



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



In the matter of: )  
 )  
 ----- ) ISCR Case No. 14-00059  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: Eric A. Eisen, Esq.

06/26/2014

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant mitigated security concerns regarding his foreign passports and travel. Applicant's eligibility for a security clearance is granted.

**Statement of the Case**

On April 1, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline C (Foreign Preference) and Guideline E (Personal Conduct). 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 adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In an April 4, 2014, response, Applicant admitted one of two allegations under Guideline C and denied the sole allegation raised under Guideline E. He also requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. I was assigned the case on May 5, 2014. On May 9, 2014, DOHA issued a notice setting the hearing for May 28, 2014. The hearing was convened as scheduled.

The Government offered one document, which was accepted into the record without objection as exhibit (Ex.) 1. A request for administrative notice (AN) of certain facts concerning the island nation of Cuba, consisting of three documents, was also offered and accepted into the record as AN Exs. I-III. Applicant gave testimony and offered five documents, which were accepted into the record as Exs. A-E without objection. The transcript (Tr.) of the proceeding was received on June 5, 2014. The record was then closed. Based on a thorough review of the case file, I find that Applicant carried his burden in mitigating security concerns. Consequently, eligibility for a security clearance is granted.

### **Request for Administrative Notice**

Department Counsel submitted a Request for Administrative Notice regarding certain facts about the island nation of Cuba. Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (*citing* ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from Government reports. See Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Various facts pertaining to these nations were derived from the offered request and its attachments.

The facts thus derived regarding The Republic of Cuba are as follows: In 1902, Spain granted Cuba its independence. Since 1959, Cuba has been a totalitarian state, which controls all aspects of life through the Communist party. The United States and Cuba have had a strained relationship since the early 1960s, when Fidel Castro forcibly took over the Cuban government after several years of armed struggle.

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 retains control through intense physical and electronic surveillance. The Cuban government has harassed its citizens for contacts with Americans. Human rights abuses occur, including abuse of detainees, unlawful killings and beatings, and threats and abuse of Cuban citizens. Political arrests and imprisonment 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 United States continues to maintain economic sanctions against the Cuban government.

Cuba targets the United States for intensive espionage activities, and there have been numerous reported cases of Cuban espionage against the United States. 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 2011, the U.S. Department of State designated Cuba as one of four countries that are state sponsors of terrorism. The Department of State explains the basis of this continuing designation as follows:

Designated as a State Sponsor of Terrorism in 1982, the Government of Cuba maintained a public stance against terrorism and terrorist financing in 2010, but there was no evidence that it had severed ties with elements from the Revolutionary Armed Forces of Colombia (FARC) and recent media reports indicate some current and former members of the Basque Fatherland and Liberty (ETA) continue to reside in Cuba. Available information suggested that the Cuban government maintained limited contact with FARC members, but there was no evidence of direct financial or ongoing material support. In March, the Cuban government allowed Spanish Police to travel to Cuba to confirm the presence of suspected ETA members.

Cuba continued to denounce U.S. counterterrorism efforts throughout the world, portraying them as a pretext to extend U.S. influence and power.

Cuba has been used as a transit point by third-country nationals looking to enter illegally into the United States. The Government of Cuba is aware of the border integrity and transnational security concerns posed by such transit and investigated third country migrant smuggling and related criminal activities. In recent years, the government has allowed representatives of the Transportation Security Administration to conduct a series of airport security visits throughout the island.

Legislation and Law Enforcement: Cuba did not pass new counterterrorism legislation in 2010. The Cuban government continued to aggressively pursue persons suspected of terrorist acts in Cuba. A Cuban court recently convicted Chavez Abarca on terrorism charges and sentenced him to 30 years in prison for his alleged role in a number of hotel and tourist location bombings in the 1990s. The Cuban Supreme Court commuted the death sentences of two Salvadorans, René Cruz León and Otto René Rodríguez Llerena, who had been convicted of terrorism, and sentenced them both to 30 years.

Regional and International Cooperation: Cuba did not sponsor counterterrorism initiatives or participate in regional or global operations against terrorists in 2010.

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 (see 31 C.F.R. 515), which are enforced and monitored 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.

### **Findings of Fact**

Applicant is a 28-year-old salesman who recently completed his academic studies. He has worked for his present employer for about eight months. Applicant has an undergraduate degree in international relations and a graduate degree in anthropology. He speaks four languages fluently and has worked on academically-sponsored projects abroad. Applicant's areas of interest include international affairs. He is presently an applicant for a position related to his studies at a governmental entity. Applicant is engaged and has no children.

Applicant's parents met in Ecuador, where his mother resided as a citizen. She met Applicant's father when he was employed by the French government and working in Ecuador. The couple married in France and, soon thereafter, they had two children: Applicant and his sibling. The children were born both French and Ecuadorian citizens due to parentage and place of birth. Applicant was raised speaking French and Spanish. Applicant has had Ecuadorian and French passports since infancy. (Tr. 48-50) When Applicant was about seven years old, his parents divorced. His mother took Applicant and his sibling to live with her back in Ecuador, where her extended family still lived. Applicant remained in Ecuador for about seven years.

In Ecuador, Applicant's mother met a businessman from the United States. After a couple of years of courtship, the man married Applicant's mother. The newlyweds moved with her children to the United States. Applicant enrolled in the local high school, where he completed his junior and senior years. In 2008, Applicant became a naturalized United States citizen, after completing his associate's degree at a local community college, but before transitioning to a four-year degree-conferring institution. As an upperclassman, Applicant participated in a month-abroad language and culture program in Brazil. While in Brazil, Applicant met his current girlfriend, who was a classmate. Through this period of Applicant's academic career, he put himself through school by working at a local discount retailer.

Applicant's girlfriend is a citizen of Cuba and a naturalized citizen-resident of the United States. She maintains a U.S. passport. Her parents live in the United States and

are seeking U.S. citizenship. (Tr. 39) Near the end of Applicant's undergraduate studies, Applicant's girlfriend invited him to be her guest when she visited extended family in Cuba in early 2010. They were advised by a U.S.-based travel agent that the most expeditious way to ensure Applicant's passage to Cuba was for them to cohabit. As a cohabitant, Applicant would fall into a licensing category permitting cohabitants of Cuban citizens to accompany a Cuban citizen-applicant on a trip to Cuba. (Tr. 34-36; 45-46) Applicant and his girlfriend moved in together, and she requested a license to bring him with her on their planned trip. The travel agent oversaw the more minute details of the licensure process. (Tr. 47)

The couple flew to Cuba on an American airline from a major U.S. city. Applicant left the United States on his U.S. passport. (Tr. 48) As instructed by their U.S.-based travel agent, he used his French passport, which he had maintained since birth and which is valid through 2015, to enter Cuba. (Tr. 49) His girlfriend's Cuban passport had been marked by U.S. officials, designating that her request for a travel guest license was granted. She also had a document designating Applicant as her travel companion and cohabitant. Applicant's U.S. and French passports were submitted along with her materials to U.S. officials during the license application process. (Tr. 55-59) Copies of these materials were submitted to the airline before the trip.

Once in Cuba, Applicant stayed with his girlfriend's brother, who lives near Havana. The trip lasted a week. Applicant used his American passport to exit Cuba. (Tr. 37) At the time, Applicant did not foresee that his use of a foreign passport might have adverse consequences regarding his future job opportunities. (Tr. 38). He has not used his French passport since this 2010 trip.

After graduating from undergraduate school in June 2010, Applicant started looking at graduate programs in a larger, more metropolitan area. His girlfriend, who shares his interest in international relations, did the same. Applicant began his master's program in January 2011. His girlfriend began her graduate program in the same area the following semester. During his graduate studies, Applicant participated in a one-year study-abroad program in Ecuador, working with American nongovernmental organizations (NGO) and local communities. It served as an integral part of his master's program. Although Applicant has a U.S. passport issued in 2008, he renewed his Ecuadorian passport in early 2012 and used it to enter Ecuador. He did so to obviate the costs and inconvenience associated with renewing the visa as a foreign traveler every 90 days. (Tr. 31 51-52) Since he was putting himself through college, this cost-saving measure was significant to him. (Tr. 52) During his time there, his girlfriend visited him twice, where she met some of Applicant's extended family.

In December 2013, Applicant was first sponsored for the position he is now seeking. At that time, Applicant turned over his Ecuadorian and French passports to his sponsor's security officer. (Tr. 41) He did so when he was told that they could raise security concerns and that their surrender could smoothen the security review process. (Tr. 41-42) He did so willingly as he wishes to become an international development professional. (Tr. 42) Working for the agency currently offering him a position is one of

his “goals.” (Tr. 42) Applicant has no plans to again access his foreign passports. He does not want to use them anymore. (Tr. 52) He credibly stated that he does not intend to use anything but a U.S. passport for foreign travel in the future.

Today, Applicant is pending a decision on his security clearance application. His girlfriend is completing her master’s degree in public policy. Although the two have dated for five years, they want to first find secure jobs in their chosen fields before committing to marriage. Applicant remains close to his mother and sibling, who remain in the United States. He and his girlfriend share a house in the United States. Applicant has no investments abroad. Since becoming a U.S. citizen, Applicant has only travelled on his two foreign passports once each – to Cuba on a segment of his Cuban trip and for travel to Ecuador on the Ecuadorian passport.

### **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, which are used 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 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. Likewise, I have not drawn 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, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The

Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such 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**

AG ¶ 9 of the adjudicative guidelines sets out the security concern relating to Foreign Preference:

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.

Here, Applicant used his French passport to enter Cuba in 2010 and used his Ecuadorian passport to live in Ecuador during a year-abroad study program. Both passports are still valid. Therefore the following is applicable:

AG ¶ 10(a) - exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport. . . .

Applicant acquired his French and Ecuadorian passports at or shortly after birth, based on parentage and his place of birth. Both were valid when he became a naturalized U.S. citizen in 2008. He flew to Cuba with both his U.S. and French passports. He did so having first been authorized to visit Cuba by a U.S. governmental entity. This authorization came in the granting of a license, extended to Applicant’s girlfriend and to Applicant, as her cohabitant, after review of her Cuban and U.S. passports and his U.S. and French passports.

Applicant used his U.S. passport departing the United States. It may be assumed that he presented that passport to the U.S. airline to match its passenger manifest. He entered Cuba with his French passport. Applicant renewed and used his Ecuadorian passport in 2012 in order to mitigate costs and facilitate convenience while studying abroad. While his renewal demonstrates an adult act to reap the benefits of foreign citizenship, it was done in pursuit of academic study and well before Applicant ever envisioned a career that might necessitate a security clearance. Regardless, he has

surrendered both foreign passports to a security officer, expressed his intent not to retrieve them, or to ever use any passport but the one issued to him by the United States. Therefore, I find that:

AG ¶ 11(a) – the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated

applies.

### **Guideline E, Personal Conduct**

The security concern for personal conduct is set out in AG ¶ 15:

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.

The SOR repeats under this guideline the first of two allegations noted under Guideline C. Specifically, SOR allegation ¶ 2.a states that Applicant used his "French passport to travel to Cuba in 2010, violating U.S. Federal regulations that prohibit U.S. citizens from traveling to Cuba without a license granted by the U.S. Government." Applicant denied this allegation. His explanation of the process under which he and his girlfriend undertook for him to be a licensed companion is consistent with the regulatory process at issue. Applicant was credible in his retelling of that process. I find that none of the personal conduct disqualifying conditions 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). 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 the facts and circumstances surrounding this case. I incorporated my comments under the three guidelines at issue in my whole-person analysis. Most of the factors in AG ¶ 2(a) were addressed under the above guidelines, but some warrant additional comment.

Applicant is a 28-year-old man. He is well-educated, articulate, and highly credible. Born in France as a French and Ecuadorian citizen, he has been a naturalized



U.S. citizen since 2008. He has made the United States his home. His immediate family is here, his home is here, and both his fiancée and her family are here. Also here in the United States is the epicenter for the type of profession he seeks to enter. There is no indication he has a preference for living anywhere else.

For nearly a decade, Applicant has pursued academic study, hands-on experiences, and the honing of multiple language skills to prepare himself for what has evolved into his passion – the field of international development. This is an uncommon field that brings together his various interests and talents. In preparation to seek a career in this field, he did not anticipate any future problems with his use of his foreign passports, nor was he advised that such activity could raise issues in the future. His use of these documents was for convenience and economy, reasons that generally provide little clout in mitigating foreign preference security concerns. Here, however, it was naïveté, not a conscious choice to demonstrate a preference for one country over another, that led him to use his foreign passports.

Now apprised of the significance of his acts, Applicant appreciates his situation. He has willingly surrendered his foreign passports and credibly stated that he has no interest in either their return or ever traveling on anything but his U.S. passport. Now apprised of the qualifications for one seeking a security clearance, and given his plans to remain in the United States with his family, marry, and pursue his career goals here, I have no concern he will again exercise any act suggesting a foreign preference. Applicant has presented sufficient information to mitigate the security concerns raised. Clearance is granted

### **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
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.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 a security clearance. Eligibility for access to classified information is granted.

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Arthur E. Marshall, Jr.  
Administrative Judge