



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 10-00463
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel  
For Applicant: *Pro se*

January 12, 2011

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

On June 17, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant. The SOR enumerated security concerns arising 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 DOD on September 1, 2006.

In his August 17, 2010, answer to the SOR, Applicant admitted the three allegations raised in the SOR and requested an administrative determination. Department Counsel submitted a File of Relevant Material (FORM), dated October 14, 2010. Applicant received the FORM on October 21, 2010, but did not submit any additional information for consideration. The case was assigned to me on December 23, 2010. Based on a review of the materials, security clearance is denied.

## Findings of Fact

Applicant is a 44-year-old technical analyst who has worked for the same defense contractor since January 2003. He is single and has no children. Born and raised in Brazil, Applicant fulfilled approximately 11 months of compulsory military service in the Brazilian military in 1985. He received a bachelor's degree from a Brazilian university in 1993. Applicant emigrated to the United States at an indeterminate time.

Applicant became a naturalized United States citizen in February 2009. He is currently a dual-citizen of the United States and Brazil. He has a current U.S. passport. He also maintains a Brazilian passport, which is set to expire in August 2011. He visits Brazil frequently. He last visited Brazil in about June 2009.<sup>1</sup> When traveling to Brazil, he presents both his U.S. and Brazilian passports in order to obviate the necessity of first obtaining a travel visa prior to his trips.<sup>2</sup> While in the U.S. and when visiting Brazil, Applicant maintains frequent contact with his mother and periodic contact with his sister. Applicant would consider giving up his Brazilian citizenship if necessary, but wishes to maintain it because of the "possibility of visiting family [in Brazil] on short notice when necessary."<sup>3</sup>

Applicant chose a decision without a hearing. The FORM consists of Department Counsel's memorandum and seven attachments, including Applicant's Answer to the SOR, his 2009 security clearance application, and two sets of interrogatories from 2010. He provided no additional information in response to the FORM.

## Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

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

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<sup>1</sup> FORM Item 4 (Security Clearance Application, dated Oct. 19, 2009) at 32-33.

<sup>2</sup> FORM Item 5 (Interrogatories) at 6.

<sup>3</sup> FORM Item 6 (Interrogatories) at 2.

classified information will be resolved in favor of the national security.” In reaching my decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence submitted.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”<sup>4</sup> The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.<sup>5</sup>

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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>6</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>7</sup> The decision to deny an individual a security clearance is not a determination as to the loyalty of an applicant.<sup>8</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find Guideline C (Foreign Preference) to be the most pertinent to the case. Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are discussed below.

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<sup>4</sup> See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>5</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Executive Order 10865 § 7.

## Analysis

### Guideline C – Foreign Preference

The concern regarding foreign preference is that when an individual acts in such a way as to indicate a preference for a foreign country over the U.S., then he or she may be prone to provide information or make decisions that are harmful to the interests of the U.S.<sup>9</sup> Conditions that could raise a security concern and may be disqualifying include 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.<sup>10</sup>

Applicant admits that he is a dual citizen of the United States and Brazil, a fact alleged under SOR ¶ 1.a. Dual citizenship is not a bar to a security clearance, nor is it necessarily incompatible with the standards required for access to classified information. The United States Supreme Court recognized a right under the United States Constitution for United States citizens to have dual citizenship with another country.<sup>11</sup> Security concerns can arise not by the mere possession of foreign citizenship, but by exercise of that citizenship. Eligibility for a security clearance must be determined by application of the disqualifying conditions for foreign preference under the factual circumstances.

Applicant completed nearly a year of compulsory military service in Brazil in 1985, as referenced in SOR allegation ¶ 1.c. This service occurred over a decade before he became a United States citizen. While military service or a willingness to bear arms for a foreign country may reflect the exercise of an obligation of foreign citizenship, such service is not disqualifying unless it occurred after an applicant became a U.S. citizen.<sup>12</sup>

Of genuine concern in this case, however, is Applicant's continued maintenance and use of a foreign passport. Such a situation raises Foreign Preference Disqualifying Condition AG ¶ 10(a) (exercise of any right 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).

Here, Applicant's dual citizenship status is based on his birth in Brazil. This fact could potentially raise Foreign Preference Mitigating Condition AG ¶ 11(a) (dual

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<sup>9</sup> AG ¶ 9.

<sup>10</sup> AG ¶ 10(a).

<sup>11</sup> *Afroyim v. Rusk*, 387 U.S. 253 (1967).

<sup>12</sup> See AG ¶ 10(a) and ¶10(a)(2).

citizenship is based solely on parents' citizenship or birth in a foreign country). However, Applicant's sole expression of a potential willingness to relinquish his dual citizenship is tentative and he continues to maintain a foreign passport. Without more information or personal testimony, here is insufficient information to raise AG ¶ 11(b) (the individual has expressed a willingness to renounce dual citizenship).

Applicant is a 44 year old adult who became a U.S. citizen in 2009. He continues to use a current Brazilian passport, although he also has a current U.S. passport which could afford him safe passage in and out of Brazil. Possession of a national passport is a privilege of a nation's citizenship. While simultaneous use of both the U.S. and Brazilian passports may facilitate speedier travel and permit one to travel without a visa, this situation obviates application of AG ¶ 11(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).

Applicant provided no evidence or information indicating sufficient facts to raise AG ¶ 11(d) (use of a foreign passport is approved by the cognizant security authority) or AG ¶ 11(e) (the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated). No other mitigating conditions are applicable.

In continuing to use his valid Brazilian passport, rather than utilize a U.S. passport for all of his international travel, Applicant continues to enjoy the privileges of foreign citizenship. The limited record contains scant information that might tend to mitigate the foreign preference security concerns this use raises. Consequently, security concerns remain unmitigated.

### **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). 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole-person" factors. I note that the information submitted by the Applicant is scant. He is a mature individual who recently became a U.S. citizen. He is a college graduate and gainfully employed. He maintains his Brazilian passport to use in tandem with his U.S. passport to facilitate his passage to, through, and from Brazil, where he often visits his family.

The possession and maintenance of a passport is an exercise of citizenship. Applicant only cited to matters of convenience when explaining why he maintains and uses his foreign passport. His continued use of his Brazilian passport may heighten his ease of travel to and from Brazil, but it presents genuine security concerns that the information of record fails to mitigate. In these cases, the burden is placed squarely on an applicant to present information and evidence that tends to mitigate, extenuate, rebut, or explain those admitted allegations forming the basis for expressed security concerns. The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials. Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. As previously noted, such a conclusion is not a reflection on an applicant's loyalty to the United States. It is merely a determination that an applicant failed to carry his burden. In light of the security concerns remaining unmitigated, clearance is denied.

### **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	For Applicant
Subparagraph 1.b	Against Applicant
Subparagraph 1.c	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 eligibility for a security clearance. Clearance denied.

ARTHUR E. MARSHALL, JR.  
Administrative Judge