



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



In the matter of:

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ISCR Case No. 11-02652

Applicant for Security Clearance

Appearances

For Government: Braden Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

January 24, 2012

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, items, and legal arguments in the case file, Applicant mitigates foreign influence security concerns but does not mitigate foreign preference security concerns. Clearance is denied.

History of Case

On July 14, 2011, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which 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 his clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on August 13, 2011, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on October 6, 2011. Applicant did not submit any information in response to the FORM. The case was assigned to me on December 22, 2011.

Besides its seven items, the Government requested administrative notice of one document: *Country Specific Information, Brazil*, U.S. Department of State (November 10, 2010). Applicant did not ask to include any items addressing Brazil's country status.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 (App. Bd. April 12, 2007); ISCR Case No. 05-11292 (App. Bd. April 12, 2007). Administrative notice is appropriate for noticing facts or government reports that are well known. See *Stein*, Administrative Law, Sec. 25.01 (Bender & Co. 2006). For good cause shown, administrative notice was granted with respect to the above-named background reports addressing the geopolitical status of Brazil.

Summary of Pleadings

Under Guideline C, Applicant is alleged to have exercised dual citizenship with Brazil after becoming a U.S. citizen in January 2007 by (i) applying for, obtaining, and holding a Brazilian passport issued in January 2009 and not subject to expiration before January 2014 and (b) using his Brazilian passport, instead of his U.S. passport, for travel in at least December 2009.

Under Guideline B, Applicant is alleged (a) to have a mother, brother, and sister who are citizens and residents of Brazil and (b) to have a daughter who is a dual citizen of Brazil and the U.S.

In his answer to the SOR, Applicant denied each of the allegations under Guidelines C and B. He claimed his holding a Brazilian passport was required by Brazilian authorities to enter and depart Brazil and claims no member of his family has any knowledge of his security clearance application, understanding of the significance of a security clearance, or the products his company makes. And he claims to have disclosed his daughter's dual citizenship and her use of a Brazilian passport for traveling convenience.

Findings of Fact

Applicant is a 38-year-old supply chain manager for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Applicant's background

Applicant was born and raised in Brazil to parents of Brazilian citizenship and residency. By virtue of his birth to Brazilian parents, Applicant was awarded Brazilian citizenship himself. He attended Brazilian primary and secondary schools. Applicant immigrated to the U.S. from Brazil sometime in 2003 (specific date of entry not provided). Applicant married his spouse (a U.S. citizen by birth) in May 2003 and has one child (age three) from this marriage. (Item 4). By virtue of his dual citizenship with Brazil, his daughter is a dual citizen of Brazil and the U.S. as well. (Items 3 and 4)

Applicant applied for U.S. citizenship and became a naturalized U.S. citizen in January 2007. (Item 4) He obtained a U.S. passport in February 2007. (Items 4 and 6) After becoming a naturalized U.S. citizen, he retained his Brazilian citizenship, because Brazil requires "anyone born in Brazil to travel in and out of Brazil with a Brazilian passport only." (Item 7) U.S. passports, in turn, are not accepted from Brazilian natives. (Item 7) Applicant has never renounced his Brazilian citizenship and never destroyed or turned in his Brazilian passport after becoming a U.S. citizen. Applicant applied for an updated Brazilian passport and received a newly issued Brazilian passport in January 2009. (Item 6) This passport will not expire until January 2014. (Item 6) Because he has family (mother, brother, and sister) still residing in Brazil, he is reluctant to destroy or relinquish his Brazilian passport.

Because of Brazilian legal requirements, Applicant can enter and exit Brazil for family emergencies only with his Brazilian passport. (Items 5 and 7) And in the event his Brazilian passport was destroyed or surrendered, he would be required to obtain a new one, a long and expensive process. So, consequently, Applicant is disinclined to destroy or surrender his Brazilian passport, or renounce his Brazilian citizenship. (Item 6)

Since becoming a U.S. citizen in 2007, Applicant has traveled on a couple of occasions to destinations outside the U.S., using his Brazilian passport exclusively to depart and re-enter the U.S. (Items 6 and 7) For instance, he used his Brazilian passport to travel to Brazil in December 2009 to visit his family, returning in January 2010. (Item 6) He is currently unwilling to destroy or surrender his Brazilian passport to his facility clearance officer (FSO) because of Brazilian requirements to obtain a new Brazilian passport for any future trip to Brazil to see his family. (Item 6) For the same reasons, Applicant is unwilling to consider renouncing his Brazilian citizenship. Applicant remains a dual citizen of the U.S. and Brazil. (Items 4, 6, and 7)

Applicant has never voted in a Brazilian election. While eligible, he never served in the Brazilian military, and is currently not subject to conscription. (Item 7) He has no business, financial, or property interests in Brazil, and considers the U.S. his principal place of residence and the country of his predominant loyalty. (Item 7) His three-year-old daughter has both a U.S. passport and Brazilian passport, which she uses to travel to and from Brazil. (Item 7)

Applicant's family ties in Brazil

Applicant's mother, brother, and sister are citizens and residents of Brazil. (Item 4) His mother was born in Brazil and is a retired seamstress. (Item 7) Applicant maintains weekly telephone contact with her and sees her once a year. (Item 7) She is not familiar with Applicant's work or aware of his application for a security clearance.

Besides his mother, Applicant has two siblings who are citizens and residents of Brazil. Both were born and raised in Brazil. (Item 7) Applicant communicates by telephone with his brother once or twice a year and sees him once a year when he

visits Brazil. (Item 7) His brother is a mechanical technician for a private German steel company operating in Brazil. His brother has no known affiliations or sympathies with any foreign governments or interests in them. (Item 7)

Applicant also has a sister who is both a citizen and resident of Brazil. (Item7) He maintains telephonic contact with her weekly and sees her every two years when he visits Brazil. (Item 7) His sister is a housewife with no affiliation with any foreign governments. The administrative record does not provide any documentation of whether or not the parents and siblings have ever worked or associated with officials of the Brazilian government and military.

Brazil's country status

Brazil is a federation of states with an advanced developing economy. (Item 8) Brazil remains a non-hostile trading partner of the U.S. and is a country whose democratic institutions are not incompatible with our own traditions and respect for human rights and the rule of law. Brazil maintains strong bilateral trading and commercial relations with the U.S. and is a charter member of the Organization of American States. *See Country Specific Information, Brazil, supra.* (Item 8) Brazil is a country with no known recent history of government-sponsored hostage taking or disposition for exerting undue influence against family members to obtain either classified information, or unclassified economic and proprietary data. (*id.*)

Policies

The Adjudicative Guidelines for Determining Eligibility for Access to Classified information (effective September 2006) list Guidelines to be considered by administrative judges in the decision-making process covering DOHA cases. These Guidelines require the administrative judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the administrative judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2 (a) of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the administrative judges in reaching a fair and impartial commonsense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Foreign Preference

The Concern: "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." See Adjudicative Guideline (AG) C, § 9.

Foreign Influence

The Concern: "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." See AG B, § 6.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted facts alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant, who is employed by a U.S. defense contractor, was born and raised in Brazil. He immigrated to the U.S. in 2003 and became a naturalized citizen in January 2007. Claiming the need for a Brazilian passport to enable him to legally enter and exit

Brazil, he retained and renewed his Brazilian passport after becoming a U.S. citizen and obtaining a U.S. passport.

Dual citizenship concerns necessarily entail country allegiance assessments and invite critical considerations over acts indicating a preference for the interests of the foreign country over the interests of the U.S. In a different vein, the continued residence of his immediate family members (his parents, brother, and sister) in Brazil raise potential concerns about their being vulnerable to future pressure or duress that could result in the compromise of classified information. To some consent, too, Applicant's young daughter's dual citizenship with Brazil, and the chances of her accompanying Applicant on his trips to Brazil, raise potential concerns. The issues, as such, raise security concerns over Applicant's preference for a foreign country over the U.S., and the potential for members of Applicant's immediate family being placed at risk to pressure Applicant to divulge classified information he might be privy to.

Foreign Preference

By virtue of his birth in Brazil to parents of Brazilian descent and citizenship, Applicant was endowed with Brazilian citizenship. This citizenship could not be lost except by express renunciation, approved by the Brazilian government which Applicant has never explored. He renewed his Brazilian passport in 2009 and has never expressed any willingness to surrender it. He still retains his Brazilian passport for use in entering and exiting Brazil to see his family and has provided no documentation of his surrendering the passport to his FSO, or other; authorized official. Risks of his being taken hostage behind Brazilian lines and denied the customary diplomatic intercession made available to U.S. citizens traveling on U.S. passports remains for so long as Applicant retains his Brazilian passport.

The Appeal Board has tended to blur convenience/force of law distinctions when appraising claimed legal necessity reasons (concerns about dealing with Brazilian officials in Applicant's case) for holding onto a foreign passport. See ISCR Case No. 99-0424 (App. Bd. February 8, 2001); ISCR Case No. 99-0254 (App. Bd. February 16, 2000). To be sure, Applicant's exercise of choice to renew and retain his Brazilian passport for use when traveling to Brazil after becoming a U.S. citizen is itself a voluntary election. He made his election to continue holding his Brazilian passport and citizenship with presumptive knowledge that his traveling to Brazil on the strength of a Brazilian passport jeopardized the ability of U.S. security personnel to monitor and track his movements and provide diplomatic assistance should it become necessary to protect him and secrets he might be privy to.

While Applicant's desire to have continued personal access to his family members in Brazil by the only legal means currently available to him under Brazilian law is understandable, his personal interests cannot take precedence over the Government's security interests. Considered in this light, Applicant's election to retain his Brazilian passport and citizenship in compliance with Brazilian ingress and egress requirements may not be recognized as an exception to Guideline C's published preference criteria. By this line of Appeal Board reasoning, Applicant's application for

renewal of a Brazilian passport reflected a conscious preference for Brazil, even if his reissuance application was for perfectly logical and understandable reasons.

So, even Applicant's claimed exercise of dual citizenship under compulsion of law is sufficient under the facts of this case to invoke one disqualifying condition of the Guidelines covering foreign preference: 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," which includes possession of a current foreign passport. Concerns over Applicant's foreign preference for Brazil through his continued possession of his Brazilian passport and dual U.S.-Brazilian citizenship remain considerable.

Applicant, to be sure, has no assets in Brazil and assures his preference is for the U.S. He has never voted in a Brazilian election, served in Brazil's military, or worked for the Brazilian government. By contrast, all of his assets and financial interests are located in the U.S. And his dual citizenship with Brazil is based solely on his parents' Brazilian citizenship and his birth in that country. Still, he retains his Brazilian passport and citizenship and has expressed no willingness to abandon either one. For these reasons, none of the available mitigating conditions covered by Guideline C apply.

Considering all of the circumstances surrounding Applicant's exercise of dual citizenship and lack of any documented surrender of his Brazilian passport or clear expression of an intent to renounce his Brazilian citizenship, conclusions warrant that foreign preference concerns are not mitigated. Unfavorable conclusions are entered with respect to subparagraph 1.a of Guideline C of the AGs.

Foreign Influence

Principal security issues raised under Guideline B center on Applicant's mother and siblings who are citizens and residents of Brazil and his daughter who retains dual citizenship with Brazil and the U.S. Security concerns are raised over risks that both Applicant's immediate family members residing in Brazil, and his daughter who has dual citizenship with Brazil and the U.S., might be subject to undue foreign influence by Brazilian government and military authorities to access classified information in Applicant's possession or control.

Because Applicant's family members either are citizen/residents of Brazil, or have dual citizenship and the potential to travel to Brazil (as is the case with Applicant's young daughter), they present potential heightened security risks covered by disqualifying condition (DC) § 7(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 the Intelligence Community Directive (ICD) 704, *Personnel Security Standards and Procedures Eligibility*, dated, October 1, 2008; the Intelligence Community Policy Guidance (ICPG) 704.2, heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion," of Guideline B. The citizenship/residence status of these family members in Brazil, and to some extent Applicant's young daughter who resides in the U.S., pose some potential concerns for

Applicant because of the risks of undue foreign influence that could compromise sensitive or classified information under Applicant's possession and/or control.

Historically, the Appeal Board has been clear and consistent in its holdings that the nature of the foreign government, the intelligence gathering history of that government, and the presence of terrorist activity in the country are material to a foreign influence case. See ISCR Case No. 07-07266 (App. Bd. Dec. June 27, 2008); ISCR Case no. 0226130 (App. Bd. Dec. Dec. 7, 2006). So, clearly, the geopolitical aims and policies of the particular foreign regime involved do matter. Brazil (the country under scrutiny in this case) has both a respectable human rights record and strong bilateral commercial relations with the U.S.

Because of Brazil's acceptable human rights record and strong bilateral relations with the U.S., any potential heightened risk of a hostage situation or undue foreign influence brought in the hopes of eliciting either classified information or economic or proprietary data out of Applicant through his family members residing in Brazil or young daughter should she travel to Brazil, is quite remote. Applicant, accordingly, may take advantage of one important mitigating condition: MC § 8(a), "the nature of the relationships with foreign persons, the country in which these persons are located, or the persons or activities of these 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 a foreign individual, group, organization, or government and the interests of the U.S." Whatever potential conflicts he may have through his continued exercise of Brazilian citizenship and contacts with his family members in Brazil have been more than counterbalanced by his demonstrated U.S. citizenship responsibilities.

Due to the infrequency of the contacts Applicant has historically had with most of his family members (his mother excepted), potential risks associated with them are tempered. Moreover, none of Applicant's family members have any identified affiliations or contacts with Brazilian government or military officials known to be associated with intelligence or military organizations interested in collecting proprietary or sensitive information in the U.S. Nor does Applicant or his young daughter have any known contacts with Brazilian government or military officials that could be exploited or subjected to pressure.

Further, from what is known from the presented evidence, none of Applicant's family members in Brazil have any known (a) political affiliations with Brazil's government, (b) history to date of being subjected to any coercion or influence, or (c) major indications of any vulnerability to the same. His mother is a retired seamstress; his brother is a mechanical technician; and his sister is a housewife. None appear to have any financial or business interests that could be at risk to exploitation or pressure.

The AGs governing collateral clearances do not dictate *per se* results or mandate particular outcomes for applicants with relatives who are citizens/residents of foreign countries. What is considered to be an acceptable risk in one foreign country may not be in another. While foreign influence cases must by practical necessity be weighed on a case-by-case basis, guidelines are available for referencing in the supplied materials

and country information about Brazil. Unlike the old AGs, the new ones explicitly take into account the country's demonstrated relations with the U.S. as an important consideration in gauging whether the particular relatives with citizenship and residency elsewhere create a heightened security risk. The geopolitical aims and policies of the particular foreign regime involved do matter. Brazil remains a friendly country of the U.S. with strong bilateral trade and commercial relations, an acceptable human rights record, and historical respect for the rule of law.

MC § 11 (8(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," has application, too, to Applicant's situation. Applicant is a naturalized U.S. citizen with no known financial interests in Brazil that could pose potential conflicts for him and his family members residing in Brazil. Whatever potential conflicts he may have through his family members who reside in Brazil are more than outweighed by Applicant's demonstrated U.S. citizenship responsibilities.

Whole-person assessment also serves to minimize Applicant's exposure to conflict of interests with his Brazilian family members. Not only is Applicant a naturalized U.S. citizen with demonstrated loyalty and professional commitments to the U.S., but he has shown no inclination to expose himself to coercion or pressure. Any foreign influence risks associated with his family members (viz., his immediate members who reside in Brazil and his daughter who resides in the U.S.) are clearly manageable ones. In Applicant's case, any likelihood of coercion, pressure, or influence being brought to bear on any of his family members by Brazilian authorities is minimal.

Overall, any potential security concerns attributable to Applicant's immediate family members residing in Brazil are sufficiently mitigated to permit safe predictive judgments about Applicant's ability to withstand risks of undue influence attributable to his familial relationships in Brazil. Favorable conclusions warrant with respect to the allegations covered by sub-paragraphs 2.a and 2.b of Guideline B.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E2 (a) of the Adjudicative Process of Enclosure 2 of the Directive.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE C (FOREIGN PREFERENCE): AGAINST APPLICANT

Subpara: 1.a AGAINST APPLICANT

GUIDELINE B: (FOREIGN INFLUENCE): FOR APPLICANT

Subparas. 2.a and 2.b: FOR APPLICANT

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge