DATE: February 11, 2004

In Re:

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

Applicant for Security Clearance

CR Case No. 01-22667

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Alina Zalev, Esq.

SYNOPSIS

Applicant was convicted in 1995 of assault and battery on a girlfriend, and sentenced to two years and two days, two days to serve with balance suspended. In January 1996, his sentence was revised to one year in the house of corrections, two days to serve with balance suspended. This judgment, which was affirmed on appeal in January 1997, does not fall within the statutory disqualification of 10 U.S.C. § 986. Criminal conduct concerns persist, as Applicant claims he was the victim of a professional confidence artist, dishonest judges, and counsel who sabotaged his own defense. His ongoing denial of any culpability raises serious doubts about his reform. There is also an unacceptable risk of undue foreign influence because his daughter is a resident citizen of the Ukraine, who is employed as a physician in a regional hospital. Clearance is denied.

STATEMENT OF CASE

On January 8, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.[(1)] DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on Criminal Conduct (Guideline J), Financial Considerations (Guideline F), and Foreign Influence (Guideline B).

On January 26, 2003, Applicant filed his response to the SOR allegations and requested a hearing before a DOHA administrative judge. The case was assigned to me on June 16, 2003. On June 30, 2003, the hearing was scheduled for July 16, 2003. On July 8, 2003, the hearing was cancelled as Applicant was outside of the U.S. and not scheduled to return until August 2003. On September 5, 2003, a formal notice was issued rescheduling the hearing for September 24, 2003.

At the hearing, the Government's case consisted of 16 exhibits. Applicant and two coworkers (one present, one former)

testified on Applicant's behalf, and he submitted eight exhibits, seven of which were accepted. A transcript of the hearing was received on October 3, 2003. The record was held open for ten days following the hearing for Applicant to submit proof of satisfaction of the judgment debt.

RULINGS ON PROCEDURE

By facsimile on October 1, 2003, Applicant timely forwarded through counsel correspondence from an attorney (Ex. I) and a superior court affidavit (Ex. J) showing payment in full of the judgment debt alleged under Guideline F, and an immigrant petition for Applicant's daughter (Ex. K) filed with the Immigration and Naturalization Service (INS). On October 6, 2003, Department Counsel objected to the admission of the immigrant petition on the basis the record was held open only for proof of judgment payment. Department Counsel indicated she had no objection to proposed exhibits I and J, and since they proved satisfaction of the judgment, the Government was no longer pursuing denial of Applicant's clearance under Guideline F. Exhibits I and J were marked and entered into the record accordingly. Considering the Directive's requirement to render an overall common sense decision based on all available information, and the relevance and materiality of proposed Exhibit K to the Foreign Influence concerns alleged, Exhibit K was marked and admitted as well.[(2)]

FINDINGS OF FACT

SOR subparagraph 2.a. is considered conceded by the Government based on Department Counsel's representation of October 6, 2003, that the Government was no longer seeking to revoke Applicant's clearance under Guideline F. The remaining SOR allegations concern (1) Criminal Conduct (Guideline J) due to an April 1986 restraining order issued against him at the request of his spouse; a December 1986 complaint filed by his landlord for violating a protective order and assault and battery; a February 1990 complaint filed by a police detective for destruction of property; a February 1994 assault and battery on his then girlfriend, for which he was sentenced to two years and two days incarceration (two days served), a sentence alleged to disqualify him from having a security clearance granted or renewed under 10 U.S.C. § 986;[(3)]

and a complaint filed by this girlfriend in July 1994 for assault and battery that was nolle prossed; and (2) Foreign Influence (Guideline B) because of his ties to his daughter, a Ukranian resident citizen whom he visits annually and supports financially. In his Answer, Applicant admitted being charged criminally as alleged in subparagraphs 1.a., 1.c., 1.d., and 1.e. (in part), did not respond to 1.f., which alleges the applicability of 10 U.S.C. § 986, and denied 1.b. and 1.e. (in part). He admitted 3.a., acknowledging his ties to his daughter, a Ukranian resident citizen. After a complete and thorough review and consideration of the evidence of record, I make the following findings:

Applicant is a 56-year-old senior systems development engineer with a defense contractor. He seeks to retain a secret security clearance. Applicant has a record of significant contribution to his employer, but also has a record of criminal involvement, as detailed below.

A native of the Ukraine (then part of Soviet Union), Applicant earned the equivalent of his bachelor and master degrees in physics from a university in the Ukraine. From October 1970 to December 1971, Applicant served a year of compulsory military service in the army of the USSR. In March 1971, he married his first wife, an ethnic Russian, and that December they had a daughter. Divorced after only two years of marriage, Applicant left the Ukraine for Israel in January 1974, where he met a United States (US) native citizen who was performing volunteer work. They decided to wed, and Applicant entered the US in September 1974. A few days after his arrival, Applicant on examination began studying for a doctorate at a private university in the US. That November he and his fiancee married. Two children were subsequently born of their union: a son born in 1976 and a daughter born in 1980.

In March 1979, Applicant became a US naturalized citizen. On earning his Ph. D. degree, Applicant commenced employment in the US defense sector, moving his family across the country. He was granted a secret security clearance for his duties in about May 1983. After his spouse was diagnosed with cancer in 1984, Applicant and his family moved back to the East coast where Applicant gained employment with a university affiliated research company involved in defense work. In mid-June 1987, Applicant began working for his present employer as a senior electrical engineer in the development of electro-optical capabilities related to surface warfare engineering.

Police were called to Applicant's residence on complaint of disputes involving Applicant and his spouse in April 1986, and Applicant and apparently his tenant in November 1996. With respect to both instances, Applicant asserts he was the victim of assaultive behavior. While his spouse obtained a restraining order against him, and Applicant was charged with assault and battery on the tenant, the evidence falls short of proving assaultive behavior by Applicant.[(4)] A complaint was filed against Applicant in February 1990 for alleged destruction of property $250 or less. Applicant indicated another car pulled into a parking spot he had planned to enter outside of the hospital where his spouse was being treated for her illness, and claims he did nothing more than ask the other party why he had taken his parking spot. Applicant was found not guilty of the charge in court.

Widowed in March 1991, Applicant in late 1991 started dating a woman, an acquaintance of his recently deceased spouse who was a cantor as his spouse had been. Their relationship became intimate and in about February 1992, she began cohabitating with Applicant while keeping her own residence. After about eighteen months, their relationship had deteriorated to where she moved out in November 1993 and he changed the locks on his residence. She left a considerable amount of personal property in his residence. According to Applicant, she gained unauthorized entry to his premises on several occasions thereafter and removed several items belonging to him (he was repeatedly "robbed" by a confidence artist). On an occasion in late January 1994, Applicant claims he tried to be nice to her, but she stabbed him in the nose without provocation. When he went to call the police, she allegedly ripped the telephone line from the wall. Yet they ended up having intimate sexual contact on that occasion. Applicant went to work the next day with a bandage on his nose, telling at least one coworker that his former girlfriend had hacked him with some scissors.

In mid-February 1994, Applicant gave this former girlfriend permission to enter his residence to retrieve music she needed for a performance. He served her tea and then retired to his bedroom. When she went upstairs to tell him she was leaving, he invited her to watch television and later to join him in bed. He became verbally and physically abusive at her refusal to do so. He grabbed her right arm and twisted it around her back, causing a spiral fracture of the mid-shaft right humerus, severe sprain and soft tissue damage to her right shoulder. Applicant also kicked her in the legs. She contacted the police, who on arrival observed she was holding her right arm and complaining of pain in her lower right leg. Applicant told the police that he physically struggled with his former girlfriend in an effort to remove her from his premises, and that she injured her arm in the struggle. Applicant's former girlfriend was transported to the hospital where she was treated for a displaced spiral fracture of the right arm. Applicant was arrested for assault and battery.[(5)]

Applicant waived a jury trial and in June 1994 was found guilty of assault and battery. He was sentenced to one year in the house of correction, suspended, and placed on probation, and ordered to be evaluated in a violent offender's program, and to stay away from the victim. In July 1994, Applicant came home to find his former girlfriend on the premises. He called the police, who allowed her to remove some of her possessions. Applicant maintains she took items of his as well, although he provided no proof for his claim. He filed charges against her for breaking and entering and obtained a restraining order against her. In October 1994, his former girlfriend filed a complaint against him for assault and battery on that date in July. Applicant pleaded not guilty and the charge was nolle prossed.

Ordered to attend violence control counseling, Applicant faced jail time if he did not finish the program. Applicant attended one or two sessions before he was kicked out for refusal to admit to abusive conduct. Applicant was allowed to pursue individual counseling with a local therapist. Circa May 1995, he completed his counseling sessions. In January 1995, he filed a motion for a new trial.

In April 1995, Applicant's June 1994 assault and battery conviction was vacated and he was granted a new trial. Applicant maintains that before his new trial, his former girlfriend entered his residence without his permission in July 1995 and removed some of his property, including his building badge for work. He presented no documentation in support of his claim.

In mid-October 1995, Applicant was convicted by a jury of assault and battery on his former girlfriend in February 1994. He was sentenced by the presiding judge to two years and two days in the house of correction, two days to be served, and deemed served, balance suspended in October 1997, $700 restitution (suspended) and $50 costs (suspended). In January 1996, on Applicant's motion to revise and revoke, the judge revised Applicant's sentence to one year in the house of correction, two days to serve, balance suspended in October 1997. In early January 1997, the

judgment was affirmed on appeal.

Up to and including December 1994, three different doctors diagnosed Applicant's former girlfriend as suffering from frozen shoulder and/or adhesive capsulitis (*i.e.,* shoulder joint with very limited passive range of motion) as a result of the fracture of her right arm by Applicant. Under treatment for her physical injuries as well as emotional distress since 1994, Applicant's former girlfriend filed a civil suit against him. In February 2000, after a hearing, a state district court judge determined, in part, Applicant had behaved erratically in permitting his former girlfriend access to his home to recover her belongings; he granted his former girlfriend permission to enter his home to recover her music on the occasion in February 1994; Applicant served her tea and invited her to join him in bed; he became physically abusive at her refusal and caused a spiral fracture of the mid-shaft of her right humerus (arm), contusions to her right tibia, foot and knee, and severe sprain and tissue damage to her right shoulder, arm, and hand; and Applicant was convicted of assault and battery, affirmed on appeal. Based on medical reports and physician testimony, the judge further found Applicant's girlfriend sustained permanent physical and emotional injuries, the assault having exacerbated a pre-existing borderline personality disorder and caused symptoms of post-traumatic stress disorder. The judge found Applicant's conduct (twisting his former girlfriend's arm behind his back, kicking her) in February 1994 was intentional and involved a high degree of likelihood that substantial harm would result, and that he interfered with her efforts to recover her property. In March 2000, a civil judgment was entered against Applicant in the amount of $253,253.50 ($150,000 in damages plus $103,140 prejudgment interest and $113.50 costs). Applicant paid off the judgment in December 2002. There is no evidence Applicant has had any contact with this former girlfriend, other than court proceedings, since 1995.

Applicant did not allow his legal difficulties to negatively impact his work performance. An expert in electro-optics, Applicant in April 2002 was awarded a patent involving a cooling apparatus. He has made valuable contributions to a surface radar engineering project. Coworkers familiar with Applicant's work describe him as a technically very competent individual who exhibits calm, level-headed demeanor on the job.

In conjunction with his present employment, Applicant executed a security clearance application on July 10, 1998. Applicant disclosed the Ukrainian residency and citizenship of his first wife and daughter from that marriage, and listed repeated travel (at least annually since July 1991) to the Ukraine to see his daughter. With regard to his police record, Applicant listed his conviction for the February 1994 assault and battery, but claimed he had been the victim of a former girlfriend, "a professional confidence artist and a violent sociopath" who he indicated attacked him while he was asleep. He contended three district court judges (one he described as a "violent sociopath") conspired with his former girlfriend to lie to the jury and rob him.

During an interview with a special agent of the Defense Security Service on June 11, 2001, Applicant discussed his foreign ties. Applicant related his first wife and his daughter by that marriage are resident citizens of the Ukraine; that his former spouse worked as a nurse in a rehabilitation facility while his daughter was a medical doctor on staff of a hospital. Applicant explained his travel to the Ukraine annually from 1991 to March 1999 to visit his daughter, for whom he provides financial support of $3,000 annually. Applicant denied any contact with his daughter since his last visit in March 1999, when it was revealed that he had been dating a married woman (educated as a chemical engineer in Russia) who had emigrated from Russia to the US without her spouse. Applicant added that this woman had since divorced and become a US naturalized citizen. Applicant denied he had ever been approached or improperly contacted on his trips to the Ukraine. He indicated he would immediately report any suspicious contacts to company security officials and/or appropriate US government authorities.

Interviewed also about his criminal record and his relationship with his former girlfriend, Applicant admitted an intimate relationship with her until June 1993. Applicant then detailed a history of her unauthorized entry into his home, although he told the agent that after she stabbed him in the nose in late January 1994, they ended up having sexual relations. On the day of his arrest for assault and battery in February 1994, Applicant let her in his residence so she could retrieve her music. Applicant claims he fell asleep while standing in the hallway waiting for her to leave, and she attacked him. Applicant denied that he twisted her arm around her back or that he hit or beat her up in any way. Applicant expressed his belief that she came to the home with a broken arm. In acknowledging his conviction following a jury trial, Applicant claimed the jury suggested no punishment due to his former girlfriend's contributing behavior, but that the judge gave him a two year suspended sentence. Faced with a civil suit related to these "same false charges," Applicant submits a report of her treatment confirmed "the broken arm story was a lie." Concerning the restraining order

obtained by his second wife against him in the mid-1980s, Applicant asserted any claims of abusive behavior on his part were false and due to his spouse's cancer. Of his dispute with his tenant in the mid-1980s, Applicant maintained he was attacked by his tenant.

Applicant continues to believe he was the victim of a confidence artist as well as corrupt judges and legal counsel who "robbed" him at trial. He testified in September 2003 that his former girlfriend already had a broken arm when she came to his home to retrieve her music in February 1994.

Having reestablished contact with his daughter in the Ukraine, Applicant filed a petition with the US Immigration and Naturalization Service (INS) in December 2002 for her to immigrate to the US. He visited his daughter in the Ukraine in July 2003. They correspond via electronic mail about six or seven times per year. Applicant is on good terms with his first wife in the Ukraine. He contacts her by electronic mail three or four times per year to discuss matters related to their daughter.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.[(6)]

Conditions that could raise a security concern and may be disqualifying include:

a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

b. A single, serious crime or multiple lesser offenses.

c. Conviction in a Federal or State court, including a courts-marital of a crime and sentenced to imprisonment for a term exceeding one year.[(7)]

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent.

b. The crime was an isolated incident.

Foreign Influence

E2.A2.1.1. The Concern: A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation or pressure.

E2.A2.1.2.1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country;

E2.A2.1.3. Conditions that could mitigate security concerns include:

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.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to Guidelines J and B:[(8)]

The Government alleged several instances of criminal conduct by Applicant, but presented sufficient proof only of the February 1994 assault and battery of his former girlfriend. Although a restraining order was apparently issued against Applicant in April 1986, the basis for the order is not of record and Applicant denies any misconduct. In addition to the confusion over the identities of the landlord and tenant, the police report documenting the November 1986 landlord-tenant dispute contains nothing more than complaints of assault by both parties. A dismissal of the charges with prejudice in court falls far short of meeting the Government's burden of proving an assault that Applicant denies. Applicant was found not guilty in court of the destruction of property charge filed against him in 1990. Concerning the July 1994 incident involving his former girlfriend, there is sufficient basis to find she was trespassing. The police record indicates Applicant locked her between some doors while he waiting for the police to arrive, but a charge of assault filed against him was nolle prossed. Favorable findings are returned as to SOR subparagraphs 1.a., 1.b., 1.c., and 1.e.

Applicant also denies culpability in the February 1994 assault and battery of his former girlfriend, but he was convicted following a jury trial in October 1995, and that judgment of conviction was affirmed on appeal in January 1997. Applicant is collaterally estopped from challenging his conviction.[(9)] Several judges and a jury reviewed the facts and determined Applicant was guilty of the crime charged. As recently as February 2000, a district court judge reviewing a related civil claim for damages concluded that Applicant intentionally twisted his former girlfriend's arm behind her back and kicked her at the same time. Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. (*See* under Guideline J, disqualifying conditions (DC) a. allegations or admission of criminal conduct, and b. a single serious crime).

The Government's case for the applicability of 10 U.S.C. § 986 (P.L. 106-398),[(10)] and hence DC c. (Conviction in a Federal or State court, including courts marital, and sentenced to imprisonment for a term exceeding one year) is based on the fact that Applicant was sentenced in October 1995 for the assault and battery to a prison term of two years and two days (two days to be served with balance suspended October 1997). Under 10 U.S.C. § 986, a person who has been convicted in a Federal or State court, including a courts-martial, may not be granted access or have renewed access to classified information absent the grant of a waiver by the Secretary of Defense or Secretary of the Military Department. With the statutory disqualification based on the sentence imposed rather than on the amount of time actually served, a sentence of two years would fall within 10 U.S.C. § 986. However, while Applicant was awaiting a decision on appeal of his conviction, the sentence was revised by the trial judge in January 1996 to one year in the house of correction, two days to serve, balance suspended October 1997, a sentence that does not fall within the federal statute. Presented is the issue of whether this revised sentence controls for purposes of determining the applicability of 10 U.S.C. § 986 to the facts of this case.

The DOHA Appeal Board, relying on the Federal Supremacy Clause of Article VI of the U.S. Constitution, has consistently maintained that post conviction state remedies, such as pardons or expungements, do not nullify the prohibition set forth under 10 U.S.C. § 986. Subsequent state action that sets aside a conviction or dismisses the prosecution, even if the dismissal has the same effect as an acquittal, do not negate a conviction for purposes of 10 U.S.C. § 986. (*See* ISCR 01-00407 decided September 18, 2002). There is no dispute that Applicant was sentenced in October 1995 to a term of imprisonment of two years and two days, with all but two days suspended. Rule 29(a) of the pertinent state rules of criminal procedure provides for revision or revocation of a criminal sentence by the trial judge:

(a) Revision or Revocation. The trial judge upon his motion or the written motion of a defendant filed within sixty days after the imposition of a sentence, within sixty days after receipt by the trial court of a rescript issued upon affirmance of the judgment or dismissal of the appeal, or within sixty days after entry of any order or judgment or an appellate court denying review of, or having the effect of upholding a judgment of conviction, may, upon such terms and conditions as he shall order, revise or revoke such sentence **if it appears that justice may not have been done** (emphasis added).

The state's highest court has made it clear that the purpose of Rule 29(a) is to permit the trial judge to reconsider the sentence he or she imposed and determine, in light of the facts as they existed at the time of sentencing, whether the sentence was just.[(11)] The record is silent as to the grounds on which Applicant filed a motion to revise or revoke and the judge's reasons why he allowed it. There is no indication that the state opposed Applicant's request to revoke, or that the appellate court reinstated the original sentence. Based on DOHA Appeal Board precedent, a revocation and revision of sentence after an appellate court's ruling denying review or having the effect of upholding a judgment on conviction would not negate the federal disqualification under 10 U.S.C. § 986. However, in this case the original sentence was revoked and revised by the trial judge before the decision of the appellate court, so the judgment affirmed by the state appellate court is considered to be the conviction and the sentence as revised. To apply the statutory disqualification under 10 U.S.C. § 986 based on a sentence that was revoked and revised pending appeal would deny a criminal defendant his right to appeal legal error, an untenable result. For 10 U.S.C. § 986 to apply, there must be not only a conviction, but also a qualifying sentence of imprisonment of more than one year. 10 U.S.C. § 986 is found not to apply. Accordingly, subparagraph 1.f. is resolved in Applicant's favor.

Applicant's criminal assault of his former girlfriend in 1994 is not recent, and the Government failed to meet its burden to prove the other allegations of misconduct. While the Directive provides for mitigation where the criminal conduct is not recent (MC a.) and is isolated (MC b.), other variables must be considered, such as the seriousness of the conduct (*see* E2.2.1.1.), the presence or absence of rehabilitation (*see* E2.2.1.6), and the voluntary nature of the conduct (*see* E2.2.1.2.). Applicant intentionally inflicted injury to his former girlfriend in knowing and reckless disregard of the consequences. Reform of such serious criminal conduct requires an acknowledgment of wrongdoing that is not present in this case. Despite strong evidence of his culpability, Applicant continues to portray himself as a victim of a "continuous criminal conspiracy." Applicant claims that his former girlfriend came to his home with her arm already broken. The police and hospital records confirm she was in a significant amount of pain from the broken arm. It is not credible that she would have set the table, jumped in bed with him, and then attacked him in the hallway while he was asleep if she already had the spiral fracture and damage to her shoulder. Applicant's vitriol toward the judicial system, as evidenced by him calling one judge a "violent sociopath," and his lack of candor with the Department of Defense about

his role in the events of February 1994, raise considerable doubt as to whether Applicant possesses the requisite good judgment to retain his security clearance. Applicant's significant contributions to his employer are viewed favorably, but they are not enough to overcome the Guideline J concerns. SOR subparagraph 1.d. is resolved against him.

Concerning Guideline B, Foreign Influence, a security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he is bound by affection, influence or obligation are not citizens of the United States or may be subject to duress. Applicant admits he is attached to his daughter, a Ukranian citizen who is a physician at a regional hospital there. He traveled to see her annually from 1991 to March 1999, until they had a falling out caused by him dating a married woman who had emigrated from Russia to the US without her spouse. In Spring 2001, Applicant wrote to his first wife in an effort to reestablish his relationship with his daughter. Apparently he was successful, as he petitioned for his daughter's immigration to the US in December 2002, and visited her in the Ukraine in 2003. In addition to his in-person contacts, he corresponds by electronic mail with his daughter six or seven times per year and sends her about $3,000 in financial assistance annually. Moreover, although not alleged by the Government, Applicant is on good terms with his first wife in the Ukraine. In determining Applicant's security suitability, consideration is therefore warranted of disqualifying condition E2.A2.1.2.1., an immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.

The security concerns raised by the foreign citizenship and residency of close family members may be mitigated where it can be determined that they are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force him to choose between loyalty to them and the United States (*see* E2.A2.1.3.1.). There is no evidence Applicant's daughter--or his first wife--is an agent of a foreign power. However, Applicant has the burden of demonstrating that these foreign nationals are not in a position to be exploited by a foreign power. As articulated by the DOHA Appeal Board in ISCR 00-0317, decided on March 29, 2002:

Under Guideline B, the presence of family members in a foreign country must be evaluated both in terms of (i) possible vulnerability to coercive pressure or influence being brought to bear on, or through an applicant's family members in a foreign country, and (ii) possible vulnerability to noncoercive means of influence being brought to bear on, or through, an applicant's family members in a foreign country.

Little is known of Applicant's daughter's associates or activities in the Ukraine. As a practicing physician, his daughter may well enjoy some visibility as well as position of stature in her community. While Applicant recently filed an application for her immigration to the United States, there exists an unacceptable risk of undue foreign influence as long as she remains subject to Ukranian laws and within the physical reach of foreign authorities. While Applicant is on good terms with his first spouse, Applicant does not feel the same affection for the woman to whom he was married for only two years in the 1970s. The Ukrainian residence and citizenship of his ex-wife are relevant because of the influence she may have on their daughter. Applicant testified his ex-wife now distributes trade literature, but the record contains scant information about her personal and work life. SOR subparagraph 3.a. is resolved against him, as Applicant has not met his burden of demonstrating that his daughter is not vulnerable to foreign influence.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: For the Applicant

Paragraph 2. Guideline F: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Paragraph 3. Guideline B: AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).

2. In noting her objections, Department Counsel clearly stated her position with respect to the immigrant petition as it bears on Applicant's ties to his daughter.

3. Title 10, Section 986 of the United States Code states in pertinent part:

§986. Security clearances: limitations

(a) Prohibition.--After the date of the enactment of this section, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

(b) Covered Persons.--This section applies to the following persons:

(1) An officer or employee of the Department of Defense

(2) A member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status.

(3) An officer or employee of a contractor of the Department of Defense.

(c) Persons Disqualified From Being Granted Security Clearances.--A person is described in this subsection if any of the following applies to that person;

(1) The person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year. . .

(d) Waiver Authority--In a meritorious case, the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the prohibition in subsection (a) for a person described in paragraph (1) or (4) of subsection (c). The authority under the preceding sentence may not be delegated.

4. It is not clear why Applicant's spouse requested the restraining order in April 1986. Concerning the November 1986 landlord-tenant dispute, Applicant is identified in the police record as the tenant. Yet, in its narrative report, the police list the name of the complainant as the person who not only claims he was attacked by the tenant, but also as the person who allegedly attacked the landlord. The SF 86 and court records indicate Applicant resided at the address until 1996, which lends some credence to his claim that he was the landlord, although it does not compel that conclusion. Court

documents pertinent to the incident indicate criminal charges were filed against Applicant in December 1986 for assault and battery and violation of restraining order by the complainant, but the charges were dismissed with prejudice. The existence of a restraining order against Applicant is some indication of a volatile relationship between the two parties, but the Government did not prove the assault alleged in SOR subparagraph 1.b., which Applicant denies.

5. Before May 2002, Chapter 265, Section 13A of the pertinent state statute provided as follows:

Section 13A. Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than two and one half years in a house of correction or by a fine of not more than five hundred dollars.

1. A summons may be issued instead of a warrant for the arrest of any person upon a complaint for a violation of any provision of this section if in the judgment of the court or justice receiving the complaint there is reason to believe that he will appear upon a summons.

6. The adjudicative factors considered most pertinent are identified as set forth in guideline J following the implementation of 10 U.S.C. §986.

7. Under 10 U.S.C. 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition.

8. A favorable finding is returned as to Guideline F, Financial Considerations, as with payment of the judgment debt, the Government elected to no longer pursue revocation of Applicant's clearance under that guideline.

9. It is well-settled that the doctrine of collateral estoppel applies in industrial security proceedings and precludes applicants from contending they did not engage in the criminal acts for which they were convicted. *See* ISCR Case No. 96-0587 (March 24, 1997) at pp. 2-3; ISCR Case No. 95-0817 (February 21, 1997) at p. 3; ISCR Case No. 94-1213 (June 7, 1996) at pp. 3-4; DISCR Case No. 92-1283 (August 26, 1993) at p. 3); DISCR Case No. 88-2271 (October 18,1991) at pp. 5-6; DISCR Case No. 88-2903 (February 13, 1990) at pp. 3-4.

10. 10 U.S.C. §986 was implemented within the Department of Defense by a June 7, 2001, memorandum from the Deputy Secretary of Defense titled *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*, and incorporated in the Directive under Guideline J (*see* DC c. Conviction in a Federal or State court, including a court-marital of a crime and sentenced to imprisonment for a term exceeding one year).

11. *See* Commonwealth v. Layne, 386 Mass. 291, 295 (1982); Commonwealth v. Barclay, 424 Mass. 377, 380 (1997).