



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



In the matter of:)
)
) ISCR Case No. 07-16650
)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Department Counsel
For Applicant: *Pro Se*

October 16, 2008

Decision

HEINY, Claude R., Administrative Judge:

Applicant was born in Ecuador and is a naturalized U.S. citizen who has lived in the United States since 1979. Applicant’s mother, sister, and brother-in-law are citizens and residents of Ecuador. His sisters, wife, and daughter are dual citizens of Ecuador and the United States living in the United States. His brother is a U.S. citizen living in Ecuador. Applicant maintains his Ecuadorian citizenship to protect financial or business interests in Ecuador and because he intends to retire in Ecuador. Applicant has rebutted or mitigated the government’s security concerns under Guideline B, foreign influence, but has not rebutted or mitigated the government’s security concerns under Guideline C, foreign preference. Clearance is denied.

Statement of Case

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order

and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) on June 5, 2008, detailing security concerns under Foreign Preference and Foreign Influence.

On June 10, 2008, Applicant answered the SOR, and requested a hearing. On July 10, 2008, I was assigned the case. On July 10, 2008, DOHA issued a notice of hearing scheduling the hearing held on August 6, 2008. The government offered Exhibits (Ex.) 1 through 3, which were admitted into evidence. Applicant testified on his own behalf. On August 14, 2008, the transcript (Tr.) was received.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Ecuador. Applicant stated the material did not apply to him even though his relatives lived in Ecuador because he had no professional or business ties to Ecuador. (Tr. 16) The attached documents were not admitted into evidence but were included in the record as Hearing Exhibits (HEX) I. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in the SOR. Applicant is a 59-year-old systems engineer who has worked for a defense contractor since May 1983, and is seeking to maintain a security clearance.

In 1975, Applicant starting working at a tracking station in Ecuador. (Tr. 21) In 1979, the tracking station closed and he came to the U.S. (Tr. 21) In 1982, he obtained his permanent U.S. residence status. In May 1983, he obtained employment with his present employer. In February 1995, he became a U.S. citizen.

In 1973, Applicant married. His wife was born in Ecuador and became a U.S. citizen in April 1988. In 1976, Applicant's daughter was born in Ecuador. In 1995,² she became a U.S. citizen and works as a social worker. (Tr. 23) In 1978, Applicant's son was born in Ecuador. In 1995, he became a U.S. citizen and is studying criminology at an American university. (Tr. 23)

¹ 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) approved by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

² In 1995, when Applicant became a U.S. citizen, his children who were minors also became U.S. citizens.

Applicant's mother – age 95 – is a citizen and resident of Ecuador who lives on a pension. His father is deceased. He has biweekly telephone contact with his mother. (Ex. 1, p. 55) One of his sisters is deceased; another – age 60 – is a citizen and resident of Ecuador and is an English teacher. (Tr. 28, Ex. 3, p. 71) He talks with this sister biweekly by telephone. (Ex. 2, p. 56) Applicant and his siblings send his mother and sister in Ecuador \$300 per month. His share is \$50 per month. (Tr. 28)

Applicant's one brother became a naturalized U.S. citizen in 1979 and his other brother became a naturalized U.S. citizen in 1994. (Ex. 1, p. 20 – 22) Another sister is a 68 year old house wife living in England. Applicant rarely contacts her, once every two years, and his last physical contact was five years ago. (Tr. 24, Ex. 2, p. 55, Ex. 3, p. 78) Two other sisters became naturalized U.S. citizens in 1978 and 1994. (Ex. 1, p. 24 – 26) His one brother and two sisters who are naturalized U.S. citizens live in the U.S. In 2007, one brother moved back to Ecuador to establish temporary residency. (Ex. 3, p. 71) This brother comes back and forth between Ecuador and the U.S. (Tr. 36)

Applicant's mother-in-law is a U.S legal resident living in Ecuador who spends six months of each year in the U.S. and six months in Ecuador. (Tr. 37, Ex. 3, p. 76, 81) When she is in the U.S., she lives with Applicant and his wife. His mother-in-law and father-in-law separated 45 years ago and Applicant is unsure if his father-in-law is still alive. (Ex. 1, p. 28) His brother-in-law is a retired accountant and a citizen and resident of Ecuador. Applicant's mother-in-law and brother-in-law live together in Ecuador. Applicant talks by telephone with his mother-in-law two or three times a month and talks weekly with his brother-in-law in Ecuador. (Ex. 2, p. 56, Ex. 3, p. 79) None of his relatives have held political office or are politically active.

In 1979, prior to coming to the U.S., Applicant purchased a townhome and an unimproved lot in Ecuador. (Tr. 33) Two weeks prior to the hearing, Applicant sold the townhome for \$35,000 and intends to build a new home. He also owns an executive suite. Applicant obtained a \$50,000 loan from his 401(k) retirement plan to purchase the executive suite in Ecuador. Applicant rents out the executive suite for \$400 per month. (Tr. 30) Applicant has \$3,500 in a saving account in Ecuador comprised of rent received on the executive suite and he has \$36,000 from the sale of his townhome in a bank account in Ecuador.

In the U.S., Applicant has \$346,000 in his 401 (k) retirement plan, owns a home in the U.S. worth \$275,000 on which he has a \$70,000 mortgage, owns four vehicles in the U.S. worth \$37,000 on which he makes monthly payments of \$575, has \$9,000 in his credit union account, and his other property in the U.S. is worth \$22,000. (Tr. 24 – 26, Ex. 2, p. 65) Applicant has no professional or business ties to anyone in Ecuador. (Tr. 16)

In August 2007, Applicant voted in an election in Ecuador. (Ex. 2, p. 65) A voter certificate is needed to conduct most legal transactions in Ecuador. Applicant must vote in Ecuadorian elections to maintain his Ecuadorian citizenship. Applicant maintains his

Ecuadorian citizenship to protect assets from future laws pertaining to eminent domain. (Ex. 2, p. 65) Applicant is unwilling to renounce his Ecuadorian citizenship because he is afraid the Ecuadorian government might take his property. (Tr. 13) Applicant intends to return to Ecuador when he retires in the next two to two and a half years. (Tr. 25) In October – November 2001, February 2002, October – November 2002, August – September 2004, January 2005, and July 2005, Applicant traveled to Ecuador on company business. In February 2007, Applicant went to Ecuador to attend his sister's funeral. (Ex. 3, p. 78)

Ecuador

Ecuador is a constitutional republic whose government is democratically elected, although none of the last three democratically elected presidents finished their terms because of political instability.³

Ecuador has a record for respecting human rights.⁴ Ecuador's constitution bars torture and similar forms of intimidation and punishment, as well as arbitrary arrest and detention. Its constitution also provides for an independent judiciary. Still, human rights organizations report incidents of police torture and other cruel, inhumane, or degrading treatment or punishment. Criminal kidnapping for profit has continued to be a problem in certain regions of the country, and there have been reported cases of arbitrary arrest and detention. Political and economic pressures and corruption in the national police and the courts have also been reported and remain a source of continuing U.S. concern.⁵

The U.S. remains concerned about the high levels of corruption in Ecuador, which, according to Transparency International, rivals those of Congo, Iraq, Sierra Leone, and Uganda and makes Ecuador the second most corrupt nation in South America.⁶

Ecuador has a mixed record as to the protection of foreign property rights. Twice in the last half-century, it has nationalized the property of U.S. firms.⁷ For many years, the U.S. and Ecuador have maintained close ties based on a shared interest in

³ U.S. Department of State, Bureau of Western Hemisphere Affairs, *Background Note: Ecuador*, January 2008 at 3 (Background Note). (HEX I)

⁴ U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *Ecuador: Country reports on Human Rights Practices – 2007*, dated March 11, 2008 at 1. (Human Rights) (HEX I)

⁵ *Id.*

⁶ CRS Report for Congress, *Ecuador: Political and Economic Situation and U.S. Relations*, May 2, 2005 at 5. (CRS Report) (HEX I)

⁷ Background Note at 4 – 5. (HEX I)

maintaining democratic institutions, combating narco-trafficking, building trade, investment and financial relationships, cooperating in fostering Ecuador's economic development, and participating in inter-American organizations.⁸

Ecuador's ongoing conflict with Colombia along its 450-mile-long northern border involves counter terrorism and security threats from Colombian foreign terrorist organizations, frequently lined with narcotics trafficking organizations.⁹

Members of the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN) were present on the Colombia side of the border and regularly entered Ecuadorian territory.¹⁰ Although Ecuadorian officials deplore Colombian guerilla activity and amassed armed forces along the border to interdict guerilla bands from Colombia, encroaching guerillas have been known to extort and intimidate local populations, and raise some security concerns for U.S. citizens residing in Ecuador. Since 1998, at least ten U.S. citizens have been kidnapped near Ecuador's border with Colombia and one killed.¹¹

Ecuador has continued to work closely with the U.S. to promote lawful economic activity and Ecuador's Congress has ratified the Inter-American Convention against Terrorism.¹² All in all, Ecuador remains a friendly country with democratic institutions and strong inter-governmental relations with the U.S. Historically, the country has shown little inclination to coerce or pressure U.S. citizens to provide classified or proprietary data, or in any way attempt to compromise sensitive and classified U.S. Information.

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.

⁸ Background Note at 6. (HEX I)

⁹ U.S. Department of State, Office of the Coordinator of Counterterrorism, Country Reports on Terrorism, Chapter 2 – Country Reports: Western Hemisphere Overview, dated April 30, 2008 (Terrorism) at 8. (HEX I)

¹⁰ *Id.*

¹¹ U.S. Department of State, Bureau of Consular Affairs, *Consular Information Sheet on Ecuador*, dated March 28, 2008 at 2. (Consular Information) (HEX I)

¹² Terrorism at 2. (HEX I)

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.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Foreign Influence

AG ¶ 6 expresses the security concerns regarding foreign influence: 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 describes conditions that could raise a security concern and may be disqualifying:

(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;

(c) counterintelligence information, that may be classified, indicates that the individual's access to protected information may involve unacceptable risk to national security;

(d) sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists;

(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;

(f) failure to report, when required, association with foreign national;

(g) unauthorized association with a suspected or known agent, associate, or employee of a foreign intelligence service;

(h) indications that representatives or nations from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, inducement, manipulation, pressure, or coercion; [and]

(i) conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

Applicant's wife and children were born in Ecuador and are naturalized U.S. citizens living in the U.S. Applicant's mother, who he helps support, and sister are citizens and residents of Ecuador. His one brother is a naturalized U.S. citizen who spends part of the year in Ecuador and part in the U.S. Applicant has a sister who lives in England. His other three siblings are naturalized U.S. citizens living in the U.S. His mother-in-law is a U.S. legal resident who spends six months of each year in the U.S. and six months in Ecuador. Applicant's brother-in-law is a retired accountant and a citizen and resident of Ecuador.

Having considered all of the Foreign Influence disqualifying conditions, applicable conditions that could possibly raise a security concern are AG ¶ 7(a) and AG ¶ 7(b), which apply. AG ¶ 7(d) does not apply even though his wife was born in Ecuador, because she is a U.S. citizen living in the U.S., which negates any potential for adverse foreign influence or duress. AG ¶ 7(e) partially applies because Applicant owns property in Ecuador and does not wish to give up his Ecuadorian citizenship for fear of losing the property. The property is not "substantial" when compared to his U.S. property, but is of concern.

AG ¶ 8 provides conditions that could mitigate security concerns:

(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 obligations 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) and 8(c) partially apply. Applicant talks with his mother, sister, mother-in-law, and brother-in-law a couple of times each month. Because of his limited contact with them, “it is unlikely [he] will be place in a position of having to choose between the interest of [his relatives and in-laws] and the interest of the U.S. “There is little likelihood that [his relationship with his Ecuadorian relatives and in-laws] could create a risk of foreign influence or exploitation.”

AG ¶ 8(b) fully applies. There is no evidence that his mother, siblings, mother-in-law or brother-in-law are or have been a political activists, challenging the policies of the Ecuadorian Government. There is no evidence his relatives or in-laws currently work or ever worked for the Ecuadorian Government, military, or news media, or that of any other foreign government. There is no evidence that terrorists or the Ecuadorian Government have approached or threatened Applicant or his relatives and in-laws for any reason. There is no evidence that his relatives and in-laws living in Ecuador currently engages in activities which would bring attention to them or that other Ecuadorian elements are even aware of Applicant’s work. As such, there is a reduced possibility that his relatives and in-laws or Applicant would be targets for coercion or exploitation.

Applicant has “such deep and longstanding relationships and loyalties in the U.S., [he] can be expected to resolve any conflict of interest in favor of the U.S. interest.” His wife, children, brother, and two sisters are U.S. citizens, and all reside in the United States. Another brother is a U.S. citizen who travels between Ecuador and the U.S. and another sister lives in the U.K. However, his mother, sister, mother-in-law, and brother-in-law are citizens and residents of Ecuador. Applicant was born in Ecuador. He came to the U.S. in 1979 and became a U.S. citizen on February, 1995. He has worked for defense contractors since 1975.

AG ¶ 8 (f) partially applies because he has property in Ecuador. However, he has significant U.S. property and assets. These mitigating conditions taken together are sufficient to fully overcome the foreign influence security concerns.

Foreign Preference

AG ¶ 9 expresses the security concerns regarding foreign influence: Foreign Preference is a security 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.

AG ¶ 10 lists conditions that could raise a security concern and may be disqualifying include:

(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 and/or use of a 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 the foreign country;
- (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 votes in Ecuadorian elections because he needs the voter certificate to conduct legal transactions in Ecuador. Applicant votes in Ecuadorian elections in order to maintain his Ecuadorian citizenship. He maintains his Ecuadorian citizenship to protect assets from the possibility of eminent domain. He is unwilling to renounce his Ecuadorian citizenship because he is afraid he might lose his Ecuadorian property. Applicant intends to retire in the next two to two and a half years, return to Ecuador, and build a home in Ecuador. He has chosen to keep his foreign citizenship so he can keep his foreign property. AG ¶¶ 10(a) (5) and 10(a) (7) apply

AG ¶ 11 lists conditions that could mitigate security concerns include:

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) 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.

None of the mitigating conditions apply. Applicant has chosen to actively maintain his Ecuadorian citizenship in order to protect his Ecuadorian property. He voted in foreign elections not because the U.S. Government encouraged it, but because he needed to prove he voted in order to transact business in Ecuador and to prove his Ecuadorian citizenship. The foreign preference concerns have not been mitigated.

Whole Person Concept

Protection of our national security is of paramount concern. Security clearance decisions are not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the adjudicative process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. In reaching this decision, I have considered the whole person concept in evaluating Applicant's risk and vulnerability in protecting our national interests.

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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.

In the more than 29 years since he left Ecuador, Applicant returned six times for company business and only once, in February 2007, for personal reasons to attend his sister's funeral. I have carefully weighed the evidence in favor of Applicant against the government's concerns about Applicant's ability to protect classified information. I find that there is little potential for Applicant to be pressured, coerced, or exploited because his mother, siblings, and in-laws are living in Ecuador or because he plans to retire in Ecuador. It is not his Ecuadorian relatives or in-laws or future retirement plans that provide concern. Future plans are merely speculative until they occur. When and if he retires to Ecuador is uncertain.

What is of security concern is his decision to maintain his Ecuadorian citizenship in order to protect his Ecuadorian property. He votes in foreign elections specifically to maintain his foreign citizenship. Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the foreign influence security concern, but failed to mitigate the foreign preference security concern.

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, Foreign Preference:	AGAINST APPLICANT
Subparagraph 1.a – 1.d:	Against Applicant
Paragraph 2, Foreign Influence:	FOR APPLICANT
Subparagraph 2.a – 2.j.:	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.

CLAUDE R. HEINY II
Administrative Judge