



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



In the matter of:)
)
) ISCR Case No. 21-00185
)
Applicant for Security Clearance)

Appearances

For Government: John Lynch, Esquire, Department Counsel
For Applicant: *Pro se*

10/12/2022

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding foreign influence, but failed to mitigate the security concerns regarding alcohol consumption, criminal conduct, and personal conduct. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On July 9, 2020, Applicant applied for a security clearance and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86). On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories and asked him to verify the accuracy of summaries of five separate interviews conducted of him by the U.S. Office of Personnel Management (OPM). He responded to the interrogatories on May 5, 2021. On June 1, 2021, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as

amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged security concerns under Guideline B (foreign influence), Guideline G (alcohol consumption), Guideline J (criminal conduct), and Guideline E (personal conduct) and detailed reasons why the DCSA adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an unsworn, undated statement, Applicant responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant by DOHA on October 13, 2021, and he was afforded an opportunity after receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive as well as the Adjudicative Guidelines applicable to his case. Applicant received the FORM on October 21, 2021. Although a response to the FORM was due on November 20, 2021, as of December 14, 2021, Applicant had not responded to the FORM. The case was assigned to me on February 1, 2022. The record closed on December 14, 2021.

Rulings on Procedure

Department Counsel requested that the administrative judge assigned the case take Administrative Notice of certain enumerated facts pertaining to the Russian Federation (Russia), appearing in extracts of 14 written submissions, as well as certain enumerated facts pertaining to marriage and divorce in the Republic of Korea (Korea) issued by the U.S. Embassy & Consulate in Korea. Facts are proper for Administrative Notice when they are easily verifiable by an authorized source and relevant and material to the case. In this instance, the Government relied on source information regarding Russia in publications of the Department of State; the Department of Justice; the Department of Homeland Security; the Office of the Director of Intelligence, National Counterintelligence and Security Center; the Office of the Director of National Intelligence; the U.S. Cybersecurity and Infrastructure Security Agency; and the U.S. Senate Select Committee on Intelligence.

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). Requests for administrative notice may utilize authoritative information or sources from the internet. See, e.g.

Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006) (citing internet sources for numerous documents).

After weighing the reliability of the source documentation and assessing the relevancy and materiality of the facts proposed by the Government, pursuant to Rule 201, *Federal Rules of Evidence*, I take administrative notice of certain facts, as set forth below under Foreign Influence Section (regarding Korean Law) and the Russia subsection. However, while I do not reject the facts set forth in the four press releases issued by the U.S. Department of Justice, any inference that Applicant or his family participated in criminal activity was not argued by the Government and is specifically rejected.

Findings of Fact

In his Answer to the SOR, Applicant admitted, with some comments, all of the factual allegations in the SOR. Applicant's admissions and comments are incorporated herein. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant is a 30-year-old employee of a defense contractor. He has been serving as a shipboard mechanic with his current employer since June 2020. He received a General Educational Development (GED) diploma in 2012. He enrolled in one university class, but because he failed to complete the course, he did not receive any credit for it. He enlisted in the Army National Guard (ANG) in February 2012, and remained in the ANG until he was honorably discharged in May 2017. That same month, he transitioned into the U.S. Army, and served on active duty until May 2020, when he was discharged under other than honorable conditions (UOTHC). He was granted a secret clearance in 2012, but it was suspended in 2020. Although he denied ever being married in his SF 86, Applicant was married in Korea to a Russian national in 2018.

Foreign Influence

Applicant was born in the United States to U.S. citizen-parents in 1992. In approximately February or March 2018, while serving with the U.S. Army in Korea, he started dating a Russian citizen who was working at an off-base Korean bar as a bartender. He purchased her an engagement ring for about \$7,000. In February 2019, they were married under Korean law, but he did not register the marriage with U.S. authorities. In September 2019, they unofficially, but not legally, separated. He believes she now resides in Russia, but he does not know exactly where. He reportedly has not had any contact with her since their separation. (Item 4 at 8, 11, 16, 22-25, 31, 34, 39-40, 45-46, 48, 51; and Item 10 at 4)

Although Applicant previously indicated that he intended to seek an annulment once he obtained a new job, he subsequently changed his mind, claiming that after he consulted with unidentified attorneys after he left military service, and they purportedly advised him that he was never legally married in Korea because it was never registered

with U.S. authorities, he decided that the marriage had never happened, so a divorce was unnecessary. (Item 4 at 16; and Item 2)

Applicant contends that because his marriage in Korea was not registered with U.S. authorities, the marriage was not legal and did not have to be reported in his SF 86 or to investigators from the U.S. Office of Personnel Management (OPM) who interviewed him. As noted by the U.S. Embassy in Korea:

Marrriages in Korea are not reported to the United States since the U.S. does not have a central marriage registry, and the U.S. Embassy does not keep a record of marriages performed in Korea. In general, **marrriages that are legally performed and valid abroad are also legally valid in the United States.** Although marriage statutes in the U.S. differ from state to state, **a marriage performed in Korea under the Korean law is recognized in all states.** (emphasis added)

(Request for Administrative Notice 2 – Marriage /Divorce)

Based on the law of Korea as presented, and Applicant's failure to submit any legal documentation from the unidentified lawyers that he cites to support his contentions, I conclude that Applicant was legally married under Korean law, and that marriage is still valid in the United States.

Russia

Russia is composed of a number of republics. On March 18, 2014, Russia annexed the Crimean peninsula of Ukraine after an unrecognized referendum, and it subsequently became the Republic of Crimea, the 22nd republic of Russia. However, Ukraine and most of the international community do not recognize Crimea's annexation and the United Nations (UN) General Assembly declared the vote to be illegitimate.

The Government consists of a strong president, a prime minister, a bicameral legislature, and a weak judiciary often subject to political manipulation. In short, it has a highly centralized, authoritarian political system dominated by President Vladimir Putin. It is a vast and diverse country with a population of over 146 million people. It achieved independence with the dissolution of the Soviet Union on August 24, 1991, and remains a nuclear superpower that continues to develop politically, socially, and economically. On paper, Russia has recognized the legitimacy of international human rights standards, but it continues to be a "police state" where human rights abuses are rampant. There are numerous reports of human rights abuses, including law enforcement personnel engaged in torture, abuse, and violence to coerce confessions from suspects, with little accountability, despite the fact that the law prohibits such practices; widespread corruption within the police force; arbitrary arrest and detention; politically motivated arrests; abductions; and life threatening prison conditions. The media is largely state-controlled. There are restrictions on freedom of movement within the country, and all adults must carry government-issued internal passports while

traveling internally, and they are required to register with the local authorities within a specified time of their arrival at a new location.

Russia's two main intelligence services are the Russian Foreign Intelligence Service (SVR) and the main Intelligence Directorate of the General Staff (GRU), both overseen by the Russian National Security Council and coordinated through the Permanent Interbranch Commissions of the National Security. Its intelligence capability is significant and focuses on collection of information from the United States. The Soviet Union engaged in a series of high profile espionage missions against the United States, and Russia has continued the tradition. Russia is one of the three most capable and active cyber actors tied to the aggressive collection of sensitive and protected U.S. trade secrets and proprietary information. Russia also provides technologies which could be used in the construction of weapons of mass destruction and missiles to other countries. It is a leading arms exporter, with major sales of advanced weapons and military-related technology to China, India, Iran, and Venezuela.

On July 26, 2018, the National Counterintelligence and Security Center released its 2018 Foreign Economic Espionage in Cyberspace Report, in which it reported that foreign economic and industrial espionage against the United States continues to represent a significant threat to the United States' prosperity, security, and competitive advantage and identified Russia as one of the three most capable and active cyber actors tied to economic espionage and the potential theft of U.S. trade secrets and proprietary information. It reported that Russia uses cyber operations as an instrument of intelligence collection to inform its decision-making and benefit its economic interests, and that Russian intelligence services have conducted sophisticated and large-scale hacking operations to collect sensitive U.S. business and technology information.

The report noted that, "[a]n aggressive and capable collector of sensitive U.S. technologies, Russia uses cyberspace as one of many methods for obtaining the necessary know-how and technology to grow and modernize its economy." Other methods of collection include use of Russian commercial and academic enterprises that interact with the West; recruitment of Russian immigrants with advanced technical skills by the Russian intelligence services; and Russian intelligence penetration of public and private enterprises, which enable the Russian government to obtain sensitive technical information from industry.

In February 2018, and again in April 2021, the Office of the Director of National Intelligence (ODNI) issued its Worldwide Threat Assessments of the U.S. Intelligence Community, Statement for the Record, in which it assessed that Russia will employ a variety of aggressive tactics to bolster its standing as a great power, weaken the United States, and undermine Euro-Atlantic unity; and that Russia will use a range of relatively low-cost tools to advance its foreign policy objectives, including influence campaigns, economic coercion, cyber operations, and measured military force. The ODNI also assessed that President Putin will likely increase his use of repression and intimidation to contend with domestic discontent over corruption, poor social services, and a sluggish economy; he will continue to manipulate the media and is likely to expand the Russian government's legal basis for repression; and Russia will continue to modernize,

develop, and field a wide range of advanced nuclear, conventional, and asymmetric capabilities to balance its perception of a strategic military inferiority vis-a-vis the United States. Russia will also seek to maintain, and where possible, expand its influence through the former Soviet countries that it asserts are in its self-described sphere of influence.

The U.S. Department of State Travel Advisory for Russia is Level 4 – Do Not Travel, due to terrorism, harassment by Russian government security officials, the arbitrary enforcement of local laws, and the embassy’s limited ability to assist U.S. citizens in Russia. The advisory directs U.S. citizens not to travel to the North Caucasus, including Chechnya and Mount Elbrus, due to terrorism, kidnapping, and risk of civil unrest; or to Crimea due to Russia’s occupation of the Ukrainian territory and abuses by its occupying authorities. Terrorist groups continue plotting possible attacks in Russia, and may attack with little or no warning. U.S. citizens have been arbitrarily interrogated or detained by Russian officials and may become victims of harassment, mistreatment, and extortion. Due to the Russian government-imposed reduction on U.S. diplomatic personnel in Russia, the U.S. Government has reduced ability to provide services to U.S. citizens.

The Department of State has assessed Moscow as being a high-threat location for terrorist activity directed at or affecting official U.S. Government interests. Although Russia continued to prioritize counterterrorism efforts in 2017, it remained a target of international terrorist groups, particularly ISIS.

Russia has attempted to reassert its dominance in, and integration of, the former Soviet states and has generally been successful with Belarus and Armenia. It has remained unwelcomingly active in the internal affairs of several of its neighboring countries—former republics of the Soviet Union or occupied “independent countries”—such as Georgia, Ukraine, Azerbaijan, and Moldova, and has issued threats against Poland (a member of the North Atlantic Treaty Organization (NATO) since 1999), the Czech Republic (a member of NATO since 1999), and Estonia (a member of NATO since 2004). Russia maintains an extensive military presence in Crimea.

The international community, including the United States and Ukraine, does not recognize Russia’s purported annexation of Crimea. In response to Russia’s violations of Ukraine’s sovereignty, and other acts, the United States suspended most bilateral engagement with the Russian government on economic issues. Anti-American and anti-Western rhetoric is widespread in both official media sources and on social media. On February 24, 2022 Russia again invaded Ukraine and took large swaths of southern and eastern Ukraine. As early as March 2022, leaders in the unrecognized Luhansk People’s Republic and Donetsk People’s Republic both expressed their wish to join Russia, originally once Russia captured all their claimed territory. However, after sudden Ukrainian gains in the east in September 2022, Russia and the unrecognized republics hastily rushed a series of referendums on annexation to Russia. The referendum results claimed an overwhelming majority supported annexation. On September 30, 2022, Putin formally announced the annexation of the two republics. However, the referendums were condemned internationally as a sham while

the European Union and G7 rejected them as illegal. The UN Secretary General condemned the annexations as a violation of the UN Charter.

Russia specifically targeted non-military areas of Ukraine with its bombing and missile attacks on civilian-populated areas, including hospitals and schools. When Ukraine's forces liberated several sections of its territory from Russian occupation in September 2022, it was discovered that significant war crimes were committed by Russian troops against innocent civilians and prisoners of war. Despite world-wide condemnation, President Putin has threatened to utilize tactical nuclear weapons in Ukraine if the war in Ukraine should prove to be unwinnable. Such actions and threats by the Russians have been universally condemned.

In its 2020 Human Rights Report, the Department of State reported that Russia's occupation and purported annexation of Ukraine's Crimean Peninsula continued to affect the human rights situation in Russia significantly and negatively. Credible observers attributed thousands of civilian deaths and injuries, as well as widespread abuses, to Russian-led forces in Ukraine's Donbas region and to Russian occupation authorities in Crimea. Human rights groups asserted that numerous Ukrainian citizens remained in Russia as political prisoners.

The most significant human rights issues in Russia included extrajudicial killings; enforced disappearance; torture that was systematic and sometimes resulted in death and sometimes included punitive psychiatric incarceration; harsh and life-threatening conditions in prisons; arbitrary arrest and detention; lack of judicial independence; political prisoners; severe interference with privacy; severe restrictions on freedom of expression and the media; increasingly severe restriction on freedom of association, including laws on "foreign agents" and "undesirable foreign organizations;" and widespread corruption at all levels and in all branches of government. The government failed to take adequate steps to prosecute or punish most officials who committed abuses, resulting in a climate of impunity.

Cybercrime is also a significant problem across Russia. The risk of infection, compromise, and theft via malware, spam email, sophisticated spear phishing, and social engineering attacks is significant. Telephone and electronic communications are subject to surveillance at any time without advisory. The Russian System for Operational-Investigative Activities permits authorities to monitor and record all data that traverses Russia's networks.

Alcohol Consumption and Criminal Conduct

Applicant began experimenting with alcohol, initially beer, by himself when he was about 15-years old, but he did not like the taste. Around four years later, because he had older friends, he generally consumed alcohol in social settings. When he arrived in Korea in May 2017, he was consuming one to two beers per day. However, because he claimed that he was not a regular drinker, he did not know his limits. His subsequent consumption of alcohol was, by his own admission, excessive enough to have had an

adverse impact on his work or result in intervention by law enforcement authorities. (Item 4 at 23)

In June 2016, after attending a ANG function and consuming alcohol to the point of intoxication, while driving he was stopped by the police. He was administered a field sobriety test and a breathalyzer, and he failed both tests. He was arrested and charged with driving while intoxicated (DWI) and open alcoholic beverage container (there was an open beer in a cup holder) during operation of a motor vehicle. He subsequently pled guilty to both offenses and was sentenced to 60 days in jail, placed on probation for 180 days, ordered to perform community service, and fined about \$2,000. (Item 2; Item 3 at 31-32; Item 4 at 15-16, 23; and Item 6 at 13)

On January 1, 2018, at about 4:00 a.m., Applicant was stopped at the main gate of his military installation for a curfew violation. A curfew had previously been ordered that required all military personnel to be on post by 1:00 a.m., and in their room by 2:00 a.m. However, Applicant and a girlfriend remained off post in a hotel room where he had consumed alcohol. He was administered a breathalyzer test which yielded a result of .048 percent blood alcohol content (BAC). He was issued a Field Grade Article 15 under the Uniform Code of Military Justice (UCMJ) by the battalion commander for violation of the curfew; failure to obey a general order concerning alcohol consumption; missing a recall formation; and making a false statement to the military police. He was given 45 days of extra duty; reduced in rank from E-4 to E-1 (suspended); and forfeiture of pay (suspended). He was also referred to the Substance Use Disorder Clinical Care (SUDCC) program under AR 600-85, *The Army Substance Abuse Program* (November 26, 2016). (Item 2; Item 4 at 15, 20; and Item 7)

Applicant's participation in SUDCC commenced in January 2018, and he was required to attend group counseling sessions two times per week and a one-on-one counseling session one time per week. In addition, there was to be zero tolerance for alcohol. (Item 4 at 20) He was transferred to a different unit within his command in early March 2018. On March 13, 2018, he missed a unit formation with his new unit, and when found in his room, he admitted to consuming alcohol. (Item 2; Item 4 at 20) He was deemed a SUDCC failure because of his continuing consumption of alcohol while in the program. As a result of that continued alcohol consumption, Applicant was command-referred to treatment at the Addictions Medicine Intensive Outpatient Program (AMIOP) on March 27, 2018. He successfully completed the five-week program, consisting of group and individual counseling eight hours per day, five days per week, on May 1, 2018. His enrollment in SUDCC was extended until March 2019, due to being a SUDCC failure. (Item 2; Item 4 at 20-21, 24)

On August 4, 2019, after consuming between 5 and 10 cocktails over a four-hour period at a restaurant with a friend, Applicant drove himself back to base, and he was apprehended by military police during a 100 percent ID card check at the entry to the military facility. Several open containers were observed in plain view in his vehicle. He failed the field sobriety tests and refused to submit to a breath sample. Nevertheless, he was transported to the medical center for a mandatory blood test authorized by his unit commander. The test registered .213 percent BAC. He was charged with driving under

the influence (DUI) without personal injury, in violation of Article 113, UCMJ. He was issued a Field Grade Article 15 and reduced in rank from specialist to private; ordered to forfeit \$840 per month for two months; given 45 days of extra duty; and restricted for 60 days. (Item 2; Item 4 at 5-6, 8; Item 8)

In November 2019, Applicant underwent a command-referred psychological evaluation at the medical center's behavioral health clinic. During the evaluation by a licensed clinical psychologist, Applicant denied needing treatment for his alcohol use; denied current use; denied any further alcohol-related incidents; denied failing to successfully complete any recommended alcohol treatment program; denied resuming alcohol consumption after completion of an alcohol treatment program; denied ever engaging in binge drinking; and denied ever arriving to duty under the influence or with a hangover. (Item 5 at 2-3) The psychologist noted that in the past year, Applicant acknowledged being intoxicated about 200 times as of March 25, 2019. The psychologist also referred to the SUDCC records that indicated a diagnosis under the *Diagnostic and Statistical Manual of Mental Disorders (4th Edition)* (DSM-IV) of Alcohol Dependence, Uncomplicated. That type of diagnosis is now referred to in the *Diagnostic and Statistical Manual of Mental Disorders (5th Edition)* (DSM-V) as Alcohol Use Disorder. The prognosis was fair to good. (Item 5 at 3)

In April 2020, an Army separation board met. In accordance with the board's findings, on May 7, 2020, Applicant was administratively separated from the Army for misconduct and issued the UOTHC discharge. (Item 2; Item 4 at 6)

As of May 5, 2021, Applicant acknowledged currently drinking alcoholic beverages such as beer, wine and liquor. He admitted consuming two to three 12-ounce beers per month. He denied drinking to intoxication which he claimed occurred when he had six or more drinks in an hour. He contended that his last intoxication occurred on August 4, 2019. He has not received any alcohol counseling or treatment since his separation from the Army, and is not participating in Alcoholics Anonymous (AA). He intends to continue consuming alcohol. (Item 4 at 51-55)

Personal Conduct

When Applicant completed his SF 86 on July 9, 2020, in Section 17 – *Marital/Relationship Status*, in response to the instruction to provide his current marital/relationship status with regard to civil marriage, legally recognized civil union, or legally recognized domestic partnership, he responded “Never entered into a civil marriage, legally recognized civil union, or legally recognized domestic partnership.” (Item 3 at 22) That response was untrue, for as noted above, in February 2019, he had actually married a Russian national under Korean law. In September 2019, they unofficially, but not legally, separated. Marriages that are legally performed and valid abroad are also legally valid in the United States. Since no annulment or divorce took place, Applicant should have candidly reported that he was married. He subsequently claimed that he misunderstood or overlooked the question. (Item 4 at 8)

When Applicant completed his SF 86 on July 9, 2020, in Section 19 – *Foreign Contacts*, in response to the question “Do you have, or have you had, close and/or continuing contact with a foreign national within the last seven (7) years with whom you . . . are bound by affection, influence, common interests, and/or obligation? Include associates as well as relatives, not previously listed in Section 18,” he answered “no.” That response was untrue, for as noted above, in February 2019 – less than a year and one-half earlier, and well within the seven-year timeframe – he had dated and actually married a foreign national whose identity he did not list in either Section 17 or Section 18. (Item 3 at 27)

When Applicant was interviewed by an OPM investigator on October 17, 2020, he denied that he was bound by affection, influence, or obligation with his Russian wife. His purchase of an expensive engagement ring, followed by their marriage, indicates that there was some form of affection, influence, or obligation for her, at least until they separated around one year earlier. (Item 4 at 8)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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. The President has authorized the Secretary of Defense or his designee to grant an applicant 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 and modified.)

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.” “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the

record.” (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)) “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 Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).)

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.” (*Id.*)

Clearance decisions must be “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, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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 avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline B, Foreign Influence

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 6:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern

if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

The guideline notes several conditions that could raise security concerns under AG ¶ 7:

(a) contact, regardless of method, 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 classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology; and

(c) failure to report or fully disclose, when required, association with a foreign person, group, government, or country.

When an allegation under a disqualifying condition is established, “the Directive presumes there is a nexus or rational connection between proven conduct or circumstances . . . and an applicant’s security eligibility. Direct or objective evidence of nexus is not required.” (ISCR Case No. 17-00507 at 2 (App. Bd. June 13, 2018) (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018))

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country, and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. (See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 at 12 (App. Bd. Feb. 8, 2001)) Applicant’s relationship with his Russian wife is a current concern for the Government. However, the security significance of these identified concerns requires further examination of his relationship with that family member who is currently a Russian citizen-resident to determine the degree of “heightened risk” or potential conflict of interest.

In assessing whether there is a heightened risk because of an applicant’s relatives in a foreign country, it is necessary to consider all relevant factors, including the totality of an applicant’s conduct and circumstances, including the realistic potential for exploitation. One such factor is the potential for pressure, coercion, exploitation, or

duress. In that regard, it is important to consider the character of the foreign power in question, including the government and entities controlled by the government, within the relevant foreign country. Nothing in Guideline B suggests it is limited to countries that are hostile to the United States. (See ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002); ISCR Case No. 00-0489 at 12 (App. Bd. Jan. 10, 2002)) In fact, the Appeal Board has cautioned against “reliance on overly simplistic distinctions between ‘friendly’ nations and ‘hostile’ nations when adjudicating cases under Guideline B.” (ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002))

There is a rebuttable presumption that a person has ties of affection for, or obligation to, his or her family members, and this presumption includes in-laws. (ISCR Case No. 07-06030 at 3 (App. Bd. June 19, 2008); ISCR Case No. 05-00939 at 4 (App. Bd. Oct. 3, 2007) (citing ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002)) Applicant has repeatedly denied that he has affection for his Russian wife.

The DOHA Appeal Board has indicated for Guideline B cases, “the nature of the foreign government involved and the intelligence-gathering history of that government are among the important considerations that provide context for the other record evidence and must be brought to bear on the Judge’s ultimate conclusions in the case. The country’s human rights record is another important consideration.” (ISCR Case No. 16-02435 at 3 (May 15, 2018) (citing ISCR Case No. 15-00528 at 3 (App. Bd. Mar. 13, 2017)) Another important consideration is the nature of a nation’s government’s relationship with the United States. These factors are relevant in assessing the likelihood that an applicant’s family members living in that country are vulnerable to government coercion or inducement.

The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, the government ignores the rule of law including widely accepted civil liberties, a family member is associated with or dependent upon the government, the government is engaged in a counterinsurgency, terrorists cause a substantial amount of death or property damage, or the country is known to conduct intelligence collection operations against the United States. The relationship of Russia with the United States, and the situation in Russia place a burden of persuasion on Applicant to demonstrate that his relationships with any family member living in Russia does not pose a security risk. Applicant should not be placed into a position where he might be forced to choose between loyalty to the United States and a desire to assist a relative living in Russia.

While there is no evidence that intelligence operatives, criminals, or terrorists from or in Russia seek or have sought classified or economic information from or through Applicant or his wife, nevertheless, it is not prudent to rule out such a possibility in the future. International terrorist groups are known to conduct intelligence activities as effectively as capable state intelligence services, and Russia has a significant problem with terrorism and crime. Applicant’s wife in Russia “could be a means through which Applicant comes to the attention of those who seek U.S. information or technology and who would attempt to exert coercion upon him.” (ADP Case No. 14-01655 at 3 (App. Bd. Dec. 9, 2015) (citing ISCR Case No. 14-02950 at 3 (App. Bd. May 14, 2015))

Applicant's relationship with his Russian wife who is now living in Russia creates a potential conflict of interest because Russian intelligence operatives could place pressure on or offer inducements to his wife in Russia in an effort to cause Applicant to compromise classified information. This relationship creates a potential heightened risk of foreign inducement, manipulation, pressure, or coercion. While Applicant now contends the relationship no longer exists, and has previously even denied the existence of the relationship, the fact that he has repeatedly denied that there was such a relationship, is troubling. He may deny that they are currently bound by any affection influence, common interests, and/or obligation, but the accuracy of that denial is questionable in light of his other examples of a lack of candor, as well as his purchase of an expensive engagement ring for her. In addition, although Applicant denied that his wife was associated with the Russian government, military, or intelligence services, in reality, he does not know if she is, and was unable to even spell her name. Nevertheless, because Applicant is now in the United States and his wife is in Russia, and they no longer communicate or have a relationship other than by marriage, the degree of "heightened risk" or potential conflict of interest is dramatically reduced. AG ¶ 7(c) has been established, but AG ¶¶ 7(a) and 7(b) have not been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from foreign influence under 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 United States;

(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

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country.

There is the presence of terrorist groups; increased levels of terrorism, violence, and insurgency; and human rights problems in Russia that demonstrate that a heightened risk of exploitation, coercion or duress are present due to Applicant's ties to his wife. However, that risk is not generated solely by the Russian government, but also by terrorists striking out against the central Russian authorities and all foreigners.

Applicant's wife is a potential target in this war on civilized humanity. The presence of terrorist groups and increased levels of terrorism, violence, and insurgency in Russia have also been described for events occurring on September 11, 2001, and more recently in Fort Hood, Boston, Paris, Nice, Orlando, San Bernardino, and New York City. However, as noted above, based on their relationship, there is a potential, but greatly reduced, risk – a “heightened risk” – of foreign exploitation, inducement, manipulation, pressure, or coercion to disqualify Applicant from holding a security clearance.

Under the developed evidence, because their relationship is so casual and infrequent it is unlikely Applicant 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 United States. I am persuaded that Applicant's loyalty to the United States is steadfast and undivided, and that he has “such deep and longstanding relationships and loyalties in the U.S., that he can be expected to resolve any conflict of interest in favor of the U.S. interest.” However, because Applicant has routinely denied the relationship existed and repeatedly failed to report it, he has failed to comply with existing agency requirements regarding the reporting of the relationship. AG ¶¶ 8(a), 8(b), and 8(c) apply, but AG ¶ 8(e) does not apply.

Guideline G, Alcohol Consumption

The security concern relating to the guideline for Alcohol Consumption is set out in AG ¶ 21:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

The guideline notes conditions that could raise security concerns for Alcohol Consumption in AG ¶ 22:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder;

(b) alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, drinking on the job, or jeopardizing the welfare and safety of others, regardless of whether the individual is diagnosed with alcohol use disorder;

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder;

(d) diagnosis by a duly qualified medical or mental health professional (e.g., physician, clinical psychologist, psychiatrist, or licensed clinical social worker) of alcohol use disorder;

(e) the failure to follow treatment advice once diagnosed; and

(f) alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder.

In June 2016, Applicant was convicted of DWI and open container during the operation of a motor vehicle. In January 2018, he appeared late at the military facility gate with a BAC of .048, after which he was disciplined under Article 15, UCMJ, for a variety of charges including violation of the curfew; failure to obey a general order concerning alcohol consumption; and missing a recall formation. Applicant's participation in SUDCC commenced in January 2018, and there was to be zero tolerance for alcohol. However, in March 2018, he missed a unit formation with his new unit, and when found in his room, he admitted to consuming alcohol. He was deemed a SUDCC failure because of his continuing consumption of alcohol while in the program. As a result of that continued alcohol consumption, he was command-referred to treatment at the AMIOP in March 2018. He successfully completed the five-week program in May 2018. His enrollment in SUDCC was extended until March 2019, due to being a SUDCC failure.

SUDCC records indicated a diagnosis under DSM-IV of Alcohol Dependence, Uncomplicated. That type of diagnosis is now referred to in DSM-V as Alcohol Use Disorder. The prognosis was fair to good.

In August 2019, after consuming between 5 and 10 cocktails over a four-hour period at a restaurant, he was apprehended by military police at the entry to the military facility. Several open containers were observed in plain view in his vehicle. He failed the field sobriety tests and refused to submit to a breath sample. Nevertheless, he underwent a mandatory blood test authorized by his unit commander. The test registered .213 percent BAC. He was charged with DUI without personal injury, in violation of Article 113, UCMJ. He was issued a Field Grade Article 15.

In November 2019, Applicant underwent a command-referred psychological evaluation at the medical center's behavioral health clinic. During the evaluation by a licensed clinical psychologist, Applicant denied needing treatment for his alcohol use; denied current use; denied any further alcohol-related incidents; denied failing to successfully complete any recommended alcohol treatment program; denied resuming alcohol consumption after completion of an alcohol treatment program; denied ever engaging in binge drinking; and denied ever arriving to duty under the influence or with a hangover. The psychologist noted that in the past year, as of March 2019, Applicant acknowledged being intoxicated about 200 times.

As of May 2021, Applicant admitted consuming two to three 12-ounce beers per month. He denied drinking to intoxication which he claimed occurred when he had six or more drinks in an hour. He contended that his last intoxication occurred on August 4, 2019. He has not received any alcohol counseling or treatment since his separation from the Army, and is not participating in AA. He intends to continue consuming alcohol. AG ¶¶ 25(a), 25(b), 25(c), 25(d), 25(e), and 25(f) have been established.

The guideline also includes examples of conditions under AG ¶ 23 that could mitigate security concerns arising from Alcohol Consumption:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;

(c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; and

(d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

None of the mitigating conditions apply. Applicant has not been candid regarding his alcohol consumption history, and his stories keep changing. While he has acknowledged some degrees of maladaptive alcohol use, he has failed to provide any evidence of positive actions, other than his reported successful completion of AMIOP, taken to overcome his alcohol problems. Aside from his unverified claim that he has been sober (not intoxicated or impaired) since August 2019, he failed to demonstrate any pattern of altered alcohol consumption, much less a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations. His maladaptive use of alcohol, and his continuing consumption of alcohol, as well as his lack of candor, continue to cast doubt on his current reliability, trustworthiness, and good judgment.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30: Criminal activity creates doubt about a person's judgment, reliability, and

trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The guideline notes two conditions under AG ¶ 31 that could raise security concerns:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or untrustworthiness; and

(e) discharge or dismissal from the Armed Forces for reasons less than "Honorable."

AG ¶¶ 31(a) and 31(b) have been established. My discussions related to Applicant's Alcohol Consumption are adopted herein. His 2016 conviction; 2018 Article 15, UCMJ, discipline; and 2019 Article 15, UCMJ, discipline, combined establish a pattern of criminal offenses that, in part, led to his administrative separation from the U.S. Army in May 2020, when he was issued a UOTHC discharge.

The guideline also includes examples of conditions under AG ¶ 32 that could mitigate security concerns arising from Criminal Conduct:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Neither condition applies. Despite repeated punishment and discipline received for his conduct, Applicant continued his criminal path unhindered by rules, regulations, or laws. While the most recent reported incident of criminal conduct took place in August 2019, given Applicant's lack of candor, his acknowledgment that he was intoxicated about 200 times during the year ending in March 2019, and his unverified position regarding his more recent alcohol consumption habits, it remains likely that such criminal conduct will recur. He failed to furnish evidence of successful rehabilitation, a good employment record, or constructive community involvement. His criminal conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment.

Guideline E, Personal Conduct

The security concern relating to the guideline 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

The guideline also includes an example of conditions that could raise security concerns for Personal Conduct under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

As noted above, Applicant was not candid when he completed his SF 86 in July 2020, and lied about his February 2019 marriage to a Russian national by claiming to never having been married; and also lied about being bound by affection influence, and common interests within the last seven years, when in fact, he purchased an expensive engagement ring and was dating and subsequently married the Russian national. In October 2020, during his OPM interview, he again lied by denying being bound by

affection influence, and common interests, when he was still married. In his defense, Applicant claimed to have conferred with unidentified attorneys who advised him that his marriage in Korea was not legal because he had not registered it with U.S. authorities. He failed to submit any documents to support his contention, or to rebut the evidence provided by the Government addressing the issue of foreign marriages in Korea. Based on the entire record, I conclude that AG ¶¶ 16(a) and 16(b) have been established pertaining to SOR ¶¶ 4.a. through 4.c.

The guideline also includes examples of conditions under AG ¶ 17 that could mitigate security concerns arising from Personal Conduct:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully; and
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

The mitigating conditions do not apply. Applicant eventually told the truth about his marriage, but it took confrontations before he did so. He still denies that there was any affection with his wife. While the relationship between them may have changed since he returned to the United States and she returned to Russia, he continues to deny any such affection between them during the seven years prior to 2020. Applicant's perceived lack of candor continues to cast doubt on his reliability, trustworthiness, and good judgment.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 2(d):

- (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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. (See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).)

There is some evidence mitigating Applicant's situation. Applicant is a 30-year-old employee of a defense contractor. He has been serving as shipboard mechanic with his current employer since June 2020. He received a GED diploma in 2012. He enlisted in the ANG in February 2012, and remained in the ANG until he was honorably discharged in May 2017. That same month, he transitioned into the U.S. Army, and served on active duty until May 2020. He was granted a secret clearance in 2012. Although he is still legally married to a Russian national, she resides in Russia and he resides in the U.S., and they have not maintained any continuing correspondence since late 2019.

The disqualifying evidence under the whole-person concept is simply more substantial. He was not candid when he falsified his responses to questions in his SF 86 in 2020, and during interviews with an OPM investigator. Although he denied ever being married in his SF 86, Applicant was married in Korea to a Russian national in 2018. He has a history of maladaptive alcohol consumption that resulted in arrests and discipline for alcohol-related incidents, and alcohol-treatment program failure. A clinical psychologist noted that in one year ending in March 2019, Applicant acknowledged being intoxicated about 200 times. His diagnosis under DSM-IV was Alcohol Dependence, Uncomplicated. That type of diagnosis is now referred to in DSM-V as Alcohol Use Disorder. The prognosis was fair to good. He was administratively discharged from the Army under other than honorable conditions. He was granted a secret clearance in 2012, but it was suspended in 2020. Because of continuing concerns about Applicant's lack of candor, I have substantial questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, while I conclude that Applicant has mitigated the security concerns arising from the foreign influence, I also conclude Applicant failed to mitigate the security concerns arising from the alcohol consumption, criminal conduct, and personal conduct concerns.

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 B:	FOR APPLICANT
Subparagraph 1.a.:	For Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraphs 2.a. through 2.f.:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a.:	Against Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraphs 4.a. through 4.c.:	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.

ROBERT ROBINSON GALES
Administrative Judge