DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 09-06971
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
For Applicant: *Pro se*

February 28, 2011

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the written record in this case, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Guideline B (Foreign Influence) and Guideline C (Foreign Preference). His eligibility for a security clearance is denied.

Applicant completed and certified a Security Clearance Application (SF 86) on June 18, 2009. On November 1, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline C (Foreign Preference) and Guideline B (Foreign Influence). DOHA acted 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On December 8, 2010, Applicant answered the SOR in writing and requested that his case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on December 30, 2010. The FORM

contained documents identified as Items 1 through 6. By letter dated December 30, 2010, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on January 6, 2011. His response was due on February 5, 2011. Applicant did not submit any information or file any objections within the required time period. On February 23, 2011, the case was assigned to me for a decision.

Procedural Matters

There are three typographical errors in the SOR. The errors are not substantive in nature. However, they are extraneous matter and should be deleted from the SOR. According, I *sua sponte* delete "response; see left side)" from the SOR allegation at ¶ 2.a.; the ")" at the end of the SOR allegation at ¶ 2.d.; and the "s" in "resides" from the SOR allegation at ¶ 2.l.

Findings of Fact

The SOR contains one allegation that raises a security concern under Guideline C, Foreign Preference (SOR ¶ 1.a.), and 13 allegations that raise security concerns under Guideline B, Foreign Influence (SOR ¶¶ 2.a. through 2.m.). In his Answer to the SOR, Applicant admitted the Guideline C allegation and all Guideline B allegations. His admissions are admitted as findings of fact. (Item 1; Item 3.)

On July 21, 2009, Applicant was interviewed about his citizenship status by an authorized investigator from the U.S. Office of Personnel Management (OPM). On April 15, 2010, he provided signed, sworn responses to foreign influence and foreign preference interrogatories sent to him by DOHA.[1]

Applicant is 39 years old and employed as a network engineer and systems administrator by a government contractor. He married in 1997 and divorced in 2004. In 2005, he remarried. He is the father of three children, ages two, four and ten. In 2004, he was granted access to public trust and privileged information. (Item 4 at 1, 3, 5-6, 12-13.)

Applicant was born and raised in Brazil. He immigrated to the United States in 1992. He became a naturalized U.S. citizen in 2004. On his SF 86, Applicant identified himself as a dual citizen of the United States and Brazil. In 2006, he renewed his Brazilian passport and used it to enter Brazil in 2007. On April 1, 2010, Applicant surrendered his Brazilian passport to his facility security officer (FSO). In the event that

[1] On April 15, 2010, Applicant reviewed the investigator's summary of his personal subject interview and made several corrections and clarifications. He corrected a travel date from 2004 to 2002; he provided correct birth dates for an uncle, an aunt, a cousin, and his parents-in-law; he clarified his wife's and his sister-in-law's names; and he listed a part-time job he had forgotten to mention during his interview. Subject to those corrections and clarifications, he provided a sworn statement in which he adopted the investigator's summary as accurate. He did not dispute the accuracy of the information in the interview or in his interrogatory responses, which is recited herein. (Item 5, 3-35.)

Applicant's Brazilian passport is returned to him, the FSO will notify DOHA. (Item 4 at 1; Item 5 at 5, 27; Item 6.)

In 2006, after becoming a U.S. citizen, Applicant voted in the Brazilian presidential election. He stated that his reason for voting in the Brazilian presidential election was that it was "[r]equired by Brazilian law." He stated in response to DOHA interrogatories that he owes a duty to Brazil to vote in the Brazilian presidential election every four years. (Item 5 at 22, 31, 34.)

In his answer to the SOR, Applicant provided the following additional information:

> While I did vote in the Brazilian Presidential elections in 2006, I do not agree that this shows a preference for a foreign country over the United States. I voted because it was a requirement of the Brazilian citizenship. There was never any need to renounce the Brazilian citizenship, so as a dual citizen I still follow the laws and duties of both countries. Never before (as I still don't see it now) have any of the laws or duties caused a conflict of interest. I also vote in the United States elections, and as voting in the United States is not mandatory, that is clearly done by choice. My whole life is here in the United States, and I surrendered my Brazilian passport when given the choice. My children are American citizens and this is the country I chose to call home.
>
> If it is a requirement that I formally renounce my Brazilian citizenship, I am willing to do so, as I have previously stated throughout this process. It is only really a matter that was never an issue before.

(Item 3 at 3.)

Applicant's wife is a citizen of Brazil and a U.S. resident alien. She resides with Applicant in the United States. Applicant's father-in-law and mother-in-law are citizens and residents of Brazil. Applicant's wife's stepfather, a citizen and resident of Brazil, serves in the Brazilian military. Applicant speaks with his wife's stepfather and her mother about once a month. (Item 3; Item 5 at 6, 11.)

Applicant has two sisters-in-law. Both women are citizens of Brazil. One of the sisters resides in Brazil; the other sister resides in the United States. Applicant sees his sister-in-law who resides in the United States every other week. (Item 4; Item 5 at 15.)

Applicant's father, a university professor, is a citizen and resident of Brazil. Applicant considers his relationship with his father to be close, although he speaks with his father on the telephone only about six times a year. From 1986 to 1994, Applicant's father served as an advisor to an international defense organization and to a Brazilian military educational organization. (Item 5 at 6, 9, 19.)

Applicant's brother, with whom he works, is a citizen of Brazil and a U.S. registered alien. Applicant sees his brother every day. Applicant's sister, a lawyer and U.S. resident, is a dual citizen of Brazil and the United States. Applicant sees his sister weekly. (Item 4; Item 5 at 14, 19.)

Applicant's aunt, uncle, and cousin are citizens and residents of Brazil. The uncle works in advertising and the aunt is a doctor of pathology. Applicant's cousin is a homemaker and psychologist. Her children and Applicant's children are about the same ages. Applicant has telephone contact with his aunt and uncle every few months. He has telephone or internet contact with his cousin several times a year. (Item 5 at 5, 20.)

In addition to his family members, Applicant identified several friends who are citizens of Brazil residing in the United States. He sees these friends socially about six times a year. (Item 5 at 18-19.)

In 2009, Applicant provided technical advice and support on an architectural matter to a unit of the Brazilian military in the United States. On his SF 86, Applicant reported contact with the Embassy of Brazil to register the births of his children, to obtain travel documents for his children, to finalize his divorce, and to register his marriage. (Item 1; Item 3; Item 4 at 10.)

Neither party provided facts about the government and policies of Brazil or its historical and present political relationship with the United States.

Burden of Proof

The Government has the initial burden of proving controverted facts alleged in the SOR. The responsibility then shifts to the applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant then bears the burden of persuasion. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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, the administrative judge applies these guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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 the 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record.

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, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion in seeking to obtain 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

Guideline C, 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." Such an individual "may be prone to provide information or make decisions that are harmful to the interests of the United States."

AG ¶ 10 describes several conditions that could raise a security concern and may be disqualifying:

> (a) 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;
>
> (2) military service or a willingness to bear arms for a foreign country;
>
> (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
>
> (4) residence in a foreign country to meet citizenship requirements;
>
> (5) using foreign citizenship to protect financial or business interests in another country;
>
> (6) seeking or holding political office in a foreign country; and,
>
> (7) voting in a foreign election.
>
> (b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;
>
> (c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest; and
>
> (d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

Applicant was born and raised in Brazil. He immigrated to the United States in 1992, and he was naturalized as a U.S. citizen in 2004. In 2006, he voted in a Brazilian

presidential election. Applicant defended his vote in the Brazilian presidential election by stating that Brazilian citizens are compelled to vote in that country's presidential elections. He also stated that he would formally renounce his Brazilian citizenship if required to do so. Applicant's vote in Brazil's presidential election suggests a preference for a foreign country over the United States and it raises security concerns under AG ¶¶ 10(a)(7) and 10(b).

Under AG ¶11(a), dual citizenship might be mitigated if "it is based solely on [an applicant's] parents' citizenship or birth in a foreign country." Under AG ¶11(b), an individual's dual citizenship might be mitigated if he or she "has expressed a willingness to renounce dual citizenship." Under AG ¶11(c), an individual's "exercise of the rights, privileges, or obligations of foreign citizenship might be mitigated if it occurred before becoming a U.S. citizen or when the individual was a minor." Under AG ¶11(f), a U.S. citizen's vote in a foreign election might be mitigated if it "was encouraged by the United States Government."

In 2006, Applicant exercised his Brazilian citizenship by voting in Brazil's presidential election. When he cast his vote, he was a 35-year-old U.S. citizen. Nothing in the record indicates that Applicant's vote in the Brazilian presidential election was encouraged by the United States Government. I conclude that AG ¶¶ 11(a), 11(c), and 11 (f) do not apply to the facts of Applicant's case.

Applicant defended his vote in the Brazilian election by stating that voting in a Brazilian presidential election was a requirement of Brazilian citizenship. In his answer to the SOR, he stated that he did not agree that by voting in the Brazilian election he showed a preference for Brazil over the United States. He stated that he also voted in U.S. elections voluntarily. Additionally, he stated that his whole life was in the United States, and the United States was the country he chose to call home. He also stated that he would renounce his Brazilian citizenship if he was required to do so by the United States. Applicant's written statements reflect ambivalence and divided loyalty regarding his Brazilian dual citizenship. However, his willingness to renounce his Brazilian citizenship if required to do so merits partial mitigation under AG ¶ 11(b).

Guideline B, Foreign Influence

AG ¶ 6 identifies foreign influence security concerns as follows: "[f]oreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, 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." Additionally, adjudications under Guideline B "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 U.S. citizens to obtain protected information and/or is associated with the risk of terrorism." AG ¶ 6.

Neither party provided information for the record about the government of Brazil and its political and economic relationship with the United States.

Applicant's wife is a citizen of Brazil and a resident U.S. alien. She resides in the United States with Applicant. Her mother and father are citizens and residents of Brazil. Her stepfather serves in the Brazilian military. Her two sisters are citizens of Brazil: one is a U.S. resident; the other is a resident of Brazil. Applicant has frequent familial contact with his wife's immediate relatives.

Applicant's father, a professor, is a citizen and resident of Brazil. Applicant feels close to his father and communicates with him several times a year. Applicant's brother is a citizen of Brazil and a resident U.S. alien. Applicant sees his brother every day because the two men work together. Applicant's sister is a dual citizen of Brazil and the United States. She resides in the United States and Applicant sees her weekly. Additionally, Applicant's uncle, aunt, and cousin are citizens and residents of Brazil. Applicant maintains regular contact with these relatives. He also has several friends who are citizens of Brazil and residents of the United States, and he has contacts with these individuals several times a year. In 2009, Applicant provided technical support and advice on an architectural matter to a Brazilian military group in the United States.

I have considered all of the disqualifying conditions under the Foreign Influence guideline. The facts in this case raise security concerns under disqualifying conditions AG ¶¶ 7(a), 7(b), and 7(d). AG ¶ 7(a) reads: "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." AG ¶ 7(b) reads: "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." AG ¶ 7(d) reads: "sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion."

Several mitigating conditions under AG ¶ 8 might be applicable to Applicant's case. If "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.," then AG ¶ 8(a) might apply. If "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," then AG ¶ 8(b) might apply. If "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," then AG ¶ 8(c) might apply. If "the foreign contacts and activities are on U.S.

Government business or are approved by the cognizant security authority," then AG ¶ 8(d) might apply.

Applicant has extensive family and friendship ties with citizens and residents of Brazil. He shares his home with his wife, who is a citizen of Brazil. Additionally, Applicant's relationships with his father, his siblings, his aunt and uncle, his cousin, his in-laws, and his wife's stepfather, a member of the Brazilian military, are neither casual nor infrequent, but are based on long-standing family ties of affection and obligation. Applicant is in frequent familial contact with most of his family members who are citizens and residents of Brazil. Moreover, Applicant has friendship connections with Brazilian citizens residing in the United States, and he provided technical assistance to a Brazilian military group in the United States.

Applicant has the burden of persuasion in obtaining a favorable security clearance decision. That burden of persuasion includes presenting evidence to warrant application of Guideline B mitigating conditions. The Government does not have the burden of affirmatively disproving the applicability of the foreign influence mitigating conditions. In this FORM case, Applicant has failed to produce sufficient evidence to establish that any of the Guideline B mitigating conditions applies to the allegations that he has admitted. Accordingly, I conclude that none of the Guideline B mitigating conditions apply in this case.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all relevant 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 communicative family member and friend. He has close familial ties with his father, his in-laws, his wife's stepfather, his aunt, uncle, and cousin, all of whom are citizens and residents of Brazil. He is in frequent contact with his family members in Brazil. Although he is a U.S. citizen, he voted in Brazil's presidential

election in 2006, thereby expressing a preference for Brazil. He has provided technical assistance to a Brazilian military group in the United States. Applicant failed to provide evidence to mitigate the Government's security concerns about his foreign relationships and contacts.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant requested a decision on the written record. He did not file a response to the FORM. The written record in this case is sparse. Moreover, without an opportunity to assess Applicant's credibility at a hearing, I am unable to conclude that he met his burden of persuasion in mitigating the Government's allegations under the foreign preference and foreign influence adjudicative guidelines.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising under the foreign preference and foreign influence adjudicative guidelines.

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
Subparagraph 1.a.:	Against Applicant
Paragraph 2, Guideline C:	AGAINST APPLICANT
Subparagraphs 2.a. - 2.m.:	Against 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Joan Caton Anthony
Administrative Judge