DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ISCR Case No. 06-22025
SSN: XXX-XX-XXXX	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Candace Le'i, Esquire., Department Counsel
For Applicant: *Pro se*

October 30, 2008

_____

Decision

_____

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to Foreign Influence and Personal Conduct. Clearance is granted.

Statement of the Case

Applicant submitted his Standard Form (SF) 86 on October 27, 2005. On March 18, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government's security concerns under Guidelines B (Foreign Influence) and E (Personal Conduct). 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, 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 him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant answered the SOR on April 2, 2008, and requested a hearing before an Administrative Judge. DOHA received Applicant's answer to SOR on April 8, 2008. Department Counsel was prepared to proceed on May 14, 2008, and I received the case assignment on June 9, 2008. DOHA issued a notice of hearing on June 20, 2008, scheduling the case for July 17, 2008. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 4. Applicant objected to GE 1 on the grounds of authenticity, and had no objection to GE 2 through GE 4. I admitted GE 1 over Applicant's objection, and also admitted GE 2 through GE 4. Applicant offered Applicant's Exhibits (AE) A through AE E. Department Counsel objected to all of Applicant's exhibits on the grounds of authenticity and hearsay. I admitted AE A through E over Department Counsel's objections. Applicant testified on his own behalf. DOHA received the hearing transcript (Tr.) on July 25, 2008.

PROCEDURAL RULINGS

Request for Administrative Notice

Department Counsel submitted a Request for Administrative Notice (Exhibit (Ex.) I(A)), requesting that I take administrative notice of the summary of facts contained in Ex. I(A) as well as those facts in Exs. I through V. Without objection from Applicant I took administrative notice of the documents offered by Department Counsel, which pertained to Columbia. Tr. 13-15.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. *See* ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from Government reports. *See* Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Various facts pertaining to Columbia were derived from Exs. I(A), and I through V as contained *infra* under the subheading "Columbia" of this decision.

Findings of Fact

As to the SOR's factual allegations, Applicant admitted the allegations in SOR ¶¶ 1.a. – 1.d., and 1.f. He denied ¶¶ 1.e. and 2.a. - 2(b)(1) – (3). His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant testified at his hearing, and I found his testimony to be credible. Applicant is a 50-year-old software engineer, who has been employed by his defense contractor employer since November 2005. GE1, Tr. 25-26. He has successfully held a security clearance at some level since 1981. In 1981, he was granted a secret security clearance shortly after enlisting in the U.S. Air Force, discussed *infra.* That clearance was later upgraded to a top secret security clearance in 1994, which he has continuously held since then. When he was transitioning from the Air Force, he applied for a job with the Central Intelligence Agency (CIA). He was vetted for and granted a top secret clearance in 2001 by the CIA, but "decided not to take the job." He seeks to renew his top secret clearance, which is an employment requirement. GE 1, Tr. 25-28.

Applicant was born in Columbia in March 1958. GE 1. In December 1973 at age 15, he immigrated to the U.S. after being "sponsored" by his older brother, who was already living in the U.S. He completed high school in the U.S. and later joined the Air Force. Applicant honorably served in the Air Force from February 1981 to March 2001, and retired from active duty as a technical sergeant (pay grade E-6). Tr. 30. His Air Force Specialty Code (AFSC) was 702/computer programmer. Tr. 32-33.

Applicant became a naturalized U.S. citizen in May 1981 shortly after enlisting in the Air Force. He holds a current U.S. passport and does not hold any other passport. GE 1. Applicant was awarded a Bachelor of Science degree in computer science in May 1996, and master's degree in software engineering in May 2003. GE 1, Tr. 23-24.

Applicant is married to his fifth and current wife, who he married in October 2003. He was married to his fourth wife from 1998 to 2003, he was married to his third wife from 1992 to 1998, he was married to his second wife from 1980 to 1991, and was married to his first wife from 1975/1976 to 1978. His first four marriages ended by divorce. GE 1, GE 4, Tr. 19-23. Applicant has three children, a 27-year-old son and a 17-year-old son born during his marriage to his second wife. He has a 3-year-old son born during his current marriage. GE 1, Tr. 33-35.

Applicant has eight immediate family members. Applicant's parents and siblings were all born in Columbia. His immediate and other family members are discussed *infra*.

Wife. His current wife is 32 years old and is a U.S. born citizen. She is employed as a bank teller. GE 4.

Children. Applicant has three sons, ages 27, 17, and 3, discussed *supra*. All of his children are U.S. born citizens and reside in the U.S.

Brother. This is Applicant's oldest brother, age 65. He immigrated to the U.S. from Columbia in 1961, and is a naturalized U.S. citizen. This brother resides in the U.S. owns a dental laboratory, and hopes to retire in the near future. He is married and has four children. Although Applicant does not live close to this brother, he communicates with him weekly by telephone or e-mail. Tr. 68-71.

Brother. This is Applicant's second oldest brother, age 61. He immigrated to the U.S. from Columbia in 1988, and is a naturalized U.S. citizen. This brother has never been married, and lives near Applicant. Applicant visits with this brother weekly. This brother sponsored Applicant to immigrate to the U.S. in 1973, discussed *supra.* Tr. 71-72, 78.

Sister. This is Applicant's only sister, age 55, and she is a Columbian citizen residing in Columbia. She is married and a homemaker with two children, a daughter (Applicant's niece) and a son (Applicant's nephew). Her husband (Applicant's brother-in-law) has been employed by the Columbian government for 30 years as an electrician. Applicant's niece, age 25, attended college in the U.S. and works for a mortgage company in the U.S. Applicant's niece lives near Applicant and he communicates with her "twice a month." She plans on becoming a U.S. citizen when eligible. Applicant's nephew, age 30, is currently unemployed, and lives in Columbia. Applicant communicates with his sister by telephone "[o]nce a month maybe." Tr. 47-51, 72-75. (SOR ¶ 1.c.)

Brother. This is Applicant's younger brother, age 48, and he is a Columbian citizen residing in Columbia. He is separated from his second wife, has three children, and lives in Columbia. He has been deported twice from the U.S. back to Columbia in 1988 and 2000, both times for selling drugs. He is not allowed to return to the U.S. Applicant stays in contact with his younger brother "two times a year" by telephone or e-mail. It is Applicant's understanding is that his brother "has a small business in which he sells gas station supplies." Tr. 44-46, 76-77. (SOR ¶ 1.b.)

Mother-in-law. Applicant's mother-in-law, age 58, is a Columbian citizen, and lives with Applicant and his wife. Applicant and his wife "sponsored" his mother-in-law to move to the U.S. in February 2004 to care for their three year old son. His mother-in-law is not married, and telephones her 74-year-old mother in Columbia "probably once a month," and sends her "$100 maybe" a month. Neither Applicant's wife nor any of her family members are employed, associated or affiliated with the Columbian government. Applicant's mother-in-law is "seriously thinking" about applying for U.S. citizenship when eligible in February 2009. Tr. 38-43. (SOR ¶ 1.a.)

Since immigrating to the U.S. in 1973, Applicant has traveled to Columbia four times. He returned to Columbia to attend his mother's funeral in 1984, and again in 1992, 2002, and 2007. Except for his 1984 visit, the remaining visits were primarily for "pleasure" and visiting family members. Tr. 49-51. (SOR ¶ 1.d.)

Applicant "sponsored" two of his "second cousins" from Columbia for student visas in the U.S. in 2001 and 2006. The second cousin he sponsored in 2001 recently graduated from college and lives in the U.S., discussed *supra* under Sister (age 55). The other second cousin is 23 years old and studying English in the U.S. Tr. 53-54. (SOR ¶ 1.f.)

Applicant stated if any of his family members in Columbia were approached by anyone seeking information about Applicant, he would contact his facility security officer. Tr. 56.

In 1988, Applicant made a $15,000 cash deposit into an international bank account located in the U.S, which resulted in Applicant being queried about the source of the deposited funds. The money belonged to two resident citizens of Columbia. Subsequent to that transaction, Applicant was interviewed or provided information on three separate occasions on September 7, 2000, February 12, 2001, and November 15, 2007. It was alleged that Applicant provided inconsistent explanations regarding this transaction. (SOR ¶¶ 1.e., 2.a., 2.b.(1) – (3)).

These purported inconsistencies are summarized in order. First, the SOR alleged Applicant stated his former sister-in-law asked him to make a $15,000 deposit into her husband's account in a September 2000 signed, sworn statement. (SOR ¶ 2.a.(1)). Second, the SOR alleged Applicant stated he was asked by a friend to make a $15,000 deposit into her brother-in-law's international bank account in a February 2001 memorandum to the Defense Investigative Service (DIS). (SOR ¶ 2.a.(2)).Third, the SOR alleged Applicant stated his girlfriend at the time asked him to take her mother to the bank to make a deposit into a joint international bank account belonging to her daughter and her son-in-law, adding the mother was unable to speak English clearly and Applicant made the deposit to help her (the mother) in a November 2007 signed, sworn statement. (SOR ¶ 2.a.(3)).

Applicant testified at his hearing and clarified these explanations. In his testimony, Applicant stated at the time he made the deposit, he did not know the money belonged to two Columbian citizens, and was being deposited on their behalf. It was not until 2001 that Applicant learned who the money belonged to. I note from observing Applicant that he struggled to recall events, which bolsters his explanation that over time his acuity diminished. Pertinent parts of the exchange between Department Counsel and Applicant are quoted, which demonstrate this assertion as well as the difficulty of reconstructing a fairly complex factual pattern years after it occurred.

> Q. Okay. Now in your sworn statement dated September 7, 2000, which is Government's Exhibit 2, you state on page 5 on February 17 of 1988 my former sister-in-law asked me to make a deposit of $15,000 into her husband's account. Is that correct?
>
> A. That's what I wrote, yes.
>
> Q. Okay. And in your signed statement dated February 12, 2001, which is Government Exhibit 3, you have a memorandum in there on page 3 where you state that you were asked -- I was asked by my friend, [HB] to make a $15,000 deposit into her brother-in-law, [LL's] international bank account of [bank name]. Is that correct?
>
> A. Correct.

Q. Okay. And then in November 15, 2007, you gave a signed sworn statement and on page 2, the first full paragraph there, on February, 1988, I made a $15,000 cash deposit at the [bank name]. This was not my money, my girlfriend at the time, [PP] need(ed) to take her mother [DP] to the bank to make a deposit.

The mother, [DP] wanted to make a bank deposit into a joint international bank account belonging to [DP's] daughter, [DEP] and her son-in-law, [LL]. Do you see that?

A. Yes. The statement I made back then, I got confused. It was – I confused her mom with her sister because of the name. Her sister has also the same name that her mom does, [D].

So when the officer told me that I had said in the past that I – the past is something for [D], then I immediately relate it to her mom, not to her sister.

Q. Okay. So you're saying when you made this statement in 2007 you confused her mother's name with her sister?

A. Correct.

Q. Okay. And it's your testimony that you intended to say her sister?

A. Correct.

Q. Okay. But still you – between the Government's – between your first statement in 2000, your second statement in 2001 you state – your first statement you state that it was your former sister-in-law?

A. Yes. And [H] is the person that – [H] is my friend and she was never my wife or anything officially, which is just someone that I knew that I would say. So I say sister-in-law, you know, it's not -- speak of sister-in-law I said because [H] was my girlfriend.

So, but in reality, officially or legally, she was never my sister-in-law because my relationship to [H] was not more than boyfriend and girlfriend.

Q. So why did you say sister-in-law?

A. I mean, it's – I really don't know. I should have said [H's] sister, because my relationship to [H] was not – never officially a legal relationship.

Q. But she was your girlfriend?

A. She was my girlfriend, yes.

Q. When you gave your second statement in 2001, you refer to – you state that a friend asked you to make that deposit?
A. Yes my friend [H] was my girlfriend.

Q. You didn't say your girlfriend?
A. Yes, I didn't say my girlfriend.

Q. Okay. Now, you state that in your third statement that you made the deposit because [H's] mother was unable to speak English clearly?

A. Right. And that's – when I say this I mean [H's] sister, right.

Q. So today, again, you're stating that this – that you meant to say her sister?

A. Yes. The reason why, is because and I'll tell you this, they have the same name. And I knew [H's] sister by niece and her second – the middle name of [H's] sister is [E] and they call her [N].

So, when I was told by the officer of [D], I immediately related it to her mother instead of [H'] sister.

Q. Okay. But you told the – this is your statement, correct?

A. Yes.

Q. And so you told – you made the statement that it was her mother not her sister.

A. Correct. But again, that's because of the confusion. This is after almost a year after everything had happened and from the statement in 2001 to 2007 is six years apart and I don't remember too well what happened that day.

Q. You don't remember if you took [H's] sister or [H's] mother?

A. Well, now after investigating and when I talked to [H's] sister about two months ago, I'm sure it was her, the one that – when we (met) at the bank.

Q. Okay. Now again, you didn't have any concern that you were depositing that amount of money into a bank account that didn't belong to you?

A. I did not.

Q. You didn't have any concern that – it was apparently [LL's] international bank account, correct?

A. Right.

Q. You didn't have any concern that this amount of money was brought over [to] the United States in cash?

A. I did not at the time. [H] was my friend and I trusted her and we had a good relationship and I didn't think she would ever have me do something that was inappropriate or illegal.

Q. You didn't think that since it was an international bank account that [LL] could deposit the money himself?

A. [LL] was not in the United States at the time.

Q. But it's an international bank account.

A. Yes.

Q. Okay. So he could have done it on his own?

A. In Columbia for sure. Yes.

Q. But he didn't do that?

A. Probably not.

Q. Have you done anything like this since 1998?

A. No. And I know better now that my actions were not appropriate at the time.

Q. Why – what do you mean by that?

A. I mean that I will ask questions now if someone asked me to deposit $15,000 or any amount of money. I would ask questions, where's this money coming from, where's it going to, and if everything is legal then I won't hesitate to do it. Tr. 60-65.

Applicant's former girlfriend's mother (DP – same name as her mother) submitted a signed, sworn statement, executed in the U.S., stating in part:

In and around February 1988, my fiancé and I were trying to buy a house. I wanted to live close to my mother [DP] and my sister [HB] whom lived in the United States for many years, my mother and my sister are US citizens.

My fiancé and I decided to deposit into my fiance's [name of bank] account $15,000 dollars that we had gradually brought from Columbia over a

> number of trips, to use as down payment towards the purchase of a house in the United States. I asked my sister to take me to the bank to make this deposit. My sister, [HB], was unable to take me to the bank, so she asked [Applicant] to take me to the bank. While at the bank, I asked [Applicant] to fill-up the deposit slip for me since I did not understand English and did not know what to write and where. [Applicant] gracefully filled up the deposit slip and I asked [Applicant] to make the deposit in case they asked me something in English that I would not understand. I handed [Applicant] the $15,000 dollars and he approached the teller counter and made the deposit on my behalf. [Applicant] deposited the $15,000 in my fiance's [name of bank] account. AE A.

The husband (LL) of Applicant's former girlfriend's mother submitted a signed, sworn statement executed in Columbia, stating in part:

> I am part owner of [name of business] since 1988 located in Columbia, with [substantial sales]. My three sons were educated in the US and are US citizens.
>
> During the trips my fiancé [DP] and I made to Columbia, we gradually brought money with the intention of buying a house, and in fact we did so in the year 2000. I went on a business trip to Columbia while my fiancé stayed in the US with her mother [DD] and her sister [HB]. My fiance's mother and sister are both US citizens. My fiancé and I decided to deposit the money in my [name of bank]. My fiancé asked [Applicant] to deposit the money since she was unable to understand [E]nglish hence did not understand the teller[']s questions. This is how in fact the fifteen thousand dollars were deposited in my [name of bank] account. AE B.

The author (LL) of AE B also submitted a letter from his bank dated May 8, 2008, which stated his bank account was opened on February 12, 1998. AE C.

Applicant submitted a letter from the Columbian Government Trade Bureau in Washington, DC, that provided data about the business owned by the author (LL) of AE B. The letter reflects the business owned by LL is in good standing. Tr. 83-85, AE D.

In response to my question inquiring how Applicant would resolve the discrepancies surrounding the $15,000 deposit in 1998, he stated:

> Sir, I mean I know it's negligence on my part that I did this and I should have asked questions. I know that my statements were not consistent and I really never thought that they were going to be taken literally like I had put it down.
>
> I think I have a good explanation on why I got confused. And I had never tried to hide anything that I've done. I always come forward to say what happened. Tr. 96.

Applicant submitted a letter from his Assistant Program Manager, which stated among other things that Applicant is a "must-have engineer" and concluded, "If [Applicant] were to lose his Top Secret Security [C]learance, it would delay the fielding and implementation of this (project Applicant is working on) critical national resource." AE E.

All of Applicant's assets are in the U.S. to include a home, 401k account, and bank account. He and his wife own a home that they recently purchased for $492,000. Tr. 92-95. Applicant earns $108,000 annually as a software engineer, and earns an additional $18,000 annually, teaching computer science courses part-time at a local community college. Tr. 104-105.

Columbia[1]

Colombia is a constitutional, multiparty democracy with a population of approximately 44.8 million. Colombia is the second most populous country in South America. Any person born in Colombia is considered a Colombian citizen.

The Department of State warns U.S. citizens of the dangers of travel to Colombia. Violence by narco-terrorist groups continues to affect some rural areas and cities. The potential for violence by terrorists and other criminal elements exists in all parts of the country. Terrorists and other criminal organizations continue to kidnap and hold persons of all nationalities and occupations for use as bargaining chips. No one is immune from kidnapping on the basis of occupation, nationality or other factors. U.S. Government officials and their families have strict limitations on travel to and within Colombia due to these dangers. Kidnap or murder victims in Colombia have included journalists, missionaries, scientists, human rights workers and business people, as well as tourists and even small children. Approximately 298 kidnappings committed by terrorist groups and for-profit kidnap gangs were reported to authorities in 2007. Robbery and other violent crimes are common in major cities while small towns and rural areas can be extremely dangerous due to the presence of narco-terrorists.

The Secretary of State has designated three Colombian groups – the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), and the United Self-Defense Forces of Colombia (AUC) – as Foreign Terrorist Organizations. These groups have carried out bombings and other attacks in and around major urban areas, including against civilian targets. Terrorist groups have also targeted critical infrastructure (e.g., water, oil, gas, and electricity), public recreational areas, and modes of transportation. The FARC has targeted civilians, government representatives and politicians, soldiers, and the civilian infrastructure. Three Irish Republican Army members assisted in training the FARC on IRA bomb tactics in Colombia. FARC held three U.S. government contractors -- all U.S. citizens -- hostage for five years, until they were rescued on July 2, 2008 by the Colombian military. Some border areas have become terrorist safe havens.

[1] The contents of this section are taken in whole or in part from Exs. I(A), I-V.

Although the government's respect for human rights continued to improve, serious problems remain. Unlawful and extrajudicial killings, forced disappearances, insubordinate military collaboration with criminal groups, torture and mistreatment of detainees, overcrowded and insecure prisons, and other serious human rights abuses were reported during 2007. Illegal armed groups and terrorist groups committed the majority of human rights violations–including political killings and kidnappings, forced disappearances, torture, and other serious human rights abuses.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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 classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"[2] demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or

[2] *See* Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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).

mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. 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).[3]

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 the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline B, Foreign Influence

AG ¶ 6 explains the Government's concern about "foreign contacts and interests" stating:

> [I]f the individual has divided loyalties or foreign financial interests, [he or she] 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.

[3] "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

AG ¶ 7 indicates three conditions that could raise a security concern and may be disqualifying in this case, including:

> (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; and
>
> (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.

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. *See* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001). Applicant has frequent contact with his sister and to a lesser extent with his brother in Columbia. These close relationships create a potential risk of foreign exploitation, inducement, manipulation, pressure, or coercion meriting a close examination of all circumstances.

The Government produced substantial evidence of these the three disqualifying conditions under AGs ¶¶ 7(a), (b) and 7(d) as a result of Applicant's admissions and evidence presented. The Government established Applicant's sister and brother are resident citizens of Columbia, and that Applicant maintains frequent contact with them by telephone/e-mail and travel. His mother-in-law is a Columbian citizen and she lives with the Applicant. She has frequent, non-casual contact with her family in Columbia. Also, Applicant sponsored two of his second cousins from Columbia for U.S. student visas.

The $15,000 cash deposit in 1998 into an international bank account of money belonging to two Columbian citizens is also relevant and is a concern under **Foreign Influence.** It is discussed further under **Personal Conduct,** *infra.* The burden shifted to Applicant to produce evidence and prove mitigating condition(s). The burden of disproving a mitigating condition never shifts to the Government.

Three Foreign Influence Mitigating Conditions under Guideline ¶ 8 are potentially applicable to these disqualifying conditions:

> (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; 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.

Applying common sense and life experience, there is a rebuttable presumption that a person has ties of affection for, and/or obligation to his immediate family. ISCR Case No. 04-07766 at 4 (App. Bd. Sept. 26, 2006); ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002). Applicant has demonstrated the indicia of ties of affection for/and or obligation to his sister and brother by telephone and e-mail contact as well as his travel to Columbia.

Applicant's sister is a career homemaker, wife, and mother of two children. Her husband (Applicant's brother-in-law) has been employed as a career electrician for the Columbian government. There is nothing in the record to suggest his employment has been anything other than a non-political position. Applicant's niece was educated in the U.S., is working in the U.S., and plans to become a U.S. citizen when eligible. His nephew is currently unemployed (discussed supra under **Facts,** Sister). Applicant's younger brother lives in Columbia and since being deported twice from the U.S. for drug involvement, is a small business owner living in Columbia selling gas station supplies.

Applicant's mother-in-law is unmarried, lives with Applicant and his wife, and she provides day care for Applicant's three-year-old son. She is part of the family, and is considering becoming a U.S. citizen. His mother-in-law's contact with Columbia is primarily limited to monthly telephone calls and modest monetary gifts to her 74-year-old mother in Columbia. Apart from Applicant's brother-in-law, who holds a non-political Government job with the Columbian government, none of Applicant's relatives living in Columbia or in the U.S. are associated with or affiliated with the Columbian government. The record does not identify what influence, if any, the Columbian government could exert on Applicant's sister or brother as a result of their being resident citizens of Columbia. However, their presence in Columbia, and Applicant's foreign travel as well as his sponsoring relatives for U.S. visas creates concerns under this Guideline. As such, the burden shifted to Applicant to show his relatives in Columbia and travel there do not create security risks.

"[T]he nature of the foreign government involved in the case, and the intelligence-gathering history of that government are important evidence that provides context for all

the other evidence of the record . . .” *See, e.g.,* ISCR Case No. 04-0776 at 3 (App. Bd. Sept. 26, 2006); *see also* ISCR Case No. 02-07772 at 7 (App. Bd. Aug. 28, 2003). As noted *supra* under the subheading “Columbia,” the U.S. Secretary of State has designated three Columbian groups, FARC, ELN, and AUC as Foreign Terrorist Organizations. Although the Columbian government’s respect for human rights continues to improve, terrorist groups operating within Columbia have committed the majority of human rights violations to include political killings and kidnapping, forced disappearances, torture, and other serious human rights abuses.

Applicant denies having “divided loyalties” between the U.S. and any foreign country. It should be noted Applicant’s allegiance to the U.S. was not challenged in this proceeding. The issue is rather a positional one.

> [Guideline B] hinges not on what choice Applicant might make if he is forced to choose between his loyalty to his family and the United States, but rather hinges on the concept that Applicant should not be placed in a position where he is forced to make such a choice. ISCR Case No. 03-15205 at 3-4 (App. Bd. Jan. 21, 2005).

On balance, Applicant has not met his burden of showing there is “little likelihood that [his relationship with his family member in Columbia] could create a risk for foreign influence or exploitation.” Applicant’s continued and ongoing relationship with his Columbian relatives and nature of unlawful activities in Columbia by terrorist organizations places Applicant in just this position, given his close relationship with his family and their continued presence and connection with Columbia.

However, Applicant is able to receive partial credit under AG ¶ 8(a). Applicant’s sister and brother maintain non-political low key positions in Columbia. Full application of AG ¶ 8(a) is also precluded given the past criminal drug activity of Applicant’s younger brother in the U.S. Although the evidence does not suggest Applicant’s younger brother is engaged in any illegal activity at present in Columbia, his having been deported twice from the U.S. for selling drugs remains troubling and lingers as a serious concern.

Applicant is able to receive full credit under AG ¶ 8(b). His relationship with his Columbian relatives is minimal when compared and contrasted with his immediate relatives in the U.S. Applicant has “such deep and longstanding relationships and loyalties in the U.S., [h]e can be expected to resolve any conflict of interest in favor of the U.S. interest.” His three sons and wife are U.S. born citizens and reside in the U.S., and they are fully inculcated with U.S. values. Applicant has lived in the U.S. since 1973 and served a 20-year career in the Air Force. He has worked for a defense contractor with dedication and distinction since retiring from the Air Force. He has substantial property and investments in the U.S., and no property or investments in Columbia. He has many friends and colleagues in the U.S. He is a loyal, dedicated U.S. citizen. He provided a work-related reference from his Assistant Program Manager to corroborate his loyalty and trustworthiness.

Applicant is able to receive full credit under AG ¶ 8(f) because his $15,000 deposit was on behalf of another party. He has no assets in Columbia as opposed to all of his assets being in the U.S. A thorough comparison of his relationship to the U.S. as compared to his relationship with Columbia is further discussed under the **Whole Person Concept**, *infra.*

Guideline E, Personal Conduct

AG ¶ 15 explains the Government's concern under this Guideline:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

> (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and,
>
> (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

A statement is false when it is made deliberately, i.e. knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

The issue here is the truthfulness of Applicant's purported inconsistencies in his September 2000 signed, sworn statement, his February 2001 memorandum, and November 2007 signed, sworn statement regarding the 1998 $15,000 cash deposit. AG ¶ 17(f) provides a condition that could mitigate security concerns in this case, stating, "the information was unsubstantiated or from a source of questionable reliability." AG ¶ 17(f) fully applies.

Having had the opportunity to listen to his testimony and observe his demeanor, his explanations as set forth in the findings of fact are accepted as credible. The exchange between Department Counsel and Applicant, *supra,* demonstrates how confusion could arise surrounding this transaction considering the similarity of names, cultural complexities, and passage of time.

I note that Applicant has held a top secret security clearance since 1994 and was vetted for a top secret security clearance by the CIA in 2001. This transaction presumably would have been uncovered and evaluated during renewal(s) of his top secret clearance(s) for the Air Force and CIA. The evidence is not sufficient to show that he made deliberately false statements when he provided his explanations surrounding the $15,000 deposit on three separate occasions or that his conduct was otherwise inappropriate or unlawful. There is no evidence that the $15,000 deposit involved any illegal activity such as money laundering. As such there is no evidence of a motive to fabricate.

Whole Person Concept

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under Directive ¶ E2.2.1. "Under the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant's life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant's security eligibility by considering the totality of an applicant's conduct and circumstances."[4] The directive lists nine adjudicative process factors (APF) which are used for "whole person" analysis.

Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation and behavior changes, etc., the eighth APF, "the potential for pressure, coercion, exploitation, or duress," Directive ¶ E2.2.1.8, is the most relevant of the nine APFs to this adjudication.[5] In addition to the eighth APF, other "[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." Directive ¶ E2.2.1. Ultimately, the clearance decision is "an overall common sense determination." Directive ¶ E2.2.3.

The Appeal Board requires the whole person analysis address "evidence of an applicant's personal loyalties; the nature and extent of an applicant's family's ties to the U.S. relative to his [or her] ties to a foreign country; his or her ties social ties within the U.S.; and many others raised by the facts of a given case." ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

I have carefully considered Applicant's family connections and personal connections to Columbia. Several circumstances weigh against Applicant in the whole

[4] ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)); ISCR Case No. 05-02833 at 2 (App. Bd. Mar. 19, 2007) (citing *Raffone v. Adams*, 468 F.2d 860 (2nd Cir. 1972) (taken together, separate events may have a significance that is missing when each event is viewed in isolation).

[5] *See* ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006) (stating that an analysis under the eighth APF apparently without discussion of the other APFs was sustainable); ISCR Case No. 03-10954 at 5 (App. Bd. Mar. 8, 2006) (sole APF mentioned is eighth APF); ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (remanding grant of clearance because Judge did not assess "the realistic potential for exploitation"), *but see* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 5, 2007) (rejecting contention that eighth APF is exclusive circumstance in whole person analysis in foreign influence cases).

person analysis. First, three foreign terrorist organizations have been identified by the U.S. Secretary of State that are operating within Columbia. Illegal armed terrorist groups committed human rights violations to include political killings and kidnappings, forced disappearances, torture, and other serious human rights abuses. Although Columbia and the U.S. enjoy a cordial relationship, the existence these terrorist groups and their concomitant internal problems within Columbia remain a concern. Second, Applicant was born in Columbia and spent a significant portion of his formative years in Columbia. Third, Applicant visited Columbia four times, i.e. in 1984, 1992, 2002, and 2007 since immigrating to the U.S. in 1973. Fourth, he sponsored two of his Columbian second cousins for U.S. student visas in 2001 and 2006. Fifth, in 1998, he deposited $15,000 into a bank account in the U.S. on behalf of two Columbian citizens. Sixth, his Columbian mother-in-law lives with him and his wife, and she maintains contact with her mother in Columbia. Seventh, he maintains frequent contacts with his sister and to a lesser extent his brother in Columbia, who was deported two times from the U.S. for drug involvement. These contacts and visits are collective manifestations of strong affection and regard Applicant has for family members in Columbia and/or connections with Columbia.

There is significant mitigating evidence that weighs towards grant of Applicant's security clearance. Applicant immigrated to the U.S. when he was 15 years old, and completed his high school education in the U.S. Shortly after completing high school, he enlisted in the Air Force and successfully completed a 20-year career. Shortly after enlisting in 1981, he was granted a secret clearance, which was later upgraded to a top secret clearance in 1994. He has held a top secret clearance since then. He was vetted for and granted a top secret clearance by the CIA in 2001, the year he retired from the Air Force. All told, he has successfully held a security clearance at some level for 27 years.

Applicant has lived in the U.S. for the past 35 years, was married in the U.S., and has three U.S. born children in the U.S. His assets in the U.S. are substantial in contrast to having no assets in Columbia. He became a U.S. citizen shortly after enlisting in the Air Force and holds a U.S. passport. His wife is a U.S. born citizen. Although his mother-in-law is a Columbian citizen, she legally resides in the U.S. with Applicant and his wife and is considering becoming a U.S. citizen. Also of note is the fact that Applicant has two older brothers, who are U.S. citizens, who reside in the U.S. He also has a niece (his sister's daughter), who resides in the U.S. and plans on becoming a U.S. citizen when eligible.

Applicant maintains much more frequent contact with his U.S. based siblings than he does with his siblings residing in Columbia. His ties to the United States are stronger than his ties to his sister and brother in Columbia. There is no evidence Applicant has ever taken any action which could cause potential harm to the United States.[6] He takes his loyalty to the United States very seriously, and he has worked

[6] The Government does not have the burden of providing such evidence.

diligently for his Government contractor/employer since November 2005. The evidence contains no derogatory record evidence about the Applicant.

I considered the totality of Applicant's family ties to Columbia. Columbia and the U.S. enjoy a friendly relationship. Apart from the internal problems within Columbia, which are not endorsed by the Columbian government, Columbia is a multiparty democracy, whose government's respect for human rights continues to improve. There is no evidence in the record to support the notion that the Columbian government engages in an adversarial relationship with the U.S.

In the unlikely event that Applicant's family in Columbia were subjected to coercion or duress from a terrorist group within Columbia, I find that because of his deep and longstanding relationships and loyalties in the U.S., that Applicant would resolve any attempt to exert pressure, coercion, exploitation, or duress in favor of the United States. Noteworthy and given great weight is Applicant's 20 years of honorable service to his country while serving in the Air Force, and his having successfully held a security clearance for 27 years. Also the issue of the $15,000 deposit occurred in 1998 and is not recent. In any event, I found his explanation credible and found him to be sincere, cooperative, and forthright in questions posed throughout the hearing. Lastly, Applicant's Assistant Program Manager submitted a compelling endorsement on his behalf.

This case must be adjudged on his own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. This Analysis must answer the question whether there is a legitimate concern under the facts presented that Applicant may have divided loyalties or act in a way adverse to U.S. interests or some attempt may be made to exploit Applicant's family members in such a way that this U.S. citizen would have to choose between his pledged loyalty to the U.S. and those family members. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has mitigated the security concerns pertaining to foreign influence, and personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my "careful consideration of the whole person factors"[7] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the Government's case. For the reasons stated, I conclude he is eligible for access to classified information.

[7]*See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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 B:	FOR APPLICANT
Subparagraphs 1.a - 1.f:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a. – 2.b. (1) – (3):	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is granted.

_____

ROBERT J. TUIDER
Administrative Judge