

DATE: December 29, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 06-17297

**DECISION OF ADMINISTRATIVE JUDGE**

**SHARI DAM**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a 30-year-old naturalized U.S. citizen who was born in Brazil. He resides in the U.S. and maintains dual citizenship with Brazil. His mother, sister, aunt and two children also reside in the U.S. and hold dual citizenship. Since 2001, he has traveled to Brazil several times on his Brazilian passport to visit family and friends living there. He does not intend to renounce his Brazilian citizenship. He mitigated the foreign influence security concerns but did not mitigate those raised by foreign preference. Clearance is denied.

**STATEMENT OF THE CASE**

On January 24, 2005, Applicant filed a security clearance application (SCA). On June 19, 2006, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR alleged security concerns under Guidelines B (Foreign Influence) and C (Foreign Preference).

In a sworn statement, dated July 18, 2006, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. On September 8, 2006, Department Counsel submitted the government's file of relevant material (FORM), containing eight exhibits labeled as Items. The FORM was mailed to Applicant on September 19, 2006, and received on September 20, 2006. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation, but did not file additional information. On November 1, 2006, the case was assigned to me.

**FINDINGS OF FACT**

Based on the entire record, including Applicant's admissions in his answer, I make the following findings of fact:

Applicant is 30 years old and has worked as a computer engineer for a federal contractor since May 2004. He was born

in Brazil and became a naturalized U.S. citizen in 1977. He resides in the U.S. with his wife and children. He maintains dual citizenship with Brazil, but does not have financial interests there. His father is a U.S. citizen. His mother, aunt and sister were born in Brazil, and became naturalized U.S. citizens. They reside in the U.S. and have dual citizenship. His wife is a U.S. citizen. Their two children were born in the U.S. and hold dual citizenship based on his citizenship. His other aunt and uncle are citizen residents of Brazil, having recently moved there. (Item 4 at 7; Item 5 at 3) Other family friends are citizen residents of Brazil. He frequently calls and visits his mother, aunt and sister who live in the U.S. He calls other family members in Brazil several times a year and telephones his friends occasionally. (Item 5 at 3) None of these people have connections with the Brazilian government and his contacts with them are unrelated to United States government business. (*Id.* at 2)

Applicant admitted that he applied for and was issued a Brazilian passport in June 2003, while possessing a U.S. passport. That passport will expire in June 2008. He registered his two children with the Brazilian government in order to acquire Brazilian citizenship and passports for them. Since 2001, he has traveled to Brazil for pleasure at least three times, using his Brazilian passport, as required by that government for its citizens. (Item 3) He maintains his draft status with the Brazilian government because it is a prerequisite for obtaining a passport. (*Id.*) He is unwilling to renounce his citizenship because it may "create complications based on citizenship status of my children. . . may limit professional opportunities in current or other industries." (Item 5 at 5; Item 3)

According to a U.S. Department of State Profile, dated August 2006, Brazil became an independent country in 1822. It "has traditionally been a leader in the inter-American community and played an important role in collective security efforts, as well as in economic cooperation in the Western Hemisphere. Brazil supported the Allies in both World Wars." (Item 6 at 7) While the federal government is generally respected for its human rights records, some of the individual state governments have been cited for abuses. (Item 8) The U.S. and Brazil have enjoyed a friendly and active relationship over the years. (Item 6 at 7)

## POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth criteria which must be evaluated when determining security clearance eligibility. Within those adjudicative guidelines are disqualifying conditions (DC) to consider in denying or revoking an individual's request for access to classified information, and mitigating conditions (MC) to consider in granting an individual's request for access to classified information. By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not only the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance is not necessarily a judgment about an applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that an applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). The Directive presumes a rational connection between past proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence in refutation, extenuation, or mitigation sufficient to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); Directive, Enclosure 3, ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or

continue his clearance." *Id.*

Based upon the allegations contained in the SOR and a consideration of the evidence as a whole, the following adjudicative guidelines are pertinent to an evaluation of the facts in this case:

**Guideline B - Foreign Influence:** A security risk may exist when an applicant's immediate family, or other persons to whom he may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information.

**Guideline C -** When an individual acts in such a way as to indicate a preference for a foreign country over the U. S., then he may be prone to provide information or make decision that are harmful to the interests of the U.S.

On August 16, 2000, the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence issued a passport policy pertaining to Adjudicative Guideline C-Foreign Preference ("ASD/C<sup>3</sup>I"). The memorandum states in part:

The purpose of this memorandum is to clarify the application of Guideline C to cases involving an applicant's possession or use of a foreign passport. The guideline specifically provides that "possession and/or use of a foreign passport" may be a disqualifying condition. It contains no mitigating factor related to the applicant's personal convenience, safety, requirements of foreign law, or the identity of the foreign country. The only applicable mitigating factor addresses the official approval of the United States Government for the possession or use. The security concerns underlying this guideline are that the possession and use of a foreign passport in preference to a U.S. passport raise doubt as to whether the person's allegiance to the United States is paramount and it could also facilitate foreign travel unverifiable by the United States. **Therefore, consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains approval of its uses from the United States Government.** Modification of the Guideline is not required. (Emphasis added) <sup>(1)</sup>

### CONCLUSIONS

After considering all of the facts in evidence and legal standards, including the "whole person" concept, I conclude the following regarding the allegations in the SOR:

**Guideline B: (Foreign Influence)**

Based on Applicant's admissions, the Government established a potential disqualifying condition under Foreign Influence Disqualifying Condition (FI 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*). Applicant's mother, sister, and aunt are naturalized U.S. citizen residents, who hold dual citizenship with Brazil. Another aunt and uncle are resident citizens of Brazil. Numerous family friends are also resident citizens of Brazil.

While family ties with persons in a foreign country are not, as a matter of law, *per se* disqualifying under Guideline B, such ties raise a *prima facie* security concern. This concern is sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance. ISCR Case No. 99-0424, 2001 DOHA LEXIS at \*\*33-34 (App. Bd. Feb. 8, 2001).

The burden having shifted to Applicant to produce evidence to rebut, explain, or mitigate the facts, I reviewed all of the mitigating conditions, and conclude two apply: (1) Foreign Influence itigating Condition (FI MC) E2.A2.1.3.1. (*A determination that the immediate family members, (spouse, father, mother, sons, daughters, brothers, sisters), co-habitant, or associates in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States*). As Applicant's mother, sister, aunt and two children reside in the U.S., there is little likelihood that they will be subject to exploitation. Although one of his aunts and uncle are citizen residents of Brazil, they recently moved there and are not

connected to the government. (2) FI MC E2.A2.1.3.5. (*Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities*). Applicant does not own property or have financial interests connected to Brazil that would affect his security responsibilities.

In evaluating whether Applicant's aunt and uncle may be exploited by the Brazilian government in a way that could force Applicant to choose between his loyalty to them and the U. S., I took into account the character of Brazil and the entities within it, including some citations of humans rights abuses in several states. However, the longstanding friendship of the U.S. with Brazil, a democratic country, and the absence of evidence in the record documenting espionage on its part against the U.S. minimizes the potential for exploitation of Applicant based on his relatives residing there.

Based on Applicant's frequent contact with his family and visits to Brazil, FI MC E2.A.2.1.3.2. (*Contact and correspondence with foreign citizens are casual and infrequent*) is not applicable.

#### Guideline C: (Foreign Influence)

The Government raised a potential disqualification under this guideline. Although Applicant was a naturalized citizen in 2001, he admitted he traveled to Brazil several times to visit family and friends, and used his Brazilian passport for convenience. He also obtained Brazilian citizenship for his two children based on his citizenship. In doing so, he exercised dual citizenship, which constitutes a disqualifying condition under Foreign Preference Disqualifying Condition (FP DC) E2.A3.1.2.1. (*The exercise of dual citizenship*). ISCR Case No. 02-02052 at 4 (App. Bd. Apr. 8, 2003) Furthermore, the mere possession of a current foreign passport without use is an exercise of dual citizenship and is disqualifying under FP DC E2.A3.1.2.2. (*Possession and/or use of a foreign passport*). ISCR Case No. 01-02270 at 3 (App. Bd. Aug. 29, 2003) According to his Answer, Applicant has no intention of relinquishing his dual citizenship.

The ASD/C<sup>3</sup>I Memo requires a clearance be denied or revoked unless an applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government. As Applicant did not present evidence of either, none of the mitigating conditions apply.

#### Whole Person Analysis

In addition to reviewing the disqualifying and mitigating conditions under the guidelines, the adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Directive ¶ E.2.2. mandates that security clearance decisions include a review of the whole person. In evaluating an applicant's conduct an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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

In considering the totality of the evidence in view of this concept, I took into account the fact that Applicant's dual citizenship is the result of his mother's citizenship and that significant members of his immediate family reside in the U.S. I also note his resolute determination not to relinquish his Brazilian citizenship. Hence, I find Applicant mitigated the security concerns raised by some members of his family's dual citizenship and his aunt and uncle, living in Brazil, as well as his travel there, as alleged in SOR ¶¶ 1.a. through 1.f. However, he did not mitigate those allegations raised in SOR ¶¶ 2.a. through 2.d. Accordingly, Guideline B is decided for Applicant and Guideline C is decided against him.

### **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 as follows:

Paragraph 1: Guideline B (Foreign Influence) FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

Paragraph 2 Guideline C (Foreign Preference) AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

Shari Dam

Administrative Judge

1. (Memorandum from Arthur L. Money, Assistant Secretary for Command, Control, Communication, and Intelligence, to Directors of Defense Agencies, *Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline*, dated August 16, 2000).