

KEYWORD: Guideline C; Guideline B

DIGEST: Applicant has used a Brazilian passport and voted in Brazilian elections. Applicant's exercise of Brazilian citizenship and his relationship with a Brazilian national raised security concerns which he failed to mitigate. Adverse decision affirmed.

CASENO: 08-01038.ind

DATE: 07/22/2009

DATE: July 22, 2009

In Re:)	
)	
-----)	ISCR Case No. 08-01038
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Elizabeth L. Newman, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 16, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 20, 2009, after the hearing, Administrative Judge Juan J. Rivera denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse security

clearance decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is an information technology network administrator employed by a defense contractor. Born in the U.S. to a U.S. father and a Brazilian mother, he lived in Brazil from age 11 until age 18. At that time he returned to the U.S. to attend college. After college he lived in Brazil for three years and then returned to the U.S., where he has lived ever since. He married a Brazilian woman in the late 1980s. She is a legal resident of the U.S. and has applied for citizenship. The couple have two children, both born in the U.S.

In the late 1990s, DOHA issued a SOR to Applicant, alleging security concerns similar to those at issue here. The Judge granted Applicant a security clearance. At the earlier hearing, Applicant promised to surrender his Brazilian citizenship and passport. He attempted to do so in the early 2000s but Brazilian authorities would not permit it. While holding a U.S. security clearance, Applicant has used his Brazilian passport twice. He is also required by Brazilian law to maintain an identification card and to vote in Brazilian elections. He has voted in Brazilian presidential elections since the late 1980s. “If he fails to [do so], he will be denied his Brazilian identification card, passport, and driver’s license.” Decision at 4. In the Analysis portion of his decision, the Judge stated that “Applicant willfully continued to exercise his Brazilian citizenship knowing that it raises security concerns . . . Considering the record as a whole, I find Applicant’s behavior indicates a preference for Brazil over the United States.” *Id.* at 8. The Judge concluded that Applicant had “failed to mitigate the foreign preference security concern” in his case. *Id.* at 11.

After reviewing the record, the Board concludes that, with one exception,¹ the Judge examined the relevant data and articulated a satisfactory explanation for the decision, “including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge’s decision that “it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance” is sustainable on this record. Decision at 11. *See also Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) (“The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security.’”).

¹The Judge’s finding that Applicant promised at the earlier hearing to surrender his Brazilian passport and renounce his Brazilian citizenship is not a fair reading of the evidence. Applicant made a conditional commitment to undertake those acts if it would make a difference. There is no indication that anyone communicated to Applicant that it would, in fact, make a difference in his case. The first Judge did not rely on the conditional promises in his favorable decision. To the extent that Department Counsel’s brief argues for sustaining this finding, it is not well founded. The Board has frequently noted that conditional promises are entitled to little weight. *See, e.g.*, ISCR Case No. 07-14151 at 3 (App. Bd. Sep. 10, 2008).

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board