenience and delay typically encountered in utilizing the visa process involved with travel abroad on a U.S. passport. DOHA's Appeal Board has construed the ASDC3i memorandum to be legally binding on DOHA administrative judges and the Board. *See* ISCR Case No. 02-07625 (May 2004). Neither judges nor the Board retain jurisdiction to review or pass judgment on the wisdom or desirability of the ASDC3i memorandum. *See* ISCR Case No. 02-04237 (August 2003).

Concerns over continued Applicant preference for Brazil are considerable for so long as he retains his Brazilian passport and dual Brazilian citizenship. With unsettled questions still very much in evidence about Applicant's reluctance to take any bold steps towards surrender of his Brazilian passport and renunciation of his Brazilian citizenship, too many preference questions loom at the present time to credit Applicant with satisfying the heavy mitigation burden imposed on applicants by the Appeal Board.

Considering all of the circumstances surrounding Applicant's dual citizenship exercise and absence of meaningful

mitigation efforts, conclusions warrant that Applicant exhibited active dual citizenship by his taking out a Brazilian passport. In so doing, he has demonstrated a preference for Brazil that has not been mitigated by documented surrender of the passport and expressed intentions to renounce his dual Brazilian citizenship. Such firm Applicant commitments are required to satisfy expressed Appeal Board burden requirements when it comes to successfully discounting residual security risks that exist with his continued exercise of dual Brazilian citizenship. Unfavorable conclusions warrant with respect to subparagraphs 1.a and 1.b of Guideline C.

## **Foreign Influence**

Besides foreign preference concerns, the Government finds security risks associated with (a) Applicant's wife being a citizen of Brazil and (b) his immediate family members (*i.e.*, sister) and his extended family members (*i.e.*, his mother-in-law, father-in-law, sister-in-law, three aunts, three uncles and seven cousins) and friends (nine of them) residing in Brazil. Although Applicant's ties to his wife's parents and siblings do not appear to be particularly close, he communicates with them often enough to invite application of Disqualifying Condition (DC) 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*).

The Adjudicative Guidelines governing collateral clearances do not dictate *per se* results or mandate particular outcomes for any chosen set of guidelines covering risks of foreign influence. What is considered to be an acceptable risk in one foreign country may not be in another. While foreign influence cases must by practical necessity be weighed on a case-by-case basis, guidelines are available for referencing. Personnel security assessments continue to be governed by the same Change 4 requirements of the Directive for appraising the security risks associated with the individual's having family abroad, which include both common sense assessments of country risks and information available from public sources.

So, under these adjudicative guidelines, while an applicant with immediate family domiciled in a hypothetical hostile country might pose a risk of a hostage situation, he might conversely be able to neutralize material risks of exploitation of immediate and/or extended family members residing in a friendly country. Based on known data about Brazil, Brazil would appear to provide an acceptable political environment for avoiding potential risks of coercion, exploitation, or pressure of a family member or friend. Reasonable conclusions can, accordingly, be reached that Applicant's immediate and extended family members and friends are not in a position to be exploited by Brazilian authorities.

While the foreign influence provisions of the Adjudicative Guidelines are ostensibly neutral as to the character of the subject country, they should not be construed to ignore the geopolitical aims and policies of the particular foreign regime involved. Brazil is a constitutional republic, governed by executive and legislative branches whose leadership is conditioned on adherence to the rule of law and respect for human rights.

Because Brazil is a constitutional democracy with a secure infrastructure and track record for respecting human rights and the rule of law, the risk of a pressure or influence situation involving an immediate, extended family member, or friend of Applicant's can be safely discounted, notwithstanding his preference for the country. Potential foreign influence concerns are sufficiently mitigated to permit safe predictive judgments about Applicant's ability to withstand risks of exploitation and pressure attributable to his familial relationships and contacts with his immediate and extended family members and friends domiciled in Brazil. Favorable conclusions warrant with respect to subparagraphs 2.a through 2.e of Guideline B.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E2.2. of the Adjudicative Process of Enclosure 2 of the Directive.

## **FORMAL FINDINGS**

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance:

**GUIDELINE C (FOREIGN PREFERENCE): AGAINST APPLICANT**

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

GUIDELINE B: (FOREIGN INFLUENCE): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: FOR APPLICANT

Sub-para. 2.c: FOR APPLICANT

Sub-para. 2.d: FOR APPLICANT

Sub-para. 2.e: 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge