



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



In the matter of:	)	
	)	
	)	ISCR Case No. 10-04363
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Candace L. Garcia, Esquire, Department Counsel  
For Applicant: *Pro se*

February 28, 2011

**Decision**

LAZZARO, Henry, Administrative Judge

Applicant, a naturalized U.S. citizen since 1993, failed to mitigate the security concern caused by his possession and use of a foreign passport. Clearance is denied.

On August 17, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.<sup>1</sup> The SOR alleges a security concern under Guidelines C (foreign preference). Applicant submitted a response to the SOR, dated September 10, 2010, in which he admitted all SOR allegations and requested a decision based on the record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) on October 19, 2010, which was mailed to Applicant on October 21, 2010. Applicant was notified he had 30 days from receipt of the FORM to submit his objections thereto or any additional

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<sup>1</sup> This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), and the adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

information he wanted considered. Applicant acknowledged receipt of the FORM on October 26, 2010. His response to the FORM was received by DOHA on November 24, 2010. The case was assigned to me on December 15, 2010.

### **Findings of Fact**

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings and exhibits, I make the following findings of fact:

Applicant is a 51-year-old man who has been employed continuously by a defense contractor since February 1989. He previously worked for the same contractor from 1985 to 1988. Applicant is currently a vice president and general manager for the contractor.

Applicant was born in Brazil in 1960. He first came to the U.S. as a tourist in 1976. He returned to the U.S. on a student visa in 1978, and he has resided in the U.S. since. Applicant graduated from college in the U.S. in 1982. He obtained a masters degree from a school in the U.S. in 1984. He obtained a second masters degree from a university in the U.S. in 1992.

Applicant became a permanent resident U.S. alien in about 1985. He became a naturalized U.S. citizen in October 1993, and he has possessed a U.S. passport since at least October 2003. Applicant's parents joined him in the United States in the 1980s. They both became naturalized U.S. citizens in the early-1990s. Applicant's parents are now retired and live in the United States. Applicant does not have any siblings.

Applicant maintains dual citizenship with Brazil. Since becoming a U.S. citizen, he has renewed his Brazilian passport in July 1997, June 2002, and February 2009. His current Brazilian passport will not expire until February 2014. There is no indication in the record that Applicant has ever contemplated renouncing his Brazilian citizenship.

Applicant travels extensively throughout the world as part of his employment. He uses his U.S. issued passport for all international travel, with the sole exception of his travels to Brazil. Applicant explained that because he is a dual citizen with Brazil he must use a Brazilian passport to enter that country and he is ineligible to receive a visa to enter Brazil on his U.S. passport. His employment requires him to travel to Brazil on occasion. He also has a few friends and relatives who reside in Brazil, who he intends to visit in the future.

Applicant has been married to a U.S. citizen since June 1991. He and his wife have three children, ages 18, 14, and 9. Applicant's children are dual citizens of the U.S. and Brazil, having acquired Brazilian citizenship at birth by virtue of Applicant's Brazilian citizenship. Applicant's two oldest children possess Brazilian passports so they can travel with Applicant to Brazil to visit friends and relatives.

### **Policies**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying and

mitigating conditions for each applicable guideline. Clearance decisions must be fair and impartial decisions based upon relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶¶ 6.3.1 through ¶¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline C (foreign preference), with its disqualifying and mitigating conditions, is most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>2</sup> The Government has the burden of proving controverted facts.<sup>3</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence,<sup>4</sup> although the Government is required to present substantial evidence to meet its burden of proof.<sup>5</sup> “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”<sup>6</sup> Once the Government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against her.<sup>7</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>8</sup>

No one has a right to a security clearance<sup>9</sup> and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>10</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>11</sup>

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<sup>2</sup> ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

<sup>3</sup> ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

<sup>4</sup> *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

<sup>5</sup> ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

<sup>6</sup> ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

<sup>7</sup> ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

<sup>8</sup> ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

<sup>9</sup> *Egan*, 484 U.S. at 528, 531.

<sup>10</sup> *Id* at 531.

<sup>11</sup> *Egan*, Executive Order 10865, and the Directive.

## Analysis

### Guideline C, Foreign Preference

Foreign preference is a concern because 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.

Applicant possesses a current Brazilian passport which he is unwilling to relinquish or otherwise invalidate because he needs it to travel to Brazil on business and to visit friends and relatives in Brazil. Disqualifying Condition (DC) 10(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 applies.*

Applicant has renewed his Brazilian passport on at least three occasions since he became a U.S. citizen. He has used that passport to travel to Brazil in the past and he intends to use it for future travel to Brazil. His children acquired dual citizenship with Brazil by virtue of Applicant's Brazilian citizenship, and the two oldest children have obtained Brazilian passports to allow them to travel to Brazil with Applicant to visit friends and relatives.

As a dual citizen with Brazil, Applicant apparently does require a Brazilian passport to travel to that country. However, he has resided in the U.S. since 1978, he has worked continuously for the same employer in the U.S. since 1989, and he has been a U.S. citizen since 1993. There is no record evidence to indicate why Applicant has retained his Brazilian citizenship, or that he has ever considered renunciation of that citizenship as an alternative to renewal of his Brazilian passport.

Security clearance decisions are made in terms of the national interest and are in no sense a determination as to the loyalty of an applicant.<sup>12</sup> There is nothing in this record to indicate that Applicant is anything but a loyal U.S. citizen or that he has an actual preference for Brazil over the U.S. However, because Applicant retains a Brazilian passport that he is unwilling to surrender, I am unable to find that he has refuted, extenuated, or mitigated the foreign preference concerns alleged by the Government. Thus, I am compelled to find no mitigating condition exists and that Applicant has failed to mitigate the foreign preference security concern.

I have considered all relevant and material facts and circumstances present in this case, the whole-person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions. Applicant failed to mitigate the foreign preference security concern that exists in this case. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. Guideline C

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<sup>12</sup> Executive Order 10865



