DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 08-01054
SSN:	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: Anna R. Noris, Esquire

February 6, 2009

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is granted.

Applicant submitted his Electronic Security Clearance Application (e-QIP), on June 12, 2007. On July 21, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines B, C and E. 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.

Applicant received the SOR. He answered the SOR in writing on August 13, 2008, and requested a hearing before an administrative judge. DOHA received the

request on August 14, 2008. Department Counsel was prepared to proceed on August 30, 2008, and I received the case assignment on September 4, 2008. DOHA issued a notice of hearing on October 1, 2008. I convened the hearing as scheduled on October 16, 2008. At the hearing, Applicant's counsel requested a continuance in order to obtain an interpreter for Applicant and his witness. I granted Applicant's request for a delay. DOHA issued a second notice of hearing on November 10, 2008, and I convened the hearing as scheduled on December 9, 2008. The government offered two exhibits (GE) 1 and 2, which were received and admitted into evidence without objection. Applicant and one witness testified on his behalf. He submitted one exhibit (AE) D, which was received and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on December 17, 2008. I held the record open until December 31, 2008, to submit additional matters. On December 30, 2008, Applicant submitted AE E, which was admitted without objection. On January 23, 2009, I conducted a telephone conference call with both counsel. I requested one additional document from Applicant, which was received on February 3, 2009 and admitted without objection as AE F. The government's response to this submission is marked and admitted as GE 15. The record closed on February 3, 2009.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Cuba and Columbia. In addition, Applicant also asked that I take administrative notice of certain facts relating to Cuba. (Tr. 9-10) The requests and the attached documents were not admitted into evidence, but were included in the record as GE 3 through 9 and 11 through 14,[1] and AE A through C. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his Answer to the SOR, dated August 13, 2008, Applicant admitted the factual allegations in ¶¶ 1.b, 1.c, 1.d, 2.a, and 2.c through 2.g of the SOR, with explanations. He denied the factual allegations in ¶¶ 1.a. 2.b and 3.a of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant, who is 60 years old, was born in Cuba prior to Fidel Castro's rise to power in 1959. He works in a security position for a Department of Defense contractor, a position he has held for the last three years. He has worked as a security officer in private industry since 1998. He worked as a jeweler for many years, but he retired from this profession when problems with his eyesight developed. English is his second language, and as such, idioms, colloquial expressions and certain general terminology

[1]The government withdrew GE 10 at the hearing.

are not necessarily understood because the Spanish language does not contain words with the same meaning. [2]

In 1966, at age 18, Applicant entered the Cuban Army, as required by Cuban law. He achieved the rank of Third Class Sergeant. While in the Army, he and several friends, who opposed the Fidel Castro government, took weapons and maps of secret hiding places for those in power (in the event of an American invasion) with the goal of giving this information to the American government. A member of their group informed the Cuban government of their activities. Initially, his friends were arrested, but he escaped. He returned to his parents home, where he remained until he was arrested. The Cuban government tried Applicant and his friends in a military court for rebellion, desertion, and ideological diversion, but took no action against his parents. The court sentenced him to eight years in prison as a political prisoner. After he served four years of his sentence, the Cuban government paroled him for good conduct. Since his release, he has not had any contact with these friends. Under Cuban governmental policy or law, the Cuban government could still return him to jail to serve the remaining four years of his sentence and if it chose to do so, could possibly detain him beyond this time.[3]

After his release from jail, Applicant worked in construction and attended a Baptist seminary trade school. He quit the seminary school before completing his training, when he realized that should an opportunity to leave Cuba arise in the future, he would not be allowed to leave Cuba because he had completed his schooling. In 1978, after American news stories, the Cuban government decided to allow former or present political prisoners and their families to leave Cuba. Applicant decided to leave Cuba under this program. He entered the United States (U.S.) in 1980 with a Cuban passport, which expired many years ago. His parents and brother remained in Cuba.[4]

Applicant's first wife and three children, two sons and a daughter, came with him to the U.S. in 1980. They continue to live in the U.S. His children are now adults. He and his first wife divorced in 1991 and he has no contact with her or her extended family. He married his present wife in 1996 and became a U.S. citizen the same year. His daughter recently became a U.S. citizen. He does not know if his sons are U.S. citizens. He talks with his daughter regularly. He has not spoken with his oldest son in seven years and could not remember when he last spoke with his younger son.[5]

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[2]Because English is his second language, he testified through an interpreter at the hearing. He does understand and speak English. Tr. 27, 62-63.

[3]Although Applicant belongs to an organization for political prisoners, he is no longer active in the organization. AE E; *Id*. 20-21, 49-51.

[4]*Id*. 21-23, 52-53.

[5]*Id*. 22-23, 32, 39-42; GE 1 (e-QIP) at 18-19.

Applicant's wife was born in Columbia, South America. She is a permanent resident of the U.S., but still a citizen of Columbia. Her two sons are citizens and residents of Columbia, South America, working in private industry. Her daughter resides in England and is a housewife. Her father, brother and sisters are citizens and residents of Columbia. When Applicant and his wife married, her children and his children were emancipated adults. He does not consider his wife's children his stepchildren. He does not talk with his wife's children or other family members although his wife does talk with her family by telephone periodically. He provides no financial support to her family. Her family members are not connected to the Columbian government or military. Applicant's wife is currently on disability from work, but plans to return to the work place.[6]

Since 1999, the U.S. has allowed limited travel to Cuba, including travel to visit with family members. In 1999, after 19 years in the U.S., Applicant decided to travel to Cuba to visit his elderly parents. He hired a travel agency to make travel arrangements for him. During this process, he learned that the Cuban government required all Cubans who had left Cuba after December 31, 1970 to obtain a Cuban passport. The Cuban government considered all these expatriates Cuban citizens and would not permit any of these individuals to enter Cuba on a foreign passport. Instead, Cuba required all expatriates who sought to enter Cuba to obtain a Cuban passport for admittance. With the help of the travel agency, Applicant obtained a Cuban passport, which was valid for two years and renewed for another year. He and his wife, but not his children, traveled to Cuba for one week in March 2000. They stayed with his family members while in Cuba. He recently attempted to submit his expired Cuban passport to his security office, but the company declined to accept his expired passport as did the agency which obtained the passport.[7]

Applicant and his wife also traveled to Columbia, South America in March 2000 to visit her family, including her sons. Applicant met his wife's family for the first and only time on this trip. Applicant has not returned to Columbia, although his wife returned 15 months ago. He and his wife also traveled to Europe in September 2000 to visit her daughter and for pleasure.[8]

Applicant traveled to Cuba a second time in 2002 to visit his elderly parents. He has not returned to Cuba and does not intend to travel to Cuba again, as he feels uncomfortable when in Cuba. He continues to fear he could be arrested and returned to jail. The Cuban passport he used to enter Cuba for this trip expired in June 2003 and has not been renewed.[9]

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[6]Tr. 25-26, 55, 59, 61.

[7]AE F; AE G; Tr. 23-24, 29, 37.

[8]Tr. 23, 25-27, 46, 55-56.

[9]*Id*. 24, 26, 49-50; GE 1, *supra* note 5, at 25. Applicant also traveled to Canada in 2005. *Id*., Tr. at 27.

Applicant's elderly parents are citizens of and reside in Cuba. Applicant's parents divorced in 1960. Both have remarried. His 92-year-old father retired after working 40 years in a cigar factory, which is owed by the Cuban government. He receives a pension. His wife is still alive. Applicant's mother, who is 84 years-old, worked in the same cigar factory as his father for 20 years. She is retired, but does not receive a pension. She depends upon her husband, a retired farmer, for income. With the Cuban government's permission, Applicant's mother traveled once to the U.S. in 1982. No other family member has traveled to the U.S. Applicant's brother is 64 years old and a retired art historian. He assumes his brother gets a pension from the Cuban government, but Applicant does not know about the pension for certain. Applicant speaks by telephone, his only means of communication, with his parents every two or three months. He spoke with his brother about one month ago. He believes that the Cuban government listens to his telephone conversations. His parents know he is a security officer, but do not know where he works. He sends each of his parents $125 two or three times a year. His family in Cuba has never been in prison. His children do not have any contact with their Cuban grandparents.[10]

Applicant holds an active U.S. passport, which he uses to travel out of and into the U.S. Since becoming a U.S. citizen, Applicant has purchased property, paid taxes, and voted in every U.S. election. He considers himself a U.S. citizen, not a Cuban citizen. He is proud to be an American citizen and would assist in the overthrow of the Cuban government. He has no allegiance to Cuba or Columbia. He did not receive any services from the Cuban government during his two visits. He does not own any property in Cuban nor does he have any bank accounts in Cuba. He will not inherit any property or anything else from his parents. He does not have any performance problems on his job.[11]

In 2007, Applicant completed his first security clearance application by hand several months before the completion of his e-QIP and gave it to his employer. He provided an undated and unsigned of copy this document at the hearing. His electronic copy was completed on June 12, 2007 by his security officer with some assistance from him and based on the information provided to the security officer in his hand written security application. The e-QIP contained a notation under the certification that his signature was on file. On a separate page, Applicant signed the certification about the truthfulness of his answers on June 12, 2007. In the e-QIP, he answered "no" to the question 17 d: "In the last 7 years, have you had an active passport that was issued by a foreign government?" In his hand written application, he answered "yes" and listed all his trips abroad since 2000, except his trip to Cuba in 2002. He listed all his foreign trips on his e-QIP. Applicant listed dual citizenship with Cuba on his e-QIP and his handwritten application. The e-QIP also contains other minor, non-contradictory information not on the hand written application. Applicant explained that his employer completed the eQIP, but he could not explain how the e-QIP had additional information

[10]GE 1, *supra* note 5, at 17, 18, 20; Tr. 36-39, 43-45.

[11]GE 2 (Interrogatories and answers with attachments) at 32; Tr. 48, 59-60.

not contained in his hand written application. He denies trying to intentionally deceive the government about the existence of his Cuban passport. He did not read the e-QIP once it was completed, but acknowledges that he signed it. It is unclear as to how the employer obtained the information contained in the e-QIP, although Applicant testified that he provided his prior employer with information about his travels abroad before he traveled. Applicant also testified to some misunderstanding about having dual citizenship with Cuba. He never asked for dual citizenship, but was told he needed a Cuban passport to enter Cuban. He found this situation confusing.[12]

A friend testified on Applicant's behalf through a translator. Applicant's friend is also Cuban born and immigrated to the U.S. in 1978. He has known Applicant for 12 to 15 years as they are members of the same church. He has returned to Cuba three times and had to acquire a Cuban passport to enter Cuba. He has not received any papers from the U.S. government to go to Cuba. He recommends Applicant for a position of trust as Applicant would never help the Cuban or Columbian government.[13]

Columbia

Columbia is a constitutional, multiparty democracy with extensive strategic ties to the United States. Columbian citizens enjoy rights similar to U.S. citizens. International observers described the May 2006 elections as free and fair, despite efforts by terrorist groups to interfere in the election process.

In the past, Columbia had significant internal problems because of the powerful drug cartels. With strong support from the U.S., the drug cartel problems have been reduced. The citizens of Columbia and other countries face serious threats from terrorist and paramilitary organizations within Columbia, but not the Columbian government. The U.S. is fully committed to supporting the Columbian government in its efforts to defeat Columbian-based Foreign Terrorist Organizations. In recent years, Columbia has expanded its role as a regional leader in counter-terrorism.

The Columbian government cooperates with U.S. and international organizations on human rights issues. Despite this fact, arrests of suspected terrorists and paramilitary can lead to human rights violations for these detainees. In Columbia, human rights violations are often committed, not by the government, but by terrorist organizations. In response to these problems, the Columbian government successfully improved human rights and security issues, for example a reduction in massacres and kidnaping, through effective law enforcement supported by an active judiciary. Again, through effective judicial decisions, the prosecutors successfully investigated and prosecuted links between politicians and paramilitary groups.

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[12]AE D (hand written security clearance application); GE 1, *supra* note 5; Tr. 29-32, 58.

[13]Tr. 67-73.

Cuba

In 1902, Spain granted Cuba its independence. Since 1959, Cuba has been a totalitarian state. Cuba is a multiracial society, which is primarily urban. Constitutional rights, such as freedom of speech and right to a fair trial, enjoyed by American citizens are not enjoyed by Cuban citizens. Cuba views Cuban-born American citizens as Cuban citizens only.

The Cuban government controls the life of its citizens. It retains control through intense physical and electronic surveillance. The Cuban government can harass its citizens for contacts with Americans. Human rights abuses occur, particularly with those arrested, detained and imprisoned, and imprisonment for political reasons continues.

The U.S. continues the broad embargo established in the 1960s against trading with Cuba and continues to prohibit most commercial imports from Cuba. Between 1989 and 1993, the Cuban gross national product declined by 35% following the loss of Soviet era subsidies. The Cuban economy is still recovering and is controlled by the state. In addition, the military plays a dominant role in the economy. Cuba currently seeks to grow its economy, partially through tourism.

The U.S. considers Cuba a state sponsor of terrorism. Cuba has long targeted the U.S. for intensive espionage activities. With the loss of Soviet subsidies, Cuba has abandoned monetary support for guerilla movements although it still maintains relations with several guerrilla and terrorist groups, sometimes providing refuge in Cuba for members of these groups.

In 1999, the U.S. opened travel to Cuba, including allowing Cuban-Americans to travel back to Cuba to visit family members. The new travel rules are governed by The Cuban Assets Control Regulations, which are enforced by the U.S. Treasury Department. These regulations require all U.S. citizens traveling to Cuba to get a license. Visits to family members in Cuba require a specific license and the number of trips is limited. In addition, persons in the U.S. can send up to $300 every quarter to family members in the same household.

Under recent U.S. policy, the U.S. presses for political, economic and democratic change in the Cuban lifestyle.

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.

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.[14]

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[14]After any decision, the losing party has a right to appeal the case to the DOHA Appeal Board. The Appeal Board's review authority is limited to determining whether three tests are met:

> E3.1.32.1. The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge:
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> E3.1.32.2. The Administrative Judge adhered to the procedures required by E.O. 10865 (enclosure 1) and this Directive: or
>
> E3.1.32.3. The Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law.

The Appeal Board does not conduct a "*de novo* determination", recognizing they have no opportunity to observe witnesses and make credibility determinations. The Supreme Court in *United States v. Raddatz*, 447 U.S. 667, 690 (1980) succinctly defined the phrase "*de novo* determination":

> [This legal term] has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 23 [(1974)], the Court had occasion to define "*de novo* proceeding" as a review that was "unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency's] determination is supported by substantial evidence." In *United States v. First City National Bank*, 386 U.S. 361,368 [(1967)], this Court observed that "review *de novo*" means "that the court should make an independent determination of the issues" and should "not . . give any special weight to the [prior] determination of "the administrative agency.

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

Guideline C, 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 describes conditions that could raise a security concern and may be disqualifying:

> (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;
>
> (2) military service or a willingness to bear arms for a foreign country;

(Internal footnotes omitted). *See* ISCR Case No. 07-10396 (App. Bd., Oct. 2, 2008) and ISCR Case No. 07-07144 (App. Bd., Oct. 7, 2008). In ISCR Case No. 05-01820 (App. Bd. Dec 14, 2006), the Appeal Board criticized the administrative judge's analysis, supporting grant of a clearance for a PRC-related Applicant, and then decided the case itself. Judge White's dissenting opinion cogently explains why credibility determinations and ultimately the decision whether to grant or deny a clearance should be left to the judge who makes witness credibility determinations. *Id*. at 5-7. *See also* ISCR Case No. 04-06386 at 10-11 (App. Bd. Aug. 25, 2006)(Harvey, J., dissenting) (discussing limitations on Appeal Board's authority to reverse hearing-level judicial decisions and recommending remand of cases to resolve material, prejudicial error) and ISCR Case No. 07-03307 (App. Bd. Sept. 29, 2008).

When the U.S. changed its policy and allowed Cuban-Americans to travel to Cuban to visit family members, Applicant decided to visit his elderly parents. Because Cuban considers all Cubans who left Cuba after December 31, 1970 citizens of Cuba only regardless of their current citizenship, it requires all Cuban expatiates to obtain a Cuban passport to enter Cuba. Applicant obtained a new Cuban passport in 1999 before he traveled to Cuban in 2000. He renewed the passport once, prior to a second trip to Cuba in 2002. His Cuban passport expired in June 2003. He acknowledged dual citizenship with Cuba when completing his security clearance application. A security concern has been raised in disqualifying condition AG ¶ 10(a)(1). However, because Applicant served in the Cuban military as a young man and prior to becoming a U.S. citizen, AG ¶(a) (2) does not apply.

The guideline also includes conditions that could mitigate security concerns arising from Foreign Preference. The following Foreign Preference Mitigating Conditions (FP MC) have the potential to apply in Applicant's case.

FP MC ¶ 11(a) (*dual citizenship is based solely on parents' citizenship or birth in a foreign country*) does not appy.

FP MC ¶ 11(b) (*the individual has expressed a willingness to renounce dual citizenship*) partially applies. Although he did not expressly offer to formally renounce his Cuban citizenship, Applicant does not consider himself a citizen of Cuban. He indicated he had dual citizenship with Cuba because Cuba considers him a citizen of Cuba. He does not consider himself to be a dual citizen of Cuba. He has no interest in Cuban citizenship and his only allegiance is to the U.S.

Because Applicant obtained a Cuban passport, mitigating condition, FP MC ¶ 11(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*), does not apply. His past military service does not raise a security concern.

FP MC ¶ 11(d) (*use of a foreign passport is approved by the cognizant security authority*) is not applicable to the facts of this case.

FP MC ¶ 11(e) (*the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated*) applies. Applicant did not renew his Cuban passport after it expired in 2003. Thus, he has not held a valid Cuban passport for almost six years. He does not intend to travel to Cuba in the future, particularly since he fears that the Cuban government could return him to jail. He supported his statement about his intent by attempting to submit his invalid passport to his security office.[15]

FP MC ¶ 11(f) (*the vote in a foreign election was encouraged by the United States Government*) is not applicable because there is nothing in the record evidence suggesting Applicant voted in a foreign election.

[15]The government concedes that his invalid passport fulfills this mitigating condition. GE 15.

Applicant mitigated the Foreign Preference concerns about use of his passport. Applicant lives in the U.S. and does not intend to return to Cuba or to serve in the Cuban Army. He would assist in the overthrow of the Cuban government. Since becoming a U.S. citizen, he has voted in U.S. elections, paid taxes, and purchased property in the U.S. He considers himself a U.S. citizen and not a Cuban citizen. He has exercised his rights of U.S. citizenship and has shown a preference to the U.S. Guideline C is found for Applicant.

Guideline B, Foreign Influence

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 6:

> 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.

Under the potential disqualifying conditions described in AG ¶ 7, the following conditions 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.

Since his divorce, Applicant has not had any contact with his former wife and her family living in Cuba. Thus, no security concern is raised by any contacts his former wife may have with her family. His former wife continues to live in the U.S. His adult daughter is a citizen and resident of the U.S. His adult sons are long-time residents of the U.S., although they may still be citizens of Cuba. While his wife is still a citizen of Columbia, she is a permanent resident of the U.S. and resides with Applicant in the U.S. Thus, these relationships are not a security concern. However, Applicant's parents and brother are citizens and residents of Cuba. Applicant maintains a normal, but limited, familial relationship with his parents and brother. He talks with them by telephone every

two or three months and visited them twice since leaving Cuba 28 years ago. He does provide each of his parents with less than $500 a year in financial support. He traveled to Columbia in 2000 to met his wife's family. He does not personally speak with her family, but his wife does have regular contact with her sons in Columbia and her father. She also visited her Columbian family 15 months ago. No financial support is provided to his wife's Columbian family. His family relationships, his wife's family contacts and his minimal financial support to his family are not *per se* a reason to deny Applicant a security clearance, but his and his wife's contacts with family members must be considered in deciding whether to grant Applicant a clearance. The government must establish that these family relationships create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion or would create a potential conflict of interest between his obligations to protect sensitive information and his desire to help his family members.

In determining if a heightened risk exists, I must look at Applicant and his wife's relationship and contacts with family members as well as the activities of the governments of Cuba and Columbia and terrorists organizations within these countries. *See* ISCR Case No. 07-05809 (App. Bd. May 27, 2008). The risk that an Applicant could be targeted for manipulation or induced into compromising classified information is real, not theoretical. Applicant's relationship and contacts with his parents and brother in Cuba raises a heightened risk of security concerns because Cuba does engage in espionage activities in the U.S. There are no indications that Cuban government targets U.S. citizens to obtain protected information. Cuba and its intelligence agents did receive protected information from persons in the U.S., but in these cases, the information was either obtained by Cuban agents or offered to the agents by the U.S. citizens rather than Cuba targeting the U.S. citizens by exploiting, manipulating, pressuring, or coercing U.S. citizens for protected information.

Under the new guidelines, the potentially conflicting loyalties may be weighed to determine if an applicant can be expected to resolve any conflict in favor of the U.S. interests.[16] In determining if Applicant's wife's contacts in Columbia cause security concerns, I considered that Columbia and the U.S. have a close relationship, are allies in the fight against terrorism, and the citizens of Columbia enjoy basic freedoms similar to U.S. citizens. There is no evidence that the Columbian government targets U.S. citizens for protected information. The human rights issues in Columbia arise from the terrorist organizations and paramilitary groups, not the Columbian government. Because of the activities of terrorist organizations and paramilitary groups in Columbia,

[16]Under the old adjudicative guidelines, a disqualifying condition based on foreign family members could not be mitigated unless an applicant could establish that the family members were not in a position to be exploited. The Appeal Board consistently applied this mitigating condition narrowly, holding that its underlying premise was that an applicant should not be placed in a position where he is forced to make a choice between the interest of the family member and the interest of the United States. (*See* ISCR Case No. 03-17620, (App. Bd, Apr. 17, 2006); ISCR Case No. 03-24933, (App. Bd. Jul. 28, 2005); ISCR Case No. 03-02382, (App. Bd. Feb. 15, 2005); and ISCR Case No. 03-15205, (App. Bd. Jan. 21. 2005)). Thus, an administrative judge was not permitted to apply a balancing test to assess the extent of the security risk.

Applicant's wife's contacts with her family in Columbia raise a heightened risk concern under AG ¶¶ 7(a) and (b).

Concerning Applicant's contacts with his family members in Cuba, I have considered that Cuba is a state sponsor of terrorism, provides refuge for members of terrorist organizations, maintains stringent control over the lives of its citizens through intense physical and electronic surveillance, denies its citizens basic freedoms enjoyed by U.S. citizens, and violates basic human rights. While there are no indications in these instances that Cuba is directly targeting U.S. citizens to provide sensitive information, Cuba does engage in intense espionage in the U.S. Cuba is a hostile country, whose interests are inimical to the U.S. The U.S. is a large democracy and Cuba is a totalitarian government. Because Cuba and the U.S. are adversaries, Cuba would act against U.S. interests if given an opportunity. While none of these considerations by themselves dispose of the issue, they are all factors to be considered in determining Applicant's vulnerability to pressure or coercion because of his family members in Cuba. His two trips to Cuba and his contacts with his family members establish that there is a heightened risk that Applicant will be targeted under AG ¶¶ 7(a) and (b).

In deciding if Applicant has established mitigation, under AG ¶ 8 (a), I must consider:

> 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.

and under AG ¶ 8(b), I must consider whether Applicant has established:

> 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. interests.

Applicant's normal relationship with his family members is not a basis to deny him a security clearance; however, his burden of proof on mitigation requires more than statements about the limited scope of his conversations with his three brothers and no conversations with his wife's sons and family. *See* ISCR Case No. 07-02485 (App. Bd. May 9, 2008). Because all Cuban industry is state owned, Applicant's parents and brother have worked, at least indirectly, for the Cuban government. However, his parents and brother have never held a political position. It is unclear whether their retirement income comes from the Cuban government, but given the Cuban government control over industry and other matters of Cuban life, I infer that the government is the source of his family's retirement income. Even though Cuba is a totalitarian state and seeks to harm the U.S., Applicant's family has not been targeted

by the Cuban government. His family members have never been imprisoned. In fact, his parents were not punished by the Cuban government when they allowed Applicant to take refuge in their home after his escape from authorities in the late 1960s. In addition, Cuba allowed his mother to travel to the U.S. in 1982 and made no overt contacts with him when he visited his family in 2000 and 2002. His closest family members are residents of the U.S. Since he became a U.S. citizen in 1996, he has exercised the rights and privileges of citizenship. Balancing these factors against Cuba's espionage activities, support of terrorism, and the lack of evidence that Cuba targets U.S. citizens for protected information, I find that Applicant would resolve any conflict in favor of the U.S. interests. Likewise, any threats against Applicant's wife's family in Columbia by terrorists organizations and paramilitary groups would be resolved in favor of U.S. interests. His loyalties are to the U.S., not Cuba or Columbia. Applicant has mitigated the government's security concerns as to his family contacts specified in SOR ¶ 2. under AG ¶ 8b.

Guideline E, 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. 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(a) 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.

For this guideline to apply, Applicant's omission must be deliberate. The government established that Applicant omitted material facts from his SF-86 when he answered "no" to Question 17 d about his Cuban passport. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty. He denies, however, that he deliberately falsified his answer to this question. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the

omission occurred.[17] For DC ¶ 16 (a) to apply, the government must establish that Applicant's omission, concealment or falsification in his answer was deliberate.

When he completed his hand written SF-86 and e-QIP, Applicant indicated that he was a dual citizen of Cuba. He explained that although he has not considered himself a citizen of Cuba after becoming a U.S. citizen, he knew that Cuba still considered him a citizen because he had to obtain a Cuban passport before he could visit his family in Cuba. He not only listed his dual citizenship status, but he also listed his trips to Cuba in 2000 on both applications and his 2002 trip on the e-QIP. His failure to list his Cuban passport on the e-QIP is not dispositive in light of the other information contained in his SF-86 and e-QIP. He clearly presented other information which, by itself, shows his connection to Cuba and raised a the security concern under Guideline B. The presentation of this information indicates that Applicant did not intentionally falsify his security clearance application. It shows he had no intention of concealing his connection to Cuba. Guideline E is found in favor of Applicant.[18]

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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The "whole person" concept requires consideration of all available information about Applicant, not a single item in isolation, to reach a common sense determination concerning Applicant's security

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[17] *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov.17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

[18] Even if I were to find the government had established disqualifying condition AG ¶ 16(a), mitigating condition AG 18(f), *the information was unsubstantiated or from a source of questionable reliability* would apply as the allegation of intentional falsification was unsubstantiated.

worthiness. I have considered all the facts and evidence in the record, even if not specifically enumerated.

As a young man, Applicant opposed the totalitarian government established by Fidel Castro. With friends, he took actions against the interest of the Cuban government, which resulted in his conviction by a military court for rebellion, desertion and ideological diversion. He served four years in jail for his political beliefs. When Fidel Castro granted former political prisoners the opportunity to emigrate to the U.S., Applicant and his immediate family left their homeland for the U.S. in 1980. For nearly 20 years, Applicant complied with U.S. policy prohibiting visits to Cuba. When the U.S. revised its policy, Applicant decided to visit his elderly parents twice. During each trip, he worried about being arrested and returned to jail to serve the remainder of his sentence. He also felt that he was being watched by the Cuban government. Because of his fear of jail and feelings about being watched, he has decided not to return to Cuba. By this decision, Applicant has eliminated the possibility of exploitation, coercion, pressure, or duress based on his fear of what could happen if he returns to Cuba. His closest contacts are his daughter, a U.S. citizen and resident, and wife, a permanent resident of the U.S. His sons are U.S. residents. Although he does not actively participate in any organizations seeking to overthrow the current Cuban government, he strongly supports U.S. policy advocating democratic reforms and changes in Cuba. He is not likely to be coerced, pressured or exploited because of his family contacts in Cuba and his wife's family contacts in Columbia as his loyalty rests with the U.S.

Applicant made a conscious decision to obtain and use a Cuban passport after becoming a U.S. citizen. He made this decision solely to visit his elderly parents, whom he had not seen in 20 years. He does not consider himself a citizen of Cuba and does not exercise any rights of Cuban citizenship as part of his daily life. He is proud to be an American and treasures the rights he has in the U.S. His loyalty to the U.S. outweighs his decision to obtain and use a Cuban passport to enter Cuba for a family visit.

Applicant's failure to list the existence of his Cuban passport relates more to a language issue than to intentional conduct on his part. Applicant did not learn English until after he arrived in the U.S. when he was 32 years old. Despite the fact that he speaks and understand English, it is his second language. As such, he has and will always continue to experience problems with interpretation of words and phrases because of linguistic differences between English and Spanish. He readily acknowledged his trips to Cuba, which required a Cuban passport. On his security clearance application, he also acknowledged his birth in Cuba and his dual citizenship status with Cuba based on Cuba's requirement that he have a passport. His employer completed the application for him. He did not read it before he signed it. The omission of the information about his Cuban passport was not deliberate, but careless.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guidelines C, B and E.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	For Applicant
Subparagraph 2.f:	For Applicant
Subparagraph 2.g:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge