DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ISCR Case No. 10-01757
	)	
Applicant for Security Clearance	)	

Appearances

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

February 28, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns regarding Guideline B (foreign influence), but failed to mitigate security concerns regarding Guideline C (foreign preference). Clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) on March 12, 2009. On October 5, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines C (foreign preference) and B (foreign influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program,* dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG), and effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR 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 Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant answered the SOR on October 13, 2010, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated November 17, 2010, was provided to him by cover letter dated November 17, 2010. Applicant received his copy of the FORM on November 24, 2010. He was given 30 days from the date he received the FORM to submit any objections, and information in mitigation or extenuation. He did not submit additional information within the 30-day period. The case was assigned to me on January 14, 2011.

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions are incorporated as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 44-year-old chief scientist and vice president for a defense contractor.[1] He has worked for his employer since March 1993 and held several positions within his company. Applicant is a first-time applicant for a security clearance.

Information contained in the FORM indicates that Applicant was born in Brazil where he spent his formative years. After arriving in the United States, he attended a prestigious U.S. university from 1995 to 2004, and was awarded a PhD. His wife was also born in Brazil. They married in Brazil in January 1994 before immigrating to the United States.

Applicant and his wife became naturalized U.S. citizens in August 2002 and October 2002, respectively. Applicant holds two active passports – a U.S. passport and a Brazilian passport. He recently renewed his Brazilian passport in March 2010 and it is valid until March 2015. (Items 5 and 6.) Applicant has a 13-year-old U.S.-born son who also holds dual citizenship with Brazil and the United States.

Applicant frequently travels to Brazil to visit his immediate family consisting of his mother, sister, and brother, as well as his in-laws. These family members are citizens and residents of Brazil. When Applicant travels to Brazil, he uses his Brazilian passport in lieu of his U.S. passport. He remains in frequent contact with his immediate family and several of his in-laws in Brazil. His family knows that he works in research, but only his wife and son know of his clearance application. Applicant claims that the process to renounce his Brazilian citizenship and get a visa using his U.S. passport is "very

[1] Background information is derived from Applicant's e-QIP unless otherwise stated.

cumbersome." He stated the Brazilian Consulate advised him this process may take up to 18 months. He added that his elderly mother has a heart condition and he does not want to place himself in a situation where he is unable to visit her on short notice. Additionally, Applicant provides an unspecified amount of money to his in-laws to help them with their living expenses. None of Applicant's relatives or associates have any ties to the Brazilian government. As a citizen of Brazil, Applicant reports that he exercises his obligation to vote for the Brazilian president, which remains a requirement for him as a Brazilian citizen. (Items 5 and 6.)

When Applicant's father passed away in 1966, he inherited a portion of his estate consisting of industrial and residential properties valued at approximately $175,000. He receives no income from these properties and his mother maintains 50% control over the properties. This is in contrast to his U.S. net worth of approximately $1 million. Applicant stated that his Brazilian assets constitute a small portion of his wealth, which he would "walk away" from if needed. (Items 5 and 6.)

Applicant stated, "…my family and I are in all respect loyal and devoted American citizens. Our inability to renounce our Brazilian citizenship is a result of arcane Brazilian laws that make it difficult to do so, and does not in any way represent any disloyalty to the United States." He added, "Most importantly to me, I want to be absolutely clear my dual citizenship does not represent a division of loyalty in any fashion, which I consciously dedicated to the United States on the occasion (of) my oath at the naturalization ceremony." (SOR Response.)

Policies

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). 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 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 and modified.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). These guidelines 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 overarching 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.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of or about potential, rather than actual, risk of compromise of classified information. Adverse clearance decisions are made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [a]pplicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination of or about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant 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 therein 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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guidelines C (foreign preference) and B (foreign influence) with respect to the allegations set forth in the SOR.

Foreign Preference

AG ¶ 9 describes the foreign preference security concern stating, "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 describes conditions that could raise a security concern and may be disqualifying in Applicant's 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;
>
> (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 in Brazil, is a dual citizen of Brazil and the United States, maintains and uses his Brazilian passport in lieu of his U.S. passport when visiting Brazil, and votes in Brazilian elections for president. He recently renewed his Brazilian passport in March 2010 for five years. He does not intend to relinquish his Brazilian passport at this time. Based on his continued possession and use of a Brazilian passport, his dual citizenship, and his voting in Brazilian presidential elections, AG ¶ 10(a)(1) and (7) apply.

AG ¶ 11 provides conditions that could mitigate 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 does not intend to relinquish his Brazilian passport. He cites as the primary reason for maintaining his Brazilian passport is ease of travel to Brazil to visit his elderly mother who is suffering from a heart condition. He added that renouncing his Brazilian citizenship and obtaining a visa to visit Brazil using his U.S. passport is a time consuming process that he cannot undertake at this time given his mother's age and current health condition. He has a close relationship with his family living in Brazil; however, he does not have a close relationship to the Brazilian government. He votes in Brazilian presidential elections out of obligation as a Brazilian citizen. None of the mitigating conditions fully apply, and foreign preference concerns are not mitigated.

Foreign Influence

AG ¶ 6 explains the security concern about "foreign contacts and interests" stating:

Foreign 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. 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 ¶ 7 indicates three conditions that could 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;
>
> (d) 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; and
>
> (e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

AG ¶¶ 7(a), 7(b), 7(d) and 7(e) are raised by Applicant's relationships with his family members who are living in Brazil. Applicant, his spouse, and son are dual United States-Brazilian citizens. His mother, brother, sister, and in-laws are living in Brazil and are citizens of Brazil. He shares living quarters with his spouse and son. Applicant inherited industrial and residential properties in Brazil valued at approximately $175,000.

Applicant's communications with his relatives in Brazil are frequent. "[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Feb. 20, 2002). Applicant has not fully rebutted this presumption. Applicant and his spouse's relationships with family living in Brazil are sufficient to create "a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." These relationships with residents of Brazil create a concern about Applicant's "obligation to protect sensitive information or technology" and his desire to help his family living in Brazil.

The mere possession of close family ties with a family member living in Brazil is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one relative living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could possibly result in the compromise of classified information. *See generally* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

The nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an Applicant's family members are vulnerable to government coercion or inducement. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government or the country is known to conduct intelligence collection operations against the United States. The Government did not submit a country summary or any evidence regarding the Brazilian government or evidence regarding the relationship between Brazil and the United States. The absence of record evidence places a much lesser burden of persuasion on Applicant to demonstrate that his relationships with his family members living in Brazil do not pose a security risk. Even with this minimal risk, Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist his family living in Brazil.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

While there is no evidence that intelligence operatives from Brazil seek or have sought classified or economic information from or through Applicant, his spouse, or his family living in Brazil, it is not possible to rule out such a possibility in the future. Applicant's communications with his family living in Brazil are frequent, and he stated he is close to his family in Brazil. Applicant's concern for the welfare of his family living in Brazil is a positive character trait that increases his trustworthiness; however, it also increases the concern about potential foreign influence. Applicant also acquired industrial and residential properties in Brazil through inheritance. The Government produced substantial evidence to raise the issue of potential foreign pressure or attempted exploitation. AG ¶¶ 7(a), 7(b), 7(d) and (7(e) apply, and further inquiry is necessary about potential application of any mitigating conditions.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns including:

> (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;

(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.

AG ¶¶ 8(a), 8(c), and 8(f) have limited applicability. Applicant frequently travels to Brazil to visit his immediate family and in-laws. Applicant and his wife have frequent contacts with their family members living in Brazil. The amount of contacts between an Applicant and relatives living in a foreign country are not the only test for determining whether someone could be coerced or influenced through their relatives. Because of his connections to his wife, and their connections to their family members living in Brazil, Applicant is not able to fully meet his burden of showing there is "little likelihood that [he and his spouse's relationships with relatives who are residents of Brazil] could create a risk for foreign influence or exploitation." He admitted that he feels close to his family living in Brazil.

AG ¶ 8(b) fully applies. Applicant has "deep and longstanding relationships and loyalties in the U.S." He has strong family connections to the United States. His spouse and only child are U.S. citizens and live in the United States. Applicant has substantial assets in the United States valued at approximately $1 million. He received his PhD degree in the United States. He has been employed at the same U.S. company for almost 18 years and holds a key position within that company.

Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationships with his family members who live in Brazil. There is no evidence that terrorists, criminals, the Brazilian government, or those conducting espionage have approached or threatened Applicant, his wife, or their family members living in Brazil to coerce or influence Applicant for classified or sensitive information. As such, there is a reduced possibility that Applicant or Applicant's family would be specifically selected as targets for improper coercion or exploitation. While the

Government does not have any burden to prove the presence of such evidence, if such record evidence was present, Applicant would have a heavy evidentiary burden to overcome to mitigate foreign influence security concerns.

AG ¶¶ 8(d) and 8(e) do not apply. The U.S. Government has not encouraged Applicant's involvement with his family living in Brazil. Applicant is not required to report his contacts with his family living in Brazil.

AG ¶ 8(f) is applicable. Applicant has substantial property interests in the United States. His net worth in the United States is $1 million in contrast to $175,000 worth of inherited industrial and residential properties of which he has limited control over and is willing to "walk away" from. He also has a significant employment stake in his company where he serves as chief scientist and vice president.

In sum, the primary foreign influence security concern is Applicant and his wife's close relationship with their family members living in Brazil, which are readily available for coercion or attempts to influence. There is no evidence that the Brazilian government has a history of espionage against the United States. Nor are there any cases in which Brazil used relatives living in Brazil to pressure security clearance holders to compromise national security. All foreign influence security concerns are mitigated because of Applicant's "deep and longstanding relationships and loyalties in the U.S." which are discussed in more detail in the whole-person concept, *infra*.

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 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. I have incorporated my comments under Guidelines C and B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under this guideline, but some warrant additional comment.

There are some facts supporting mitigation of security concerns. Applicant has lived in the United States with his wife for approximately 18 years. Their only son was born in the United States. Applicant has had a successful career with his company, attained a prominent position within his company, and acquired substantial assets. He has earned a PhD degree in the United States.

There is no derogatory information concerning Applicant's police, financial, or employment records. There is no evidence of record showing any U.S. arrests, illegal drug possession or use, or alcohol-related incidents. He is a law-abiding U.S. citizen who expresses a preference for the United States interests over the interests of the Brazilian Government. He considers the United States to be his home. Applicant's statements regarding his loyalty towards the United States are important factors militating towards approval of his access to classified information.

The danger of coercion from the Brazilian government is minimal. Brazil and the United States have enjoyed a cordial relationship throughout the years. There is no evidence that Brazilian citizens were coerced by Brazil into betraying the United States, or that their relatives living in Brazil were used by Brazilian intelligence officials to obtain classified information from security-clearance holders.

The circumstances tending to support denial of Applicant's clearance under Guideline C are more significant than the factors weighing towards approval of his clearance at this time. Applicant continues to hold a Brazilian passport, and he intends to use it in the future to enter and exit Brazil.

I have carefully applied the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole-person. I conclude he has mitigated the foreign influence concerns. However, he has not fully mitigated the foreign preference security concerns resulting from his continuing retention of a Brazilian passport, and his plans to use it to visit family members living in Brazil, as well as continuing to vote in Brazilian presidential elections after receiving his U.S. citizenship.

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 1a – 1d:	Against Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 2a – 2i:	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. Eligibility for access to classified information is denied.

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Robert J. Tuider
Administrative Judge