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

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| In the matter of: | ) | |
| | ) | |
| XXXXXXXXXX, XXXXX | ) | ISCR Case No. 09-07917 |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Richard A. Stevens, Esq., Department Counsel
For Applicant: *Pro se*

June 14, 2011

## Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns pertaining to Guideline C (foreign preference). Clearance is denied.

## Statement of the Case

On March 24, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On August 25, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline C (foreign preference). 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs after September 1, 2006.

Applicant answered the SOR on October 4, 2010, and DOHA received his answer on October 8, 2010. Department Counsel was prepared to proceed on January 13, 2011. The case was assigned to me on February 1, 2011. DOHA issued a notice of

hearing on February 16, 2011, scheduling the hearing for March 3, 2011. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 3, which were received without objection. The Applicant offered Applicant Exhibit (AE) A, which was received without objection, and he testified on his own behalf. DOHA received the hearing transcript (Tr.) on March 11, 2011

## Findings of Fact

Applicant admitted all of the SOR allegations. His answers are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

### Background Information

Applicant is a 47-year-old consulting technical director, who has been employed by a defense contractor since April 2003. He is a first-time applicant for a security clearance and is applying for a clearance to enhance his position within his company. (GE 1, Tr. 21, 26-28.)

Applicant was born in September 1963 in Brazil, where he was raised, educated, and spent his formative years. The highest level of education he achieved in Brazil was a bachelor of business administration degree, which he was awarded in August 1986. In August 1988, at age 25, Applicant immigrated to the United States on a student visa. He attended a U.S. university from September 1988 to January 1991, and was awarded a master's degree in computer science. He attended a second U.S. university from September 1993 to January 1998 with the intent of pursuing his PhD in computer science; however, he did not complete his PhD program and instead was awarded a second master's degree in computer science. (GE 1, Tr. 21-26.)

Applicant married his wife in Brazil in July 1988 shortly before he came to the United States. His wife accompanied him to the United States as a student spouse. She, like Applicant, was born, raised and educated in Brazil. Applicant became a naturalized U.S. citizen in July 2002 and was also issued his U.S. passport in the same month. Applicant is a citizen of Brazil, the United States, and Italy. He acquired his Italian citizenship through his grandfather. Applicant's wife is a dual citizen of Brazil and the United States. (GE 1, Tr. 29-30, 38.)

Applicant and his wife have two daughters, ages, 19 and 12. Their oldest daughter is a citizen of Brazil, the United States, and Italy; and their youngest daughter is a citizen of Brazil and the United States. (GE 1, Tr. 31-32.) Applicant's parents remained in Brazil when he immigrated to the United States. His father is deceased and his mother lives in Brazil. Apart from his mother, he has no siblings or immediate family living in Brazil. He does have "some cousins" living in Brazil, but he does not stay in touch with them. With regard to in-laws, Applicant's mother-in-law, brother-in-law, and

sister-in-law live in Brazil. Applicant maintains frequent contact with his mother by e-mail and telephone. He typically calls her every Sunday and exchanges e-mails with her less frequently. Applicant, his wife, and daughters travel to Brazil to visit their family members "on average" once every year and a half. (GE 1, Tr. 32-35.)

**Foreign Preference**

The security concerns under foreign preference are straightforward. Applicant exercises dual citizenship with Brazil and the United States by maintaining and using a valid Brazilian passport. After becoming a U.S. citizen in July 2002, he renewed his Brazilian passport most recently in October 2007; it is valid until October 2012. Applicant used his Brazilian passport in lieu of his U.S. passport when traveling to Brazil in 2003, 2005, 2008, and 2009. (SOR ¶ 1a (1) – (3).)

Applicant explained that he maintains his Brazilian passport to visit his mother and other family members living in Brazil. As a dual citizen of Brazil and the United States, he can leave the United States using his U.S. passport, but as a Brazilian citizen, he must enter Brazil using his Brazilian passport. Applicant submitted a print-out from the Brazilian Consulate stating, "U.S. citizens also possessing Brazilian nationality cannot be issued Brazilian visas and must obtain a Brazilian passport (from the Brazilian Embassy or Consulate nearest to their place of residence) to enter and depart Brazil." The print-out further stated, "11) Brazilian citizens must travel to Brazil on a Brazilian passport." Applicant testified that he was born in Brazil and that he will be Brazilian forever. It never occurred to him to renounce his Brazilian citizenship. He intends to remain permanently in the United States. He has no intention of surrendering his Brazilian passport and understands that DoD policy precludes him from being granted a security clearance while holding a valid foreign passport. (AE A, Tr. 14-15, 38-41, 45.)

## Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are

applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ 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 or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

## Analysis

### Foreign Influence

Under AG ¶ 9, the Government's concern is, "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."

AG ¶ 10 sets out one condition that could raise a security concern and may be disqualifying in this case:

> (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.

Applicant applied for a Brazilian passport after becoming a U.S. citizen. He maintains his Brazilian passport primarily for ease of travel to visit his mother and other family members living in Brazil. He renewed his Brazilian passport in October 2007 and it will not expire until October 2012. He used his Brazilian passport in lieu of his U.S. passport during visits to Brazil after becoming a U.S. citizen. Applicant understands maintaining his Brazilian citizenship and Brazilian passport is at odds with DoD security policy.

Three Foreign Preference Mitigating Conditions under AG ¶ 11 are potentially mitigating to this disqualifying condition:

> (a) dual citizenship is based solely on parent's citizenship or birth in a foreign country;
>
> (b) the individual has expressed a willingness to renounce dual citizenship; and
>
> (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Had Applicant complied with the mitigating conditions *supra,* especially AG ¶¶ 11(b) and 11(e), he could well have mitigated this concern. Having chosen to maintain his Brazilian citizenship as well as his Brazilian passport for future travel to Brazil precludes application of these mitigating conditions.

**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.

My comments in the Analysis section are incorporated in my whole-person analysis. I recognize and understand Applicant's desire to maintain his citizenship and passport for ease of travel to Brazil particularly with an aging parent living there. Applicant also recognizes the consequences of maintaining dual citizenship with the United States and Brazil and maintaining a valid Brazilian passport as it affects his eligibility to obtain a security clearance.

For reasons discussed *supra*, I conclude Applicant has failed to mitigate the security concerns arising from his foreign preference.

## 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:

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| Paragraph 1, Guideline C: | AGAINST APPLICANT |
| Subparagraph 1a (1) – (3): | 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's security clearance. Eligibility for access to classified information is denied.

ROBERT J. TUIDER
Administrative Judge