

DATE: September 6, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-00631

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric Borgstrom, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 14, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On December 30, 2005, after considering the written record, Administrative Judge Noreen A. Lynch granted Applicant's request for a security clearance. The Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: (a) whether the Administrative Judge's conclusion that Foreign Influence Mitigating Condition 1 applied is arbitrary, capricious or contrary to law; (b) whether the Administrative Judge's conclusion that Foreign Influence Mitigating Condition 3 applied is arbitrary, capricious or contrary to law; and (c) whether the Administrative Judge's conclusion that whole person factors sufficiently mitigate Foreign Influence security concerns to allow the grant of a security clearance, is arbitrary, capricious or contrary to law. We affirm the Administrative Judge's decision to grant the clearance.

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

#### **A. Facts**

The Administrative Judge made the following relevant findings of fact:

Applicant is a 46-year-old U.S. citizen who has worked for a defense contractor in foreign posts for the last 13 years with a security clearance. Applicant traveled to Belarus (former republic of the Soviet Union) for work in 1995, 1996, and 1997. He met his future wife, a native-born Belorussian citizen, in Estonia in 1999. He traveled to Belarus in 2000 to further the relationship.

Applicant reported his dating relationship to his security officer in 1999 or 2000, and informed his Regional Security Officer of his intent to marry. The security officer forwarded the information. Applicant's wife now resides with him in the United States and is in the process of becoming a U.S. citizen. On ay 12, 2005, she received her permanent residency card.

Applicant's mother-in-law, father-in-law, and sister-in-law are citizens and residents of Belarus. Applicant's mother-in-law is a retired gym teacher. His father-in-law worked as an electrician for a union and is also retired. His sister-in-law works as a teacher's aide and is also a student. None of them was a member of the Communist Party, nor held any public office.

Applicant's wife maintains contact with her family in Belarus. She wants to have them come to the U.S. and live with her and become U.S. citizens. Applicant sent \$500.00 a month over a period of a year to help his mother-in-law because her pension is not sufficient to sustain her.

Applicant does not intend to visit Belarus again except for work purposes. However, he stated in his written interrogatory that he would return "if his wife forced him." He also declared that if there were any security problem he would send her back to Belarus.

Belarus, a former Soviet Republic, is a republic, but the elected president has "consolidated power steadily in the executive branch through authoritarian means." Security forces arbitrarily arrest and detain citizens, especially for political reasons. Government restrictions on free speech, free press, peaceful assembly, and religious practice continued in 2003 and 2004. Political opposition is pressured through judicial and extra-judicial means. As a result of the human rights climate in Belarus, the U.S. Government pursues a policy of "selective engagement." However, the government of Belarus is not otherwise hostile to the U.S. There are approximately 10 million residents in Belarus.

Humanitarian aid continues to be the primary engagement with the U.S. Direct military to military cooperation continues to be minimal. The U.S. continues to support Belarus' adherence to arms control agreements and treaties into which it has previously entered.

The United States Government continues to support the development of the private sector in Belarus and its transition to a free market economy. In 1993, a bilateral trade treaty guaranteeing reciprocal most-favored-nation status entered into force.

## B. Discussion

The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . ." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966)). In evaluating the Administrative Judge's finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

For purposes of appeal, Department Counsel adopts the Administrative Judge's findings of fact. Department Counsel takes issue with the Administrative Judge's finding that there is no evidence that Belarus is actively engaging in the collection of classified or secure information from the U.S. This issue will be addressed in the discussion of the Judge's "whole person" analysis later in this decision.

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

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency . . ." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

In this case, the Administrative Judge concluded that the government has established a *prima facie* case to deny Applicant a security clearance because: (a) an immediate family member, or a person to whom Applicant has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country (Directive ¶ E2.A2.1.2.1); and (b) Applicant shared living quarters with a person, regardless of citizenship status, if the potential for adverse foreign influence or duress exists (Directive ¶ E2.A2.1.2.2). In such situations, 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive ¶ E3.1.15.

The Administrative Judge reviewed possible mitigating conditions listed under Guideline B. Where an Adjudicative Guidelines disqualifying or mitigating condition is applicable, the Judge must consider that 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 disqualifying or mitigating condition. *See, e.g.*, ISCR Case No. 02-22461 at 11 (App. Bd. October 27, 2005). The Judge found that Applicant's wife, his closest family member, maintains contact with her mother and sister, and some of the correspondence relates to attempts by the couple to bring her family to the United States. The Judge considered both Foreign Influence Mitigating Condition 3<sup>(1)</sup> (FIMC3) and Foreign Influence Mitigating Condition 1<sup>(2)</sup> (FIMC1) and in each instance she specifically concluded that the mitigating factor "does not apply." Decision at 6-7. The Board agrees that the Judge's discussion that followed has some confusing aspects to it, but it does not contradict the conclusions that FIMC1 and 3 are not applicable.

The Administrative Judge then analyzed Applicant's circumstances under the "whole person" concept. Even if a Judge reasonably concludes that particular Adjudicative Guidelines disqualifying and mitigating conditions do not apply to the specific facts of a case, the Judge must still evaluate an applicant's security eligibility under the general factors of Directive § 6.3 and Adjudicative Process ¶ E2.2.1 (which refers to the whole person concept). Any doubt as to whether access to classified information is clearly consistent with national security must be resolved in favor of the national security. Directive ¶ E2.2.2.

Like her discussion on FIMC1 and 3, the Administrative Judge's decision with respect to the whole person analysis is not a model of clarity. In her whole person analysis, the Judge cites Belarus's emphasis on economic progress and efforts to bring the wife's family to the U.S. The Judge appears to rely heavily on the fact that the Department of State Background Note on Belarus (Government Exhibit 7) does not mention Belarus as a collector of U.S. classified or protected information. Even if the Board assumes, solely for purposes of this appeal, that Belarus does not target security clearance holders for collection of U.S. classified or protected information, the Background Note and other record evidence suggest that the Judge's reliance on this factor was unreasonable. Nevertheless, Applicant's appeal brief refers to several incidents discussed in the record evidence that were not specifically analyzed by the Judge in her whole person analysis. Since Applicant is *pro se*, the Board construes his brief as raising the issue of whether the Judge's decision can be affirmed on grounds either not cited in the decision or in the whole person analysis itself. We conclude that it can be.

In the record evidence Applicant described his efforts to bring his dating relationship, and later his intent to marry, to the attention of appropriate security officials, and the Administrative Judge mentioned those facts generally in her decision. Among the factors that an adjudicator should consider in adjudicating a security clearance is whether the Applicant voluntarily reported information that has a security significance. Directive ¶ E2.2.5.1. Additionally, Applicant was born in the United States, and his deepest and most longstanding ties and loyalties are in the United States. Applicant appears to have extensive social ties with fellow contractor employees that are involved in the same type of government-related work that he does. *See* Government Exhibit 4. Applicant's statement that he would report any foreign efforts to pressure him is not very probative; however, Applicant's additional statement that he would send his wife back to Belarus if necessary to eliminate security problems is unusual in the history of this program. *Cf.* ISCR Case No. 04-06564 at 4 (App. Bd. May 30, 2006). Overall, the Board concludes that there is sufficient record evidence from which the Administrative Judge could reasonably conclude, based on a whole person analysis, that Applicant mitigated security concerns raised by the presence of his in-laws in Belarus.

### Order

The judgment of the Administrative Judge granting Applicant a clearance is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "Contact and correspondence with foreign citizens are casual and infrequent" (Directive ¶ E2.A2.1.3.2).

2. "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" (Directive ¶ E.2.A2.1.3.1).