DATE: February 16, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-04300

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 7, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested a hearing. On July 22, 2005, after the hearing, Administrative Judge Kathryn Moen Braeman granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: (1) whether the Administrative Judge's conclusion that Applicant's possession, renewal, and use of her Russian passport was sufficiently mitigated is unsupported by the record evidence and is arbitrary and capricious; (2) whether the Administrative Judge's application of Guideline B Mitigating Conditions 1, 3 and 5 is unsupported by the record evidence and is arbitrary and capricious; and (3) whether the Administrative Judge's application of the "whole person" factors to the Guideline B security concerns is unsupported by the record evidence and is arbitrary and capricious. We reverse the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Administrative Judge's Factual Findings.

A. Facts

The Administrative Judge found the following:

Applicant was born in Russia and resided there until 1989. She received a master's degree from a university in Moscow in January 1987 and worked as an engineer in Moscow from 1987 to 1988. Applicant came to the U.S. in 1989. She became a naturalized U.S. citizen in October 1999, but retained her dual citizenship with Russia and had a Russian passport. Applicant acquired a U.S. passport in 1999 and used it for all foreign travel except for travel to Russia. She used her Russian passport for travel to Russia for convenience. When her passport from Russia expired in 2000, Applicant had her mother renew it for her in Russia. It was issued in May 2000 and was valid until May 2005. Applicant traveled to Russia in January 2002 on her expired Russian passport and obtained the renewed one from her mother to exit Russia in February 2002. Applicant also possessed an "inner passport" for travel within Russia which she did not

use because she remained in Moscow when she visited. Since Applicant left Russia, she has not accepted any other rights or benefits of citizenship such as voting or a pension and does not intend to do so in the future. Applicant also has no intention of ever returning to Russia to live or work there.

When interviewed by the Defense Security Service (DSS) in June 2002, Applicant stated that she had not taken any steps to relinquish her Russian passport and was not willing to give up her dual citizenship as a condition for access to classified information. While her mother is alive, Applicant wanted to be able to travel to Russia easily if her mother became ill and avoid the possible delay to get a visa to travel to Russia on her U.S. passport. Applicant subsequently learned about U.S. travel agencies that make all of the arrangements for travel to Russia and can expedite a visa on a U.S. passport, and used that service for her travel to Russia in April 2005.

Applicant owns an apartment in Russia which is worth about $30,000. After Applicant moved to the U.S., her mother moved into the apartment in 1993. Applicant made her mother a co-owner in 2001 and traveled to Russia to complete the paperwork. Her mother was officially given permission to reside in the apartment in 2001. Applicant does not retain cultural ties to Russia and is fully assimilated into the U.S. as demonstrated by her U.S. affiliations, vested interests, associations, financial ties and loyalties. Applicant received a Ph.D. from an American university in 1997. The majority of Applicant's investments and assets, such as her 401K plan, are in the U.S. as is her U.S. home which is worth more that $240,000. Applicant has $50,000 in her U.S. bank account and has no foreign bank accounts. She is willing to give away her share in the apartment in Russia, but she is not able to sell it because her mother lives in it.

When she answered her SOR in November 2004, Applicant stated she knew some people who had dual citizenship and had a security clearance, so she had initially hoped she also could do so. She did not fully understood the security requirements prohibiting use of a foreign passport until Department Counsel explained the policy before her hearing. Then Applicant stated she was willing to relinquish her Russian citizenship.

At the time of the hearing in February 2005, Applicant brought her Russian passport to the hearing to show that she was willing to surrender it. She also explained that she did not understand what procedures to take to relinquish her Russian citizenship, but was willing to do so now that she understood the requirement.

After the hearing, Applicant traveled to Russia to relinquish her Russian citizenship in April 2005. From a U.S. travel agency, Applicant got a Russian visa to travel on her U.S. passport to and from Russia. Because her Russian passport was to expire in May 2005, Applicant left it in Moscow to relinquish at the time her citizenship is irrevocably annulled . Applicant hired a lawyer in Russia to prepare the documents to abjure and retract her Russian citizenship. It took her four days to obtain all the required papers and make the official translation into English. Applicant had to go to the Passport Visa Department at 5 AM in order to be sure to be admitted before the office closed at 5 PM. According to Russian Federation Law, Applicant's citizenship will be "irrevocably annulled by the decision of the presidential committee" which takes up to six months. Her Russian passports will then become invalid.

Applicant's mother is a 72-year-old citizen of Russia who resides in Russia. She is an engineer in a mathematical institute and edits scientific papers. She also works in a museum. Applicant has weekly contact with her mother by telephone and occasionally by e-mail. Her mother has visited in the U.S. every two years. Applicant provides financial assistance to her mother of about $1,000 to $2,000 per year to help pay the cost of her travel to the U.S. Applicant has traveled to Russia to visit her mother in 1995, 2002, and 2005. If anyone would attempt to pressure her mother in order to get information from Applicant, she would report it to the U.S. authorities and seek help.

Applicant's aunt is a citizen of Russia currently residing in Russia. She works part-time in a museum. Applicant telephones her aunt two to three times a year. Applicant provides financial assistance to her aunt of about $600 per year. Applicant traveled to Russia to visit her aunt in 1995, 2002, and 2005.

Applicant was married in Russia in 1987, but is currently separated from her husband. Her husband is a citizen of Russia who lives in the U.S. and became a naturalized U.S. citizen in May 2001. Applicant has a son born in 1988 in Russia who is a citizen of Russia. He currently lives with the Applicant in the U.S. and became a naturalized U.S. citizen in April 2001. Applicant's father-in-law is a citizen of Russia who lives in Russia. He is a theoretical physicist at a scientific society without ties to the government. Applicant has contact with him three to five times a year by telephone and visits him in Russia when she travels there. He has visited in the U.S. on three or four occasions.

Applicant is not close to her father-in-law and no longer has any close friends in Russia.

Applicant's sister is a citizen of Israel who and resides in Israel. She is not working but was formerly employed by a private landscaping company. She is married and has three children. Her husband worked for the Israeli branch of a U.S. company. Applicant has visited her sister and family in Israel and retains contact with her sister, her brother-in-law and the children. Her eldest nephew has served in the Israeli military and her niece is now in the Israeli military as service is mandatory. Applicant speaks to them once every couple of months when she calls her sister. Her youngest nephew is still in school. Applicant has traveled to Israel to visit her sister in 1991, 1994, and 1997. Applicant has never been approached by any intelligence organizations from any foreign government.

Both Russia and Israel are active collectors of economic intelligence.

B. Discussion

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he 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." Directive ¶ E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

In this case, the appealing party does not challenge the Administrative Judge's findings of fact.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions.

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive ¶ E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine, for example, whether it: does not examine relevant evidence; fails to articulate a satisfactory explanation for its conclusions; does not consider relevant factors; fails to consider an important aspect of the case; offers an explanation for the decision that runs contrary to the record evidence; or is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law.

(1) Department Counsel argues that the Administrative Judge erred by concluding that Applicant's possession, renewal, and use of her Russian passport was mitigated by her action to relinquish the passport and renounce his Russian citizenship once she understood the DoD policy that disqualified foreign passport holders from obtaining security clearances as expressed in the ASDC3I memo. Specifically, Department Counsel argues: (a) that although Guideline C itigating Condition 4[(1)] applies, given the degree to which Applicant exercised Russian citizenship, such mitigating evidence is insufficient to overcome the security concerns presented by Applicant's pre-renunciation conduct which demonstrated a foreign preference, and (b) Applicant has not actually surrendered her Russian passport in accordance with the ASDC3I memorandum. These arguments have mixed merit.

In concluding Applicant had mitigated the security concerns raised by her acts of foreign preference by application of Guideline C Mitigating Condition 4, the Administrative Judge articulated a rational explanation for her determination--basing it on such factors as the Applicant's strong ties and loyalties to the United States, the extensive effort undertaken by the Applicant to surrender her passport and renounce her Russian citizenship before the close of the record, and the fact that Applicant's lack of awareness concerning the requirements expressed in the ASDC3I memo and the Guideline C Mitigating Conditions may have affected the timing of her renunciation actions. There are no stated requirements in

Guideline C Mitigating Condition 4 concerning when an applicant is required to comply with its provisions. The unfavorable record evidence cited by Department Counsel is not sufficient to demonstrate the Administrative Judge's application of Guideline C Mitigating Condition 4 is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 02-28041 at 4 (App. Bd. Jun. 29, 2005). As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Department Counsel's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. The Board need not agree with the Judge's conclusion to conclude that her application of Guideline B Mitigating Condition 4 to mitigate the security concerns raised by Applicant's acts of foreign preference, other than the possession of a Russian, is sustainable.

The Administrative Judge's conclusion with respect to the status of Applicant's Russian passport is more problematic. On appeal, Applicant acknowledges that she has not yet irrevocably surrendered her Russian passport to a governmental authority as contemplated in the ASDC3I memorandum, since she says that is only done in "the final part of the citizenship revocation process." Instead, she deposited it with an independent agent of her choice (her mother), for surrender to a governmental authority at a later date dependent on the occurrence of a future contingency--an arrangement that is revokable at will and not final. Therefore, the Judge's conclusion that Applicant had surrendered her Russian passport as required by the ASDC3I memorandum is not sustainable.

The ASDC3I memorandum notes that the possession of a foreign passport is a disqualifying condition for which there is no corresponding mitigating condition, and that the other mitigating conditions of the guideline cannot be used to mitigate such conduct. While the memorandum does not specifically address or limit the application of other provisions of the Directive, such as the general factors, it does state unequivocally: "consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use form the appropriate agency of the United States Government." Because of that language, the Board concludes that the Administrative Judge could not mitigate the concerns raised by Applicant's possession of a Russian passport under the Directive's general factors.

(2) Department Counsel argues that the Administrative Judge's application of Guideline B Mitigating Conditions 1,[(2)] 3 [(3)] and 5[(4)] is unsupported by the record evidence and is arbitrary and capricious. This argument has mixed merit.

Having found that Applicant had close ties with her sister in Israel, and her sister's son and daughter (who is performing mandatory service in the Israeli military), the Administrative Judge articulated no rational basis for a conclusion that Applicant's niece is not an agent of a foreign power. An employee of a foreign government need not be employed at a high level or in a position involving intelligence, military, or other national security duties to be an agent of a foreign power for the purposes of Guideline B Mitigating Condition 1. *See*, *e.g.*, ISCR Case No. 02-24254 at 5-6 (App. Bd. Jun. 29, 2004). Given the record evidence and her finding, the Judge's application of the first prong of Guideline B Mitigating Condition 1 is unsustainable.

Regarding the Administrative Judge's application of the "second prong" of Guideline B Condition 1, Department Counsel asserts that the Judge failed to hold the Applicant to her mitigation burden when evaluating the security concerns in the case. Department Counsel argues that the Judge's conclusion that Applicant's Russian and Israeli relatives could not be exploited by those countries by coercive or non-coercive means is conclusory and is not adequately supported by the Judge's findings with respect to such factors as Russia's and Israel's aggressive intelligence posture, the age of Applicant's mother, the fact that Applicant's mother and aunt are dependent upon Applicant for support, and Applicant's statement as to what actions she would take if she were ever approached by anyone seeking information. Department Counsel's contentions have merit. The Judge offered no rationale as to why the second prong of Foreign Guideline B Condition 1 has been satisfied. Given the record evidence and her findings, the Judge's application of the second prong of Guideline B itigating Condition 1 is unsustainable.

Regarding Guideline B Mitigating Condition 3, Department Counsel argues that by applying it as she did, the Judge erroneously concluded that Applicant's contacts with her Russian and Israeli relatives are casual and not frequent. Again, Department Counsel's contention has merit. There is a rebuttable presumption that contacts with immediate family members are not casual. *See*, *e.g.*, ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Given the record evidence in this case concerning Applicant's extensive contacts with her Russian and Israeli relatives, and the Judge's

own findings of fact about those contacts, the Judge did not articulate a rational basis for the application of Guideline B Mitigating Condition 3 and her conclusion that it applies is unsustainable.

With respect to Guideline B Mitigating Condition 5, given the record evidence in this case concerning Applicant's substantial financial assets in the U.S., and the Judge's own findings of fact in that regard, the Judge articulated a rational explanation as to why Applicant's foreign financial interests are minimal and not sufficient to affect her security responsibilities. The Board need not agree with the Judge's conclusion to conclude that her application of the Guideline B itigating Condition 5 to the security concerns raised by Applicant's foreign financial interest is sustainable.

(3) Department Counsel argues that the Administrative Judge's application of the "whole person" factors to the Guideline B security concerns is unsupported by the record evidence and is arbitrary and capricious. The Board does not find this argument persuasive.

As indicated in preceding sections of this decision, the Administrative Judge erred in her application of Guideline B Mitigating Conditions 1 and 3. However, that error is harmless in that the Judge did not rely heavily on those two mitigating conditions in reaching her ultimate security clearance decision. *See* ISCR Case No. 03-19101 at 8-9 (App. Bd. Jan. 31, 2006). Absent the applicability of those conditions, it is clear that the Judge would have reached the same result based upon the record as a whole. The continued viability of the Judge's favorable conclusions about Applicant's security eligibility under Guideline B turns on whether the Judge articulated a rational basis for those favorable conclusions that is consistent with a "whole person" analysis in light of the record evidence as a whole. For the reasons that follow, the Board concludes Department Counsel has failed to demonstrate the Administrative Judge's analysis of Applicant's security eligibility under the "whole person" is unsustainable.

An Administrative Judge must apply pertinent Adjudicative Guidelines disqualifying and mitigating conditions. However, a Judge's obligation to apply pertinent provisions of the Adjudicative Guidelines does not override the Judge's obligation to evaluate an applicant's security eligibility in light of the "whole person" concept. Accordingly, the mere presence or absence of an Adjudicative Guideline disqualifying or mitigating condition is not solely dispositive of a case. Even if there is an Adjudicative Guideline disqualifying or mitigating condition that is applicable, a Judge must consider the applicable disqualifying or mitigating condition in light of the record evidence as a whole and any pertinent general factors, and decide what weight can reasonably be given to the applicable disqualifying or mitigating condition. And, if a Judge reasonably concludes that particular Adjudicative Guidelines disqualifying or mitigating conditions do not apply to the specific facts of a case, the Judge still must evaluate the applicant's security eligibility under the general factors of Directive ¶ E2.2.1 (which refers to the "whole person" concept).

In view of the foregoing, the Board concludes that Department Counsel has not demonstrated error in the Administrative Judge's application of the "whole person" concept with respect to the security concerns under Guideline B. In this case, the Judge articulated a detailed, rational explanation for her favorable determination under the "whole person" concept. The Board concludes that the Judge's error concerning the Adjudicative Guidelines did not adversely influence her "whole person" analysis of Applicant's security eligibility under Guideline B and that the Judge's errors did not significantly under cut her "whole person" analysis. The Board need not agree with the Judge's "whole person" analysis to conclude that it is sustainable.

When an appealing party demonstrates factual or legal error, the Board must consider whether: (a) the error is harmful or harmless; (b) the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds; and (c) if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded. In this case, the Judge's favorable clearance decision under Guideline B is sustainable. However, her favorable clearance decision under Guideline C is not sustainable and the identified error cannot be remedied by remand. Therefore, that decision must be reversed.

Order

The decision of the Administrative Judge granting Applicant a clearance is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Directive ¶ E2.A3.1.3.4 ("Individual has expressed a willingness to renounce dual citizenship").

2. Directive ¶ E2.A2.1.3.1 ("A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States").

3. Directive ¶ E2.A2.1.3.3 ("Contact and correspondence with foreign citizens are casual and infrequent").

4. Directive ¶ E2.A2.1.3.5 ("Foreign financial interests are minimal and not sufficient to affect the individuals security responsibilities").