DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 11-03121
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

01/30/2014

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines B (Foreign Influence) and C (Foreign Preference). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on July 22, 2011. On June 13, 2013, the Department of Defense (DOD) sent her a Statement of Reasons (SOR) alleging security concerns under Guidelines B and C. DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant received the SOR on June 14, 2013; answered it on June 25, 2013; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 16, 2013, and the case was assigned to me on October 23, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of

hearing on November 14, 2013, scheduling the hearing for December 12, 2013. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. I admitted the enclosures to GX 4, but I declined to admit Applicant's handwritten answers to interrogatories, because they were unsigned and not otherwise authenticated. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. DOHA received the transcript (Tr.) on December 17, 2013.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about Colombia. The request and supporting documents are attached to the record as Hearing Exhibit I. I took administrative notice as requested. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In her answer to the SOR, Applicant admitted the allegations in SOR ¶ 1.a, 2.a, and 2.b. She denied SOR ¶ 2.c. Her admissions in her answer and at the hearing are incorporated in my findings of fact.

Applicant is a 52-year-old electronic manufacturing technician employed by a defense contractor since September 2005. She worked as an electronic technician for a non-government employer from January 1996 to December 1999, was unemployed from January to November 2000, and worked for non-government employers from November 2000 until she began her current job.

Applicant has never held a security clearance. She applied for a security clearance in 2005, but processing of her application was terminated in January 2008 for failure to respond to interrogatories. (Personal Subject Interview (PSI) dated March 28, 2012, at 7-8, attached to GX 2.)

Applicant was born in Colombia. She entered the United States illegally in 1986. When she was required to return to Colombia and apply for a visa to enter the United States legally, she renewed her Colombian passport, which had expired. (Tr. 18.) She became a legal resident alien in 1991, attended a business school from September 1993 to May 1995, received a certificate in microcomputers, and became a U.S. citizen in January 1996. She obtained a U.S. passport in March 1999 and renewed it in May 2009, but she retained her Colombian passport. (PSI at 4; AX A; AX B; AX C; Tr. 46.)

Applicant married a U.S. citizen in October 1987 and divorced in June 2004. She has a 21-year-old daughter from this marriage, who is a citizen and resident of the United States. She married a Colombian citizen in July 2004, and they divorced in June 2008. She sponsored her former stepdaughter for entry into the United States in March 2006. Her former stepdaughter is a permanent resident alien living in the United States. (GX 1 at 19-28.)

Applicant's mother, father, and three of her four brothers are citizens and residents of Colombia. Her father retired around 1989, after working for 20 years as an employee of a private company providing park services for a local government in Colombia. Her mother is a homemaker who has never worked outside the home. Her oldest brother retired from a local police department in Colombia after 20 years. Her second oldest brother is a citizen and resident of the United States, working as a welder for a non-government employer. Her third oldest brother is a chemist, who works for a Colombian paper company and has no government connections. Her youngest brother works as an electrician on a commercial, non-government ship, and he previously worked as an electrician for a contractor providing services to the Colombian Coast Guard. (GX 1 at 23-25; PSI at 2-3; Tr. 47-52.)

Applicant traveled to Colombia in July 2003, using her U.S. passport, to visit her seriously ill father. After a two-week visit, she attempted to leave Colombia, using her U.S. passport, and was informed by Colombian authorities that she could not leave the country without a Colombian passport. Her Colombian passport had expired. She renewed her Colombian passport and used both passports when she departed the country.

In November 2006, Applicant again visited Colombia to visit her father. She traveled on her U.S. passport but took her Colombian passport with her. She entered and exited Colombia, using only her U.S. passport. She was not required to show her Colombian passport.

In June 2006, Applicant visited her father in Colombia again. She showed both her U.S. passport and her Colombian passport when entering and exiting Colombia. In 2007, she surrendered her Colombian passport to her facility security officer (FSO) after being advised that her possession of an active foreign passport raised security concerns. (PSI at 5-6.)

In June 2009, Applicant traveled to Colombia to care for her father. She retrieved her Colombian passport from the FSO and used both passports to enter and exit Colombia. After returning from Colombia in July 2009, she surrendered her Colombian passport to the FSO, who currently holds it. Applicant last used her two passports for travel to Colombia in March and April 2013. The Colombian passport expired in July 2013, and Applicant has not renewed it. (PSI at 6; Tr. 59; AX A; AX D.)

Applicant testified that if she needed to travel to Colombia to care for her family, she would ask the FSO for her expired Colombian passport, renew it, use it to enter and exit Colombia, and then return it to the FSO. She has not used her Colombian passport for any purposes other than to enter and exit Colombia. (Tr. 60-61.) She has never explored the possibility of renouncing her Colombian citizenship. (Tr. 67.)

Applicant has not had contact with her brothers in Colombia since her last visit in April 2013. She has more frequent contact with her youngest brother, because he lives with her parents and is her point of contact with her parents. (Tr. 51-54.) In addition to

her second oldest brother and her daughter, who are citizens and residents of the United States, Applicant maintains contact with several maternal cousins who live in the United States. (Tr. 64.)

Applicant's parents visited her in the United States for about six months in 2000 and for about two months in 2002. Applicant sends her parents $150 per month. Her brothers also contribute to supporting their parents. (PSI at 7; Tr. 62.)

One of Applicant's coworkers, who has known her and her cousins for about 10 years and sees Applicant on a daily basis, testified, "She is on time every day. Her work is impeccable. It's – she is perfect. She is a very good person." Her coworker holds a security clearance and supports Appellant's application for a clearance. (Tr. 73-76.)

Colombia is a constitutional, multiparty republic. Its last presidential election was considered by observers to be free and fair. There have been significantly fewer instances of security forces acting independently of civilian control than in past years. However, impunity and an inefficient justice system subject to intimidation limits Colombia's ability to prosecute individuals accused of human rights abuses. The availability of drug-trafficking revenue often exacerbates corruption.

The United States has long enjoyed favorable relations with Colombia. The United States provides substantial support to the Colombian government's counter-narcotics efforts, and encourages the government's efforts to strengthen its democratic institutions in order to promote security, stability, and prosperity in the region. Although the government's respect for human rights continues to improve, serious problems remain, including unlawful and extrajudicial killings, forced disappearances, insubordinate military personnel who collaborate with criminal groups, and mistreatment of detainees. Illegal armed groups and terrorist groups commit the majority of human rights violations–including political killings and kidnappings, forced disappearances, torture, and other serious human rights abuses.

Violence by narco-terrorist groups and other criminal elements continues to affect all parts of the country. Citizens of the United States and other countries continue to be victims of threats, kidnapping, and other criminal acts. The United States has designated three Colombian groups – the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), and the United Self-Defense Forces of Colombia (AUC) – as foreign terrorist organizations. The U.S. State Department has advised travelers:

> Security in Colombia has improved significantly in recent years, including in tourist and business travel destinations such as Cartagena and Bogota, but violence linked to narco-trafficking continues to affect some rural areas and parts of large cities. . . . Terrorist groups and other criminal organizations continue to kidnap and hold civilians, including foreigners,

> for ransom or as political bargaining chips. No one is immune from kidnapping on the basis of occupation, nationality, or other factors.

(Enclosure IV to HX I.)

Any person born in Colombia is considered a Colombian citizen, even if never documented as such. Dual U.S.-Colombian citizens are required to present a Colombian passport to enter and exit Colombia.

Policies

"[N]o 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 applicants 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and 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 that 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). "[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

Guideline B, Foreign Influence

The SOR ¶ 1.a alleges that Applicant's father, mother, and three of her four brothers are citizens and residents of Colombia. The security concern under this guideline is set out in AG ¶ 6 as follows:

> 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.

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

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." ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). 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 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, or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. *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).

When family ties to a foreign country are involved, the totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). Applicant's contact with and connection to her immediate family members in Colombia are sufficient to establish two disqualifying conditions under this guideline:

> AG ¶ 7(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
>
> AG ¶ 7(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.

The "heightened risk" required to raise AG ¶ 7(a) is a relatively low standard. "Heightened risk" denotes a risk greater than the normal risk inherent in having a family member living under a foreign government. The risks presented by terrorism and criminal activity in Colombia are sufficient to establish the heightened risk in AG ¶ 7(a) and the potential conflict of interest in AG ¶ 7(b).

The following mitigating conditions under this guideline are potentially relevant:

> AG ¶ 8(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;
>
> AG ¶ 8(b): there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding

relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

AG ¶ 8(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.

None of these mitigating conditions are established. Applicant's ties to her immediate family members in Colombia are strong. Her ties to the United States are also strong. She has been a U.S. citizen since 1996, and one of her brothers and daughter are U.S. citizens. However, she has divided loyalties. I am not convinced that she would resolve a conflict of interest in favor of the United States if she were required to choose between the welfare of her family members and the interests of the United States. While Applicant's contacts with her parents and siblings in Colombia may be infrequent, she has not overcome the presumption that they are not casual. *See* ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002).

Guideline C, Foreign Preference

The SOR alleges that Applicant renewed her Colombian passport in 2003, after becoming a U.S. citizen in 1996 (SOR ¶ 2.a); that she possessed a valid Colombian passport issued in July 2003 (SOR ¶ 2.b), and that she used her Colombian passport in 2003 and 2009 for travel to and from Colombia (SOR ¶ 2.c). The concern under this guideline is set out in AG ¶ 9: "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."

The relevant disqualifying condition is AG ¶ 10(a)(1): "exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen," including but not limited to "possession of a current foreign passport." The first part of this disqualifying condition is established, because Applicant exercised her rights as a Colombian citizen by obtaining, renewing, and using a Colombian passport. Her Colombian passport expired in July 2013. Nevertheless, the underlying concern remains, because Applicant intends to maintain her connection to Colombia by renewing her passport if she needs it to visit or care for her ailing parents.

The security concern under this guideline is not limited to countries hostile to the U.S. "Under the facts of a given case, an applicant's preference, explicit or implied, even for a nation with which the U.S. has enjoyed long and peaceful relations, might pose a challenge to U.S. interests." ADP Case No. 07-14939 at 4 (App. Bd. Mar. 11, 2009).

Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision. ISCR Case No. 99-0454 at 5, 2000 WL 1805219 (App. Bd. Oct. 17, 2000). Under Guideline C, "the issue is not whether an applicant is a dual national, but

rather whether an applicant shows a preference for a foreign country through actions." ISCR Case No. 98-0252 at 5 (App. Bd. Sep. 15, 1999). Applicant's actions fall short of a "preference" for Colombia in the usual sense of the word. However, they reflect her desire to maintain a connection to Colombia related to her concern for her parents.

The following mitigating conditions are potentially relevant:

> AG ¶ 11(a): dual citizenship is based solely on parents' citizenship or birth in a foreign country;
>
> AG ¶ 11(b): the individual has expressed a willingness to renounce dual citizenship; and
>
> AG ¶ 11(e): the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

AG ¶ 11(a) is not established, because Applicant has voluntarily exercised her Colombian citizenship by obtaining and renewing her Colombian passport. AG ¶ 11(b) is not established, because Applicant has not considered renouncing her Colombian citizenship. AG ¶ 11(e) is partially established, because Applicant has surrendered her passport to her FSO, and it is currently invalid. The mitigating value of her surrender of the passport is diminished by the fact that her arrangement with the FSO allows her to retrieve her passport upon request. The fact that her passport has expired is undercut by her stated intention to renew it if she needs to travel to Colombia again.

Whole-Person Concept

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

I have incorporated my comments under Guidelines B and C in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant was candid and sincere at the hearing. She has been a U.S. citizen for many years and she sponsored her stepdaughter for a visa to the United States. She has a good reputation at work. She is a dutiful daughter. However, her family ties to Colombia and her continued use of a foreign passport reflect divided loyalties.

After weighing the disqualifying and mitigating conditions under Guidelines B and C, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on foreign influence and foreign preference. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline C (Foreign Preference):	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	Against Applicant

Conclusion

I conclude that 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.

LeRoy F. Foreman
Administrative Judge