DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-00832
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: Pro Se

December 31, 2008

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Decision

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HARVEY, Mark W., Administrative Judge:

Applicant's statement of reasons (SOR) alleged four delinquent debts. Two were discharged in his 2004 bankruptcy. Applicant's first and second mortgage total $233,857. He failed to make any mortgage payments for the last nine months, accruing an additional $20,000 in delinquent debt. He currently retains a valid Cuban passport. Applicant failed to mitigate financial considerations and foreign preference security concerns. Foreign influence and personal conduct security concerns are mitigated. Eligibility for a security clearance is denied.

Statement of the Case

On September 26, 2006, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Government Exhibit (GE) 1). On August 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to him,[1] pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as

[1]Government Exhibit (GE) 9 (SOR, dated August 12, 2008). GE 9 is the source for the facts in the remainder of this paragraph unless stated otherwise.

amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised. The revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, are effective within the Department of Defense for SORs issued after September 1, 2006. The SOR alleges security concerns under Guidelines C (Foreign Preference), B (Foreign Influence), E (Personal Conduct) and F (Financial Considerations). 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.

On September 26, 2008, DOHA received Applicant's SOR response, and Applicant requested a hearing (GE 10). Department Counsel indicated he was ready to proceed on November 17, 2008, and on that same date the case was assigned to me. At the hearing held on December 9, 2008, Department Counsel offered nine exhibits (GEs 1-8, 12) (Transcript (Tr.) 16), and Applicant offered six exhibits (Applicant's Exhibit (AE A-F) (Tr. 48-50). There were no objections, and I admitted GEs 1-8, 12 and AEs A-F (Tr. 16-17, 34-35, 50). Additionally, I admitted the SOR (GE 9), his SOR response (GE 10), and a Hearing Notice (GE 11). Applicant received more than 15 days notice of his hearing (Tr. 28). I received the transcript on December 16, 2008.

Procedural Rulings

Administrative Notice

Department Counsel asked me to take administrative notice concerning materials related to the Cuba (Tr. 13-14; GE 12). Department Counsel offered in support of the requested administrative notice of facts concerning Cuba, supporting documents to show detail and context for those facts (Ex. I to VII—listed in Request for Administrative Notice at 3-4). I responded that I would take administrative notice of the facts in the four-page cover document; but not the underlying documents (Tr. 14). The parties did not object to my ruling (Tr. 14, 17-18).

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). Exhibits I to VII are attached to GE 12 to ensure the administrative record is complete.

Findings of Fact[2]

In his SOR response, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, 1.c, 2.a, 3.a, 4.a, 4.d and 4.e with some explanations (GE 10). 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 is a 29-year-old employee of a defense contractor (Tr. 5, 19).[3] He has worked for the contractor as a painter since 1996 (Tr. 19, 61). He does not now and never has had access to classified material (Tr. 6, 46). He married his spouse in 1999; and has two children ages five and three (Tr. 20; GE 1). Applicant earned a high school diploma and has not attended college (Tr. 5, 19). He has never served in the military (GE 1). His security application did not disclose a police record, or a felony conviction. There is no indication of illegal drug abuse or mental disability. He has never left employment under adverse circumstances. When he completed his 2006 SF 86, he disclosed his bankruptcy (GE 1).

Foreign Influence and Foreign Preference

Applicant's grandmother living in the United States obtained approval and Applicant, his parents and his sisters emigrated from Cuba to the United States in 1990 (Tr. 20). Applicant's parents were both born in Cuba and now are U.S. residents and citizens (Tr. 30, 34). Since emigrating from Cuba in 1990, his father visited Cuba three times, and his mother visited Cuba twice (Tr. 35). Applicant's father is a pastor and communicated with pastors who live in Cuba (Tr. 45).

Applicant was 10 or 11 years old when he immigrated to the United States (Tr. 21). Applicant's wife was born in Puerto Rico and she is a U.S. citizen (Tr. 36). His two children are U.S. citizens (Tr. 72). Applicant's grandmother on his father's side of the family, three uncles and five first cousins are citizens and residents of Cuba (SOR ¶ 2.a, GE 10). Applicant may communicate with his grandmother three times a year when his parents call her, and typically these communications occur when the family gathers together on holidays (Tr. 40-41). Applicant does not call her on his own (Tr. 41). He has three uncles living in Cuba, who are his father's brothers (Tr. 41-42). His uncles living in Cuba do not have telephones, and the only time he might have talked to them was if his father called his grandmother and his uncle or uncles happened to be at her residence (Tr. 43). Applicant had about five first cousins living in Cuba (Tr. 43). His only contact with his first cousins was during his visit to Cuba in 2006 (Tr. 44).

[2]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

[3]GE 1 (2006 security clearance application) is the source for the facts in this paragraph, unless stated otherwise.

Applicant was unsure about whether his relatives living in Cuba had served in the Cuban military, served in the Cuban government or received pensions from the Cuban government (Tr. 37-40, 42-44). Applicant visited his family in Cuba in November 2006 for a week when he accompanied his parents and three sisters on the trip from the United States to Cuba (Tr. 24, 35, 46; SOR ¶ 2.b, GE 10). Applicant does not own any property in Cuba (Tr. 45).

Applicant admitted exercising dual citizenship with Cuba and the United States (SOR ¶ 1.a, GE 10). He possessed a Cuban passport that was issued on July 14, 2006, and it is not due to expire until July 13, 2012 (Tr. 21-23; SOR ¶ 1.b, GE 10). He used his Cuban passport to enter and exit Cuba in 2006 (Tr. 46). He did not receive any financial, educational, medical or other benefits from Cuba after emigrating from Cuba in 1990 (Tr. 29). He did not exercise any other rights of a Cuban citizen after leaving Cuba in 1990 (aside from his 2006 use of his Cuban passport) (Tr. 29). Applicant became a naturalized U.S. citizen in 1996 prior to applying for the Cuban passport (Tr. 21; SOR ¶ 1.c). At the time of his hearing, he retained his Cuban passport (Tr. 23-26). He offered to give his Cuban passport to his facility security officer (FSO); however, he wanted to be able to use his Cuban passport if there was an emergency with a family member in Cuba (Tr. 25). He does not intend to live in Cuba (Tr. 46). His loyalty is to the United States (Tr. 47). He did not provide any evidence that he actually turned-in his Cuban passport to his FSO.

Republic of Cuba

Cuba is a totalitarian state, which controls all aspects of life through the Communist party. Cuba has engaged in numerous human rights violations such as abuse of detainees, unlawful killings and beatings, and threats and abuse of Cuban citizens. The United States and Cuba have had a strained relationship since the early 1960s, when Castro forcibly took over the Cuban government after several years of armed struggle. The United States continues to maintain economic sanctions against the Cuban government. Since 1982, Cuba has been on the U.S. State Department's list of State Sponsors of Terrorism. Cuba maintains close relationships with Iran and Syria and has offered safe havens for members of terrorist organizations. Cuba targets the United States for intensive espionage activities, and there have been numerous reported cases of Cuban espionage against the United States.

Personal Conduct

Applicant admitted that he answered, "No" on his September 26, 2006, security clearance application in response to Section 17d, which asked about whether in the last seven years he had an active passport issued by a foreign government (GE 10). He admitted he had a currently valid Cuban passport; however, he thought the question was seeking information about whether he had a passport to a country in addition to either Cuba or the United States (Tr. 32-33). He disclosed on this same security clearance application that he was born in Cuba and considered himself a dual citizen of

Cuba and the United States (Tr. 33, GE 1). He did not consider Cuba to be a "foreign" government (Tr. 33).

Financial Considerations

In 2003, Applicant's wife became unemployed, which resulted in the loss of income and created financial problems (Tr. 51). After 2003, she was sporadically unemployed (Tr. 61-62). In 2007, her salary decreased from $14.50 an hour to $10.00 hourly (AE C, D). In 2008, she had been making about $1,200 per month as a receptionist (Tr. 60). When she became unemployed, she received unemployment compensation; however, it was insufficient to kept their debts current (Tr. 61). In July 2004, Applicant petitioned for bankruptcy and his unsecured debts were discharged in October 2004 (Tr. 50-51; SOR ¶ 4.a, GE 10; AE A). The SOR listed two delinquent debts that were discharged in the 2004 bankruptcy: $1,084 reported on a credit report as delinquent in March 2004 (Tr. 52-54; SOR ¶ 4.b, GE 6, 10; AE A), and $2,030 reported delinquent on a credit report in June 2004 (Tr. 52-53; SOR ¶ 4.c, GE 10).

Applicant's first mortgage in the approximate amount of $187,057 and second mortgage in the approximate amount of $46,800 became delinquent in February 2008 (SOR ¶¶ 4.d and 4.e). His monthly payments on the two accounts totaled $2,375 (Tr. 70). In his SOR response, dated around September 26, 2008, he said he has placed his two mortgages under a short sale transaction and predicted it would be "settle[d] or solved within 2 to 3 months" (GE 10). As of December 9, 2008, Applicant's agent was looking for someone to purchase his residence at a suitable price (Tr. 54). Applicant has not made any payments on his mortgages since February 2008 (Tr. 55). First he sent the mortgage holders a letter asking to readjust the mortgage to lower payments and then he sent a letter and short sale assignment indicating he wanted to resolve the debts with a short sale (Tr. 56-57; AE B, C, D). The mortgage holders have not replied to his short sale proposal (Tr. 58).

In January 2007, Applicant completed a personal financial statement (PFS) as part of an Office of Personnel Management interview, indicating he had negative monthly net income of $850 (Tr. 67, GE 5). After completing this PFS, his financial situation became worse as his spouse became unemployed (Tr. 67). He has taken two loans out for about $15,000 against his 401K program, which he valued at about $30,000 (Tr. 69). He is attempting to repay his 401K program (Tr. 69).

In January 2008, Applicant began a financial counseling program, which addressed 13 debts totaling $10,924 with monthly payments of $410 (Tr. 62-66; SOR ¶ 1.f, GE 10). As of November 2008, the balance owed on this program was $10,415 (AE E). His car payments and insurance are not part of this program (Tr. 66). Even though Applicant was saving $2,375 per month by not paying his mortgages (which was substantially more than the $1,200 monthly his wife was receiving before she became unemployed), they still had negative income each month (Tr. 71). His mortgagees have not foreclosed on his residence. His wife is currently employed (Tr. 73).

Recommendation

Applicant's facility security officer (FSO) described Applicant as a "model employee, as asset to the corporation and an exemplary citizen. . . . [His] personal conduct, trustworthiness, reliability and honesty have [led] to a steady progression of promotion to higher levels of responsibility and expectation by his supervisors and management" (AE F). His FSO opined that Applicant had taken necessary actions to correct his financial problems and recommended approval of Applicant's security clearance (AE F).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant Applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to 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. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the Applicant that may disqualify the Applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an Applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An Applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude relevant security concern are under Guidelines C (Foreign Preference), B (Foreign Influence), F (Financial Considerations) and E (Personal Conduct).

Foreign Preference

Under AG ¶ 9 the security concern involving foreign preference arises, "[W]hen 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(a)(1) describes conditions that could raise a security concern and may be disqualifying. These conditions state, "10(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport."

Applicant renewed his Cuban passport after becoming a U.S. citizen. He continues to possess a Cuban passport that will continue to be valid until 2012, establishing AG ¶ 10(a)(1). "Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance." ISCR Case No. 07-00852 at 3 (App. Bd. May 27, 2008) (citing *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990)). Because the government has

raised financial considerations security concerns, the burden now shifts to Applicant to establish any appropriate mitigating conditions. Directive ¶ E3.1.15.

AG ¶ 11 provides conditions that could mitigate security concerns:

> (a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;
>
> (b) the individual has expressed a willingness to renounce dual citizenship;
>
> (c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;
>
> (d) use of a foreign passport is approved by the cognizant security authority;
>
> (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and
>
> (f) the vote in a foreign election was encouraged by the United States Government.

None of the mitigating conditions apply. Security officials did not authorize Applicant's possession or use of his Cuban passport, and he did not invalidate or relinquish his Cuban passport as described in AG ¶¶ 11(d) and 11(e).[4] His Cuban passport was not surrendered to his security officer. He obtained and used the Cuban passport after he became a U.S. citizen. If he had surrendered his Cuban passport to his FSO, as he offered to do, I would have mitigated foreign preference security concerns under AG ¶ 11(e); however, because he did not do so, this security concern cannot be mitigated.

Foreign Influence

AG ¶ 6 explains the security 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

[4]In the decretal paragraph, I find "For Applicant" with respect to SOR ¶ 1.a and 1.c because all foreign preference security concerns relate to his possession and use of a currently valid Cuban passport. SOR ¶¶ 1.a and 1.c are essentially restatements of this security concern and those comments are hereby merged into SOR ¶ 1.b.

> vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

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

> (a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion; and
>
> (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.

Applicant's grandmother, three uncles and five cousins, are citizens and residents of Cuba. Applicant visited his Cuban relatives in 2006 for a week. He spoke to his grandmother on the telephone about three times per year on holidays, when his father telephoned her. His relatives may have connections to the Cuban government or military. For example, his grandmother may be receiving a pension from the Cuban government. There is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members. *See* ISCR Case No. 01-03120 (App. Bd. Feb. 20, 2002). However, his grandmother, uncles and cousins are not immediate family members and this presumption does not apply. Since 1990, he has only gone to Cuba on one occasion, and then only stayed for a week.

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 frequent, non-casual 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).

The nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an Applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, the country is known to conduct intelligence operations against the United States, or there is a serious problem in the country with crime or terrorism. Cuba's hostile relationship to the United States, Cuba's failure to adhere to human rights standards, Cuba's support of terrorists,

and Cuba's espionage targeting of the United States, place a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his relationships with family members living in Cuba do not pose a security risk and he is not in a position to be forced to choose between loyalty to the United States and his family living in Cuba. With the ongoing hostile relationship between Cuba and the United States, it is conceivable that Cuban intelligence officials would target any Cuban citizen or former Cuban citizen living in Cuba or the United States in an attempt to gather valuable information from the United States.

There is evidence that Cuban intelligence officials seek classified information from the United States. Applicant's connections to his family members living in Cuba create a potential conflict of interest because these relationships are sufficiently close to raise a possible security concern about his desire to help these relatives living in Cuba by providing classified information.

The Government produced substantial evidence of Applicant's relationships and contacts with his family members living in Cuba to raise the issue of potential foreign pressure or attempted exploitation. There is clear evidence that Cuba remains a lawless totalitarian state, and Applicant's family living in Cuba are available should Cuban officials seek to exploit them to obtain classified information. AG ¶¶ 7(a) and 7(b) apply, requiring further review and analysis.

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

> (a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;
>
> (b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;
>
> (c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;
>
> (d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

AG ¶¶ 8(a) and 8(c) cannot be applied with respect to his family members living in Cuba. Applicant has an emotional bond with his family members living in Cuba, and through his parents with his family, living in Cuba. Applicant communicates with them sufficiently to negate these mitigating conditions. Additionally, he was reluctant to turn-in his Cuban passport because he wanted it to be available should there be an emergency for the family living in Cuba. Although Applicant's close relationships with his parents and his family members living in Cuba are an important positive reflection of his character, these same close relationships raise security concerns for possible foreign influence.

There is no evidence that his family members living in Cuba have been political activists or that they have high profile jobs with the Cuban government, the military or any news media. There is no evidence that terrorists, criminals or the Cuban Government have approached or threatened Applicant's family members living in Cuba for any reason. There is no evidence that these family members living in Cuba currently engage in activities which would bring attention to them or that they or other terrorists or other anti-U.S. elements are even aware of Applicant's relationship with those family members. As such, there is a reduced possibility that these relatives would be targets for coercion or exploitation.

Applicant's relationships with his relatives in Cuba, his frequent contacts with his parents (who frequently contact family members in Cuba) and Applicant's somewhat frequent contacts with his grandmother living in Cuba, and the adversarial nature of the United States' relationship with the Cuban government, all weigh against mitigating security concerns. *See* ADP Case No. 05-17812 at 2, 3 n.2 (App. Bd. Jun. 11, 2007) (finding contacts with siblings in PRC "once every two or three months" not to be casual and infrequent); ISCR Case No. 04-12500 at 2, 4 (App. Bd. Oct. 26, 2006) (finding contacts with applicant's parents and sisters a total of about 20 times per year not casual and infrequent); ISCR Case No. 04-09541 at 2-3 (App. Bd. Sep. 26, 2006) (finding contacts with applicant's siblings once every four or five months not casual and infrequent).

Applicant's close relationship with his two children, parents and three sisters living in the United States and his strong connections to the United States developed over the last 18 years tend to mitigate foreign interest security concerns. 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 spouse and children are U.S. citizens, and they all reside in the United States. He and his spouse

are fully inculcated with U.S. values. He has many friends and colleagues in the United States. He is a loyal, dedicated U.S. citizen. He has provided a statement from his FSO corroborating his loyalty and trustworthiness. Applicant has worked for the same government contractor with dedication and distinction for 12 years. He has made significant contributions to national security and his company. All these circumstances demonstrate that Applicant will recognize, resist, and report any attempts by a foreign power, terrorist group, or insurgent group at coercion or exploitation. I conclude AG ¶ 8(b) is established and mitigates foreign influence security concerns.

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

> Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two financial considerations disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts," and "(c) a history of not meeting financial obligations." ISCR Case No. 03-20327 at 3 (App. Bd. Oct. 26, 2006) provides, "Applicant's credit report was sufficient to establish the Government's prima facie case that Applicant had . . . SOR delinquent debts that are of security concern." Applicant's history of delinquent debt is documented in his credit report, his 2006 security clearance application and his SOR response. Applicant's SOR alleged four delinquent debts. Two SOR debts were discharged by Applicant's 2004 bankruptcy. However, Applicant's first and second mortgage total $233,857. He failed to make any mortgage payments for the last nine months, accruing an additional $20,000 in delinquent debt. Even though he is not paying his mortgage, and his wife is now employed, they have a negative cash flow each month. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) are potentially applicable:

> (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn,

unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's conduct does not warrant application of any mitigating conditions. His financial problems are not isolated because he currently has two large delinquent debts totaling about $250,000. The ongoing nature of his delinquent debts is "a continuing course of conduct" under the Appeal Board's jurisprudence. *See* ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). Moreover, I am not convinced his debts "occurred under such circumstances that it is unlikely to recur and does not cast doubt on the [her] current reliability, trustworthiness, or good judgment." He discharged his delinquent debts in 2004 using bankruptcy, and now has even much more delinquent debt than he had in 2004. Although he has been paying some of his debts, he has failed to make any payments on his mortgages for the last nine months.

Under AG ¶ 20(b), Applicant's spouse's intermittent unemployment contributed to their financial problems. The substantial reduction in home values is another significant problem. As such some of their debts are due to forces beyond their control. However, he did not provide sufficient information to establish that he acted responsibly under the circumstances or made sufficient efforts to address his delinquent debts.[5] He receives some credit for informing his creditors that he was not going to pay his mortgages and for seeking a short sale; however, even though he was not paying his mortgages he still had a negative cash flow and his extensive debts are increasing. Because of his spouse's periodic unemployment and the significant decline in home values, AG ¶ 10(b) partially mitigates financial considerations security concerns.

[5]"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with his or her creditors and attempted to negotiate partial payments to keep debts current.

AG ¶¶ 20(c) and 20(d) do not fully apply. Applicant received financial counseling. However, there are no indications that "that the problem is being resolved or is under control" because the amount of delinquent debt is increasing more than $2,000 every month. There is insufficient information to establish that Applicant showed good faith[6] in the resolution of his delinquent SOR debts because he did not establish that his failure to pay his delinquent debts was reasonable and necessary under the circumstances.

AG ¶ 20(e) does not apply because Applicant did not dispute his responsibility for any debts. I conclude Applicant's overall conduct in regard to his delinquent debts casts doubt on his current reliability, trustworthiness, and good judgment. He failed to resolve or pay his mortgages. He failed to make partial payments on his mortgages. He did not provide good cause for his failure to pay or at least to set up payment plans and make some payments despite having an opportunity to do so. Based on my evaluation of the record evidence as a whole, I conclude financial considerations are not mitigated.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

> 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. . . .

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

> (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

[6]The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

> In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

SOR ¶ 3.a alleges Applicant falsely denied on his 2006 security clearance application that he did not have a foreign passport. Applicant admitted that he had a Cuban passport.

AG ¶ 17(f) provides one condition that could mitigate security concerns in this case, "the information was unsubstantiated or from a source of questionable reliability." Applicant disclosed his birth in Cuba and his status as a dual citizen on his 2006 security clearance application. He understood the term "foreign" in relation to his passport to request information about passports from countries other than Cuba or the United States. I specifically find Applicant's description of his state of mind when he completed his security clearance application to be credible. AG ¶ 17(f) applies to Applicant's failure to disclose his possession of a Cuban passport on his security clearance application. This failure was not deliberate, and the allegation of falsification is unsubstantiated.[7]

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the 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.

[7]The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

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. AG ¶ 2(c). I hereby incorporate all of my comments under the preceding discussions of the four pertinent adjudicative guidelines into this section.

There is some evidence tending to mitigate Applicant's conduct under the whole person concept. He has much greater connections to the United States than to Cuba, and I am confident he would resolve any conflict in favor of United States interests. His dedication to his work and his country is a very positive indication of his good character and trustworthiness. He is loyal to his country. Applicant's record of good employment and law-abiding character weighs in his favor. There is no evidence of any security violation, or criminal activity. He received financial counseling. Some of his financial problems arose from his spouse's periodic unemployment. His non-SOR debts are current and being paid, or in a payment plan. These factors show some responsibility, rehabilitation, and mitigation.

The mitigating evidence under the whole person concept and the adjudicative guidelines are not sufficient to warrant access to classified information. His debts were discharged in 2004 utilizing bankruptcy. The overall amount of unresolved debt is about $250,000 and substantial. He has been continuously employed for 12 years, and his wife's intermittently unemployment does not account for the magnitude of their delinquent debt. When she has been employed, her income has been about $15,000 per year. Even when she was employed, and they were not making their monthly mortgage payments of $2,375; they still had a negative monthly cash flow. Applicant has been aware of the security significance of his delinquent SOR debts since he received the SOR in August 2008, and his offer to resolve his delinquent mortgages with the short sale of his residence in June 2008 is an inadequate attempt to resolve these debts.

The foreign preference security concern is substantial. After becoming a U.S. citizen in 1996, Applicant renewed his Cuban passport in 2006. He used his Cuban passport for his 2006 visit to Cuba for one week. He did not relinquish or surrender his Cuban passport to his facility security official (FSO). Even if he had relinquished his Cuban passport to his FSO, I would still deny his access to classified information because of his financial problems.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the financial considerations and foreign preference security concerns. Foreign influence and personal conduct security concerns are mitigated.

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 and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant

has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline C:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a to 1.c:	For Applicant
Subparagraphs 1.d and 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Paragraph 4, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

Conclusion

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 eligibility for a security clearance. Eligibility for a security clearance is denied.

_____
Mark W. Harvey
Administrative Judge