



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



In the matter of:)	
)	
)	ISCR Case No. 09-08043
)	
Applicant for Security Clearance)	

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

June 30, 2011

Decision

Duffy James F., Administrative Judge:

Applicant has failed to mitigate the Foreign Preference and Foreign Influence security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On October 6, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline C, Foreign Preference, and Guideline B, Foreign Influence. DOHA acted under Executive Order (EO) 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on October 18, 2010, and requested a hearing if it was necessary. Department Counsel submitted a notification that the Government was ready to proceed on November 30, 2010. The case was originally assigned to another judge and was reassigned to me on March 28, 2011. DOHA issued a notice of hearing

on April 13, 2011, and the hearing convened as scheduled on April 27, 2011. The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. The Government also requested that administrative notice be taken of Hearing Exhibits (HE) I through VI. Applicant had no objection to the administrative notice request and it was granted. Applicant testified and offered no exhibits. The record was held open until May 11, 2011, for Applicant to submit additional information. On Applicant's behalf, his Facility Security Officer timely submitted exhibits (AE) A through D, which were admitted into evidence without objection. HE VII is an email showing that Applicant adopted AE A through D. DOHA received the hearing transcript (Tr.) on May 9, 2011.

Procedural Rulings

At the hearing, Applicant waived the 15-day notice requirement imposed by ¶ E3.1.8 of the Directive. Based on Applicant's testimony, Department Counsel moved to amend Paragraph 1 (Guideline C) of the SOR by adding the following allegation:

- c. You obtained an Ecuadorian passport in April 2011 and currently possess that passport.

Applicant had no objection to the motion to amend the SOR, and it was granted.¹

Findings of Facts

In his Answer to the SOR, Applicant admitted each of the original SOR allegations. His admissions are incorporated herein as findings of fact.

Applicant's background

Applicant is a 32-year-old employee of a defense contractor. He has been working for his current employer since June 2009. He is a high school graduate. He is married and has two children, ages nine and four. This is the first time that he has applied for a security clearance.²

Applicant was born in Ecuador. He is a dual citizen of Ecuador and the United States and currently resides in Ecuador. Except for a period of approximately two years (1999-2000) when he resided in the United States, he has always resided in Ecuador. His mother and father are missionaries who reside in Ecuador. His mother was born in the United States and is only a U.S. citizen. His father was born in Ecuador and is a dual citizen of Ecuador and the United States. His father served in the U.S. military and is a Vietnam War veteran. Applicant acquired his U.S. citizenship by birth and his

¹ Tr. 12-14, 48-52, 58-60, 63-65.

² Tr. 5, 27-28, 40-41, 55; GE 1 through 3.

parents documented his birth by filing a Consular Report of Birth Abroad at the U.S. Embassy in Ecuador in July 1980.³

Applicant's wife and two daughters are citizens and residents of Ecuador. His daughters are not currently eligible for U.S. citizenship because he fails to meet the U.S. residency requirements (six years) for them to acquire U.S. citizenship through him. His daughters may become eligible by residing in the United States for a period of time. He indicated that he and his family will reside permanently in the United States when he is in a better financial situation.⁴

Applicant's brother and three sisters were born in Ecuador, and they are dual citizens of Ecuador and the United States. None of them have served in the military. His brother resides in the United States. Each of his sisters resides in Ecuador. One of his brothers-in-law is a U.S. citizen; the other two are Ecuadorian citizens. His mother-in-law and father-in-law are citizens and residents of Ecuador. He also has nieces and nephews who are citizens and residents of Ecuador. His grandfathers have passed away, and his grandmothers reside in the United States. None of Applicant's relatives are connected, currently or in the past, with any foreign government.⁵

Applicant inherited land in Ecuador from his grandfather. He and other family members reside on that property. The value of the property is approximately \$45,000 to \$65,000. He has a bank account with a balance of about \$300 to \$800 in Ecuador. He also has a bank account with about \$1,000 in the United States. Except for that latter bank account, he owns no other property in the United States.⁶

Applicant voted in a general election held in Ecuador in 2009. He has never voted in a U.S. election. He was issued an Ecuadorian passport in June 2005 that was due to expire in June 2011. His company submitted a letter dated November 16, 2009, documenting Applicant's destruction of that passport. He signed that letter. At the hearing, he testified that he acquired another Ecuadorian passport on April 19, 2011, that is due to expire on April 19, 2016. He used this Ecuadorian passport to travel from Ecuador to the hearing and was planning to use it to return to Ecuador. He has always used an Ecuadorian passport to enter or depart Ecuador. He testified that Ecuadorian custom officials require that he use his Ecuador passport. He also indicated that, in order to use only his U.S. passport to enter and exit Ecuador, he would have to renounce his Ecuadorian citizenship. During an interview with a Department of State investigator in October 2010, he stated that, if requested, he would be willing to give up his Ecuadorian citizenship as he holds his U.S. nationality in higher regards over his Ecuadorian nationality. At the hearing, he did not indicate that he intends to renounce

³ Tr. 28-34, 38-41, 44-46, 59-60.

⁴ Tr. 40-41, 52, 57.

⁵ Tr. 31-32, 37-44, 46-47; GE 3.

⁶ Tr. 34-36, 38-40, 43-44, 47-48, 52-53, 55-58.

his Ecuadorian citizenship. On May 11, 2011, Applicant surrendered his new Ecuadorian passport to his company's facility security officer who indicated a Joint Personnel Adjudication System (JPAS) incident report would be submitted in the event the passport is returned to Applicant. A U.S. State Department publication reflects that a child born in Ecuador must depart that country for the first time using an Ecuadorian passport, but a dual national may re-enter Ecuador either as an Ecuadorian citizen or as a U.S. citizen with visa or as a tourist.⁷

Applicant provided character reference letters in his post-hearing submission. One coworker indicated that Applicant displays the highest moral character, professionalism, and patriotism. The coworker describes him as a valuable asset to any organization. Other coworkers wrote letters attesting to his dedication, commitment to excellence, and integrity.⁸

Ecuador

Ecuador is a constitutional republic with a population of 14.6 million. The government is democratically elected and consists of a president with a cabinet, unicameral legislature, and court system including a national court of justice and provincial courts. In the past, Ecuador has been caught in cycles of political instability. Ecuador's political parties have historically been small, loose organizations that depend more on populist, often charismatic, leaders to retain support on programs and ideology. Frequent splits have produced great factionalism. The last three popularly elected presidents did not complete their terms. Ecuador's current president was first installed in January 2007 after an election process that election observers considered free, fair, and transparent. However, in March 2007, 57 members of Congress were dismissed for violations of campaign laws. This resulted in a largely deadlocked Congress that was replaced by a constituent assembly in September 2007. This assembly drafted a new constitution that voters approved in a referendum on September 28, 2008. The president was re-elected in April 2009.⁹

The Ecuadorian Government generally respects the human rights of its citizens. However, the country continues to experience serious human rights problems including isolated unlawful killings and use of excessive force by security forces, sometimes with impunity; arbitrary arrests and detentions; corruption and other abuses by security forces; and corruption and denial of due process within the judicial system.¹⁰

The United States and Ecuador have maintained close ties based on mutual interests in combating narco-trafficking and cooperating in fostering Ecuador's

⁷ Tr. 48-53, 58-66; AE A; HE III.

⁸ AE B through D.

⁹ HE I, II, V, VI.

¹⁰ HE I, V.

economic development. Ecuador uses the U.S. dollar as its official currency. Ecuador has always placed great emphasis on multilateral approaches to international problems and is a member of the United Nations and the Organization of American States. Ecuador is also a member of many regional groups, yet it has experienced border disputes with its neighbors Peru and Columbia. A major crisis erupted in March 2008, when Columbian forces raided a Revolutionary Armed Forces of Columbia (FARC) terrorist camp in Ecuador. The ongoing rift between Columbia and Ecuador has caused Ecuador to reinforce its ties with President Chavez and Venezuela.¹¹

Recent events have strained bilateral relations between the United States and Ecuador. U.S. officials have expressed concern about President Correa's ties with President Chavez of Venezuela. In addition, President Correa's refusal to extend the U.S. lease of Manta – an Air Force Base along the Pacific Coast used for U.S. aerial counter-drug detection and monitoring operations – beyond 2009, which jeopardized future U.S.-Ecuadorian counter-narcotics cooperation. Crime is a serious problem in Ecuador, and in late 2009 and early 2010, the Government declared a state of emergency in several areas of the country. During these emergencies certain constitutional rights are suspended, detention powers are expanded, and military forces worked with police forces on anti-crime initiatives. Due to the spread of organized crime, drug trafficking, small arms trafficking, and incursions by various Columbian terrorist organizations, the U.S. Embassy advises caution when traveling in certain parts of the country. U.S. Government personnel are under strict limitations with respect to traveling alone or overnight in certain areas, including Guayaquil. Eleven U.S. citizens including one in October 2009, have been kidnapped over the past decade.¹²

Ecuador's greatest counter-terrorism and security challenge is the presence of narcotics, criminal, and terrorists groups along its northern border. "[The FARC] regularly used Ecuadorian territory for recuperation, medical aid, weapons and explosives procurement, and coca processing. These activities involved Ecuadorian and Columbians refugees in northern Ecuador in direct and indirect ways." While the current administration has publicly expressed a desire to eliminate the FARC's presence in Ecuador, insufficient resources and a porous 450 mile boarder have made that presence difficult to thwart.¹³

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions that are to be used in evaluating an applicant's eligibility for access to classified information.

¹¹ HE I, II, III, IV, VI.

¹² HE III, VI.

¹³ HE IV.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* Executive Order 12968, 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 is as follows:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

AG ¶ 10 describes conditions that could raise a security concern and may be disqualifying. Two are potentially applicable in this case:

- (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; (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country; (4) residence in a foreign country to meet citizenship requirements; (5) using foreign citizenship to protect financial or business interests in another country; and
- (b) action to acquire or obtain recognition of a foreign citizenship by an American citizen.

As a U.S. citizen, Applicant obtained Ecuadorian passports in June 2005 and April 2011. He has used the Ecuadorian passports to exit and enter Ecuador, most recently in April 2011. He voted in the Ecuadorian general election in 2009. For most of his life, he has resided in Ecuador, along with his immediate family. His actions indicate a preference for Ecuador over the United States. The evidence establishes AG ¶¶ 10(a) and 10(b).

AG ¶ 11 provides conditions that could mitigate foreign preference 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) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and
- (e) the vote in a foreign election was encouraged by the United States Government.

Applicant's Ecuadorian citizenship was based on his birth in that country, but since becoming an adult he has exercised rights and privileges of Ecuadorian citizenship, e.g., voting in the general election and using an Ecuadorian passport to travel. During an interview with a Department of State investigator, he has indicated that he would renounce his Ecuadorian citizenship if he was ever requested to do so. In

making the renunciation contingent upon a request, he has not demonstrated that he is unequivocally willing to renounce his foreign citizenship.¹⁴ No evidence was presented that the U.S. Government encouraged him to vote in the 2009 Ecuadorian general election. I find that AG ¶ 11(b) partially applies, but does not mitigate the security concerns under Guideline C. AG ¶¶ 11(a), 11(c), and 11(e) do not apply.

Applicant obtained an Ecuadorian passport in 2005 that was destroyed in 2009. He signed the letter documenting the destruction of that passport and, in doing so, should have been aware that possession of a foreign passport created security concerns and impacted his security clearance eligibility. Nevertheless, he recently renewed his Ecuadorian passport in April 2011, while his security clearance application was pending. He used that new passport to travel from Ecuador to the hearing and stated he would use it to return there. Since returning, he surrendered his Ecuadorian passport to his facility security officer. I find that AG ¶ 11(d) applies, but does not mitigate the Guideline C security concerns. Specifically, he has indicated he is required to use his Ecuadorian passport to travel to or from Ecuador. U.S. State Department information, however, reflects that dual citizens of Ecuador and the United States may enter Ecuador as a U.S. citizen with a visa. No evidence was presented that he obtained a visa to reside in Ecuador and, thereby, enable him to use his U.S. passport to enter or exit Ecuador. At the hearing, he said that he would have to renounce his Ecuadorian citizenship in order to travel only on a U.S. passport. No evidence was presented that he renounced his Ecuadorian citizenship. In short, he has failed to establish that he has taken whatever action may be necessary for him to no longer need his foreign passport for international travel. Under these circumstances, I find that his most recent surrender of his Ecuadorian passport to his facility security officer does not mitigate the Guideline C security concerns arising under SOR ¶ 1.c.

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding foreign influence:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying. Four are potentially applicable here:

¹⁴ See ISCR Case No. 09-07072 at (App. Bd. Dec. 14, 2010).

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

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information;

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion; and

(e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

AG ¶¶ 7(a), 7(d), and 7(e) require substantial evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk of greater than the normal risk inherent in having a family member living under a foreign government or owning property in a foreign country. The totality of Applicant’s family ties to a foreign country as well as each individual family tie must be considered.

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.”¹⁵

Furthermore, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.”¹⁶ Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation’s government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant’s family members are vulnerability to coercion from the government, terrorist organizations, or other groups.¹⁷

¹⁵ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

¹⁶ ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

¹⁷ See *generally*, ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

Applicant's numerous and close family ties in Ecuador are a concern. His wife and children are citizens and residents of Ecuador. He resides there with them. His father and sisters are dual citizens of Ecuador and the United States and reside in Ecuador. Although his mother is solely a U.S. citizen, she resides in Ecuador. A number of his extended family members are citizens and residents of Ecuador. Most of his property and financial interests are located in Ecuador. Although the United States and Ecuador maintain close ties, Ecuador has significant security challenges arising from narco-terrorism and criminal groups. A terrorist organization, the FARC, operates inside its borders. While Ecuador generally respects the rights of its citizens, it has experienced isolated unlawful killings and use of excessive force by security forces, arbitrary arrests and detentions, and corruption and denial of due process within the judicial system. Eleven U.S. citizens have been kidnapped there in the past decade. Given Applicant's extensive contacts and interests in Ecuador, the narco-terrorism concerns and human rights abuses in Ecuador create heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. Additionally, considering those security concerns in Ecuador, his extensive family contacts in Ecuador could also create a potential conflict of interest with his obligations to protect sensitive information. I find that AG ¶¶ 9(a), 9(b), 9(d), and 9(e) apply.

AG ¶ 8 provides conditions that could mitigate foreign influence security concerns. Four are potentially applicable in this case.

(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; 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.

The nature of Applicant's contacts and interests in Ecuador are not minimal, infrequent, or casual. On the contrary, he lives there and his contacts and interests in that foreign country are extensive. Most of his immediate family members are citizens and residents of Ecuador. Most of his property and financial interests are located there.

While it is unlikely that Applicant would be put in a position of having to choose between his contacts and interests in Ecuador and that of the United States, Ecuador's terrorism and human rights problems remain a security concern. I find that AG ¶ 8(a) and 8(f) marginally apply and that AG ¶ 8(c) does not apply.

Applicant has resided in Ecuador for about 30 years and in the U.S. for about 2 years. He voted in an Ecuadorian election and has never voted in a U.S. election. The vast majority of his family members as well as his financial interests are in Ecuador. He recently obtained and used an Ecuadorian passport. When considering his relationship to the United States and his relationship to Ecuador, I am not convinced his sense of loyalty to Ecuador is so minimal that he can be expected to resolve any conflict of interest in favor of the U.S. interest. I find AG¶ 8(b) does not apply.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

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

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines C and B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. I considered Applicant's character references. One reference letter indicated that he displays the highest moral character, professionalism, and patriotism. Others attest to his dedication, commitment to excellence, and integrity. Applicant stated that he intends to relocate his family to the United States when he is in a better financial situation. Nevertheless, his actions indicate a preference for Ecuador over the United States. In particular, he has shown such a preference by voting in the 2009 Ecuadorian general election and by recently obtaining and using an Ecuadorian passport. Although he surrendered his foreign passport to his facility security officer since the hearing, he has failed to persuasively demonstrate that he will not use the foreign passport while holding a security clearance.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. Considering all the evidence, I conclude Applicant failed to mitigate the security concerns arising under the guidelines for Foreign Preference and Foreign Influence.

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
Subparagraphs 1.a – 1.c:	Against Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraphs 2.a – 2.k:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge