



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



In the matter of:)
)
) ISCR Case No. 08-01038
)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro Se*

April 20, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant mitigated the foreign influence security concerns arising from his contacts and relationship with residents and citizens of Brazil. He failed to mitigate the foreign preference security concerns raised by his continuous exercise of his Brazilian citizenship. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SF 86) on November 28, 2006. On July 16, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the government's security concerns under Guideline C (Foreign Preference) and Guideline B (Foreign Influence).¹ The SOR

¹ The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

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 for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, denied or revoked.

Applicant answered the SOR on August 16, 2008, and requested a hearing before an administrative judge. The case was assigned to me on December 2, 2008. DOHA issued a notice of hearing on December 8, 2008, scheduling a hearing on January 21, 2009. The hearing was conducted as scheduled.

At the hearing, the government offered exhibits (GE) 1 through 15, which were admitted without objection (Tr. 33). Applicant testified on his own behalf, and presented four exhibits, marked AE 1 through 4, which were admitted without objection (Tr. 40, AE 4). DOHA received the transcript of the hearing (Tr.) on January 29, 2009. I closed the record on February 6, 2009.²

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.b – e, and SOR ¶¶ 2.a – c, and 2.e, with one correction and explanations. He denied SOR ¶¶ 1.a and 2.d. His admissions are incorporated herein as findings of fact. After a thorough review of all evidence of record, I make the following additional findings of fact.

Applicant is a 50-year-old information technology network administrator working for a defense contractor since 2002 (GE 1). He was born in the United States to a U.S. born father, and Brazilian mother (Tr. 39-40). At age 11, his mother moved back to Brazil with Applicant, where he grew up and was educated. From age 18 to 23, Applicant lived in the United States and attended college. He received his bachelor's degree in 1981 (Tr. 6). After college, he returned to Brazil and lived there for three years. He returned to the United States at age 26, and thereafter, he has consistently resided in the United States, except for short vacation periods in Brazil.

Applicant did not serve in the Brazilian or U.S. military forces. He explained that he attended a mandatory induction meeting in Brazil, but was excused from military service because of his bad eyesight. He never worked in Brazil or for the Brazilian government. In 1987, following his return to the United States from Brazil, Applicant started working for a U.S. government agency (Tr. 41-44). After a few years he formed his own company and worked as a subcontractor for different U.S. agencies. After his company went out of business, he was hired by several government contractors. He has had access to classified information at the secret level since 2003 (Tr. 7-10).

Applicant's Brazilian wife came to the United States as a college student, and received a master's degree in contracting (Tr. 67). After college, she was hired by the Brazilian Navy to work in the United States as a civilian purchasing agent (Tr. 65). He

² Applicant was allowed additional time to submit a statement from his Facility Security Officer.

married his Brazilian wife in September 1989 (Tr. 65). They have two U.S. born children of this marriage: a 15-year-old son, and a 13-year-old daughter. His wife and children have valid Brazilian passports. While working for the Brazilian Navy, she sponsored into the United States a Brazilian live-in nanny. The nanny worked and lived with them from 2000 to 2008. Since the summer of 2008, the nanny has been living with her boyfriend and working during the day for Applicant (Tr. 76).

After leaving that job, his spouse worked for a U.S. private company. In 2006, she was hired by her current employer, a large world organization as a purchasing agent. She is a legal foreign resident (green card holder) applying for U.S. citizenship.

Applicant's mother-in-law is 78 years old. She is a retired elementary school teacher. His wife communicates with her mother in a weekly basis. She also communicates with her siblings (two brothers and one sister) at least once a month. They call each other for birthdays and special occasions (Tr. 72). Two of his wife's siblings are law clerks and work for the Brazilian government (Tr. 70). Her other brother is an engineer, currently working for a private corporation in another foreign country. Applicant's in-laws are citizens and residents of Brazil. Applicant's sister-in-law has visited them approximately four times since their wedding. His brothers-in-law have visited him approximately twice. Applicant's in-laws and cousins visited and stayed with Applicant during the 2008 Christmas season.

Whenever Applicant and his family travel to Brazil they stay with his wife's family. They have vacationed in Brazil in 1999, 2000, 2001, 2005, and 2007. He and his family plan to travel to Brazil in the summer of 2009

Applicant's 82-year-old mother is a Brazilian citizen residing in the United States (Tr. 77). She worked for the Brazilian Navy procurement office in the United States and in the Brazilian embassy (Tr. 47). In 1987, she was forced to retire (after a car accident) from her job as an administrative assistant to the Brazilian embassy's foreign service office (Tr. 78-80). She has worked as a real state agent thereafter. Applicant's father was U.S. sailor who served during World War II as a gunner in a B-17 (Tr. 45). Applicant had little contact with his father after his mother returned to Brazil.

In 1997, a DOHA administrative judge granted Applicant access to classified information at the secret level. The security concerns adjudicated then were basically the same Guidelines B and C security concerns alleged in the pending SOR. At his 1997 hearing, Applicant promised he would surrender his passport and renounce his Brazilian citizenship. In 2003, Applicant attempted to surrender his Brazilian passport, but was not allowed to do so. According to Brazil's law, he cannot renounce his citizenship (Tr. 39, Answer).

Applicant and his wife have immediate and extended family in Brazil and he feels obligated to visit them and to ensure his children know and share with their relatives in Brazil. He is willing to renounce his Brazilian citizenship and to surrender his passport, but only if he could use his U.S. passport to travel in and out of Brazil. Because he is

not allowed to enter and leave Brazil without his Brazilian passport he renewed his Brazilian passport and maintains his Brazilian citizenship. As of January 2009, he had not fully surrendered his passport and had not renounced his Brazilian citizenship.

Since receiving his security clearance in 2003, Applicant used his Brazilian passport twice (2005 and 2007) to travel to Brazil (Tr. 52). He traveled to four other foreign countries and always used his U.S. passport. According to his facility security officer (FSO), Applicant has complied with all security rules and regulations. To minimize the security concerns raised by his possession of a Brazilian passport, in 2003, he surrendered his passport to his FSO for safekeeping (Tr. 50). Applicant also has consistently reported all foreign contacts to his FSO in person and by email. Furthermore, he has notified his FSO of any upcoming foreign trips, and provided his FSO with trip reports at the conclusion of each trip. The FSO submitted incident reports through JPAS to account for Applicant's use of his Brazilian passport and the circumstances of the foreign trips (AE 4).

In 2005, Applicant travelled to Brazil without his passport. He was allowed to enter Brazil with his Brazilian identification card. However, to depart Brazil, he was forced to renew his passport. It will expire in August 2010 (Tr. 63). Applicant is also required to maintain a valid Brazilian identification card (which he updated at age 30) (Tr. 53), and to vote in Brazil's presidential elections (Tr. 62). He complies with Brazilian laws and has consistently voted in Brazil's presidential elections since 1987. He casts his vote at the Brazilian embassy in the United States. He intends to vote in future Brazilian presidential elections to be able to maintain his passport. If he fails to vote in Brazilian presidential elections, he will be denied his Brazilian identification card, passport, and driver's license. Applicant also maintains a valid Brazilian driver's license to be able to rent cars and drive in Brazil. He renewed his driver's license in 2007 (Tr. 59).

In 2007, to minimize his possession of the Brazilian passport he attempted to store it at the U.S. embassy in Brazil while he was in country. The embassy refused to hold his Brazilian passport (AE 4, Tr. 52). He plans to use his Brazilian passport when he visits Brazil with his family in the summer of 2009 (Tr. 63).

Applicant considers himself to be a loyal, trustworthy, and patriotic American. He believes he has complied with all the security conditions imposed on him to account for his foreign passport and his foreign trips. Having lived in a foreign country, he understands the privilege of living in the United States with constitutional rights and protections. Applicant stated he has no proprietary, economic or financial interests outside of the United States (Tr. 82). He owns a home in the United States with an estimated value of \$1 million. He also has approximately \$100,000 in a retirement account and other investments (Tr. 84). He and his family are active members of their community. He has voted in all U.S. local and national elections since 1987 (Tr. 84).

At his hearing, Applicant presented two reference letters, one from the president of his company, who has known and observed him during the last 11 years, and the second from his supervisor, who has known and observed him during the last 7 years.

Both consider Applicant to be the consummate professional, loyal, trustworthy, reliable, and to display good judgment (AEs 2 and 3).

I take administrative notice of the following facts. The government of Brazil is a charter member of the Organization of American States and a 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 Government presented no evidence addressing security concerns about Brazil's economic and political status, or its human rights record. There is no evidence the government of Brazil engages in the gathering of U.S. sensitive economic, industrial, or proprietary information.

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.³

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

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 controlling adjudicative goal is a fair, impartial and common sense 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 making a decision.

The protection of national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security."⁴ In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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,

³ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁴ *Egan, supra*, at 528, 531.

or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified 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 classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Foreign Preference

Under AG ¶ 9 the security concern involving foreign preference arises, “[w]hen 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.”

Under AG ¶ 10(a)(1) Applicant may be disqualified for the “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, (3) accepting educational, medical, retirement, social welfare, or other such benefits, and (7) voting in a foreign election.”

Applicant was born in the United States to a U.S. born father and Brazilian mother. As such, he is a dual U.S. and Brazilian citizen. As of the day of his hearing, he possessed a valid Brazilian passport, a Brazilian identification card, and a valid drivers license. Since 1987, he has voted in all Brazilian national elections, as required by Brazilian law. AG ¶¶ 10(a)(1), (3), and (7) apply.

AG ¶ 11 provides six conditions that could mitigate the foreign preference security concerns:

- (a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

(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;

(d) use of a foreign passport is approved by the cognizant security authority;

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and

(f) the vote in a foreign election was encouraged by the United States Government.

Applicant was born in the United States and lived here until age 11 when his mother relocated to Brazil. He returned to the United States to attend college, and received his bachelor's and master's degrees in the United States. He then returned to Brazil for three years. He has made the United States his home since age 26, and has worked for U.S. government contractors or U.S. agencies most of his life. He has worked hard for government contractors earning their trust. There is no evidence he has ever taken any action which could cause potential harm to the United States, or that he lacks honesty and integrity.

All of Applicant's financial and economic ties are in the United States. He has no other financial, economic, or proprietary interests in any foreign country. Applicant's questionable actions (voting in Brazilian elections and possessing a valid Brazilian passport, identification card and driver's license), were compelled by Brazil's laws.

Applicant surrendered his Brazilian passport to his FSO and conscientiously reports any contact with foreigners, provides advance notice of his foreign trips, and submits a trip report to his FSO. He only uses his Brazilian passport to travel to Brazil. He uses his U.S. passport to travel for any other foreign travel. He attempted to renounce his Brazilian citizenship and to surrender his passport in 2003, but was informed that such action is prohibited under Brazilian law.

I find that AG ¶¶ 11(b) and (e) partially apply, but do not fully mitigate the foreign preference security concerns. In his 1997 DOHA hearing, Applicant was informed of the security concerns raised by his exercise of his dual citizenship. Since his 1997 DOHA hearing, Applicant has repeatedly expressed a willingness to renounce his Brazilian citizenship. Notwithstanding, he has not effectuated this offer. To the contrary, since 1997 he has renewed his Brazilian passport, his Brazilian driver's license, voted in Brazilian elections, and has continued to use his Brazilian identification card. Moreover, Applicant intends to continue exercising his Brazilian citizenship in the future.

Applicant willfully continued to exercise his Brazilian citizenship knowing that it raises security concerns and that it would affect his ability to hold a security clearance. Considering the record as a whole, I find Applicant's behavior indicates a preference for Brazil over the United States. Considering his past behavior, Applicant's mere offers to renounce his Brazilian citizenship fail to mitigate the foreign preference security concerns.

For the same reasons outlined in the preceding paragraphs, I find that Applicant's surrendering his Brazilian passport to his FSO, informing the government of future travel plans to Brazil, and providing trip reports of his whereabouts while in Brazil, do not fully mitigate his exercise of Brazilian citizenship and the foreign preference security concerns.

Guideline B, Foreign Influence

Under Guideline B, the government's concern is that:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, he or she may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 6.

AG ¶ 7 sets out three conditions that raise a security concern and may be disqualifying in this case:

(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information; and

(d) sharing living quarters with a persona or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.⁵ Applicant has frequent contacts and a close relationship of affection and/or obligation with his extended family members and his in-laws who are Brazilian citizens residing in Brazil. The closeness of the relationship is shown by Applicant's frequent telephone contacts with them, directly or through his wife, his frequent travels and vacationing in Brazil where he stays with his in-laws, and his in-laws visits to Applicant in the United States. He expressed feeling of affection and or obligation for his extended family members and in-laws.

This contact creates a possible risk of foreign pressure or attempted exploitation because there is always the possibility that Brazilian agents may exploit the opportunity to obtain sensitive or classified U.S. information. The government produced substantial evidence raising these three potentially disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the government.

Six Foreign Influence Mitigating Conditions under AG ¶ 8 are potentially applicable to these disqualifying conditions:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U. S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

⁵ See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

Applicant does have a strong bond of affection and obligation toward his Brazilian extended family members. Notwithstanding, Applicant's contacts with his Brazilian family members do not raise a heightened risk of foreign exploitation. Considering the record as a whole -- Brazil's form of government, its relationship with the United States, and that Brazil has no history of collecting sensitive information from the United States, the possibility of foreign pressure or attempted exploitation is substantially diminished. It is unlikely Applicant will be placed in a position of having to choose between the interests of his family in Brazil and the U.S. interests. AG ¶¶ 8(a), (b) and (e) apply.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

Applicant is a loyal and proud American. Except for approximately 10 years he lived in Brazil (from age 11 to 18), he has lived in the United States all his life. Available evidence suggests he has been a valuable employee of several government agencies and numerous government contractor providing important services for government agencies. There is no evidence Applicant has ever compromised or caused others to compromise classified information. There is no evidence he has ever taken any action which could cause potential harm to the United States, or that he lacks honesty and integrity.

On balance, there are more substantial circumstances that weigh against Applicant in the whole person analysis. Applicant is exercising the rights and privileges of a Brazilian citizen. Moreover, he intends to continue doing so in the future. He has numerous family members in Brazil for whom he has feelings of affection and or obligation. Applicant is more concerned about his vacation trips and maintaining his family contacts in Brazil than about the security concerns raised by his behavior.

Considering the record as a whole, Applicant's overall behavior raises a significant doubt about his preference for Brazil over the United States. "Because of the extreme sensitivity of security matters, there is a strong presumption against granting a security clearance. Whenever any doubt is raised . . . it is deemed best to err on the side of the government's compelling interest in security by denying or revoking [a] clearance." *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990). After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant mitigated the foreign influence security concerns, but failed to mitigate foreign preference security concern.

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:

Paragraph 1, Guideline C:	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 2.a-2.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant's security clearance. Eligibility for access to classified information is denied.

JUAN J. RIVERA
Administrative Judge