

DATE: April 26, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-31433

## **DECISION OF ADMINISTRATIVE JUDGE**

**CAROL G. RICCIARDELLO**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Edward W. Loughran, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is 40 years old and has worked for a federal contractor since 1997. Applicant married a Russian citizen in 2002. Applicant's mother-in-law, stepfather-in-law, and sister-in-law are all citizens and residents of Russia. Applicant and his wife visit her family in Russia once a year and she stays in weekly contact with them. Applicant knowingly purchased pirated software at a Russian market, and illegally altered software to extend the free trial period. Applicant has failed to mitigate security concerns under Guideline B and Guideline E. Clearance is denied.

### **STATEMENT OF CASE**

On March 22, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance.<sup>(u)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B, foreign influence and Guideline E, personal conduct considerations.

In a sworn statement, dated April 15, 2004, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. In his SOR response, Applicant admitted all allegations contained in the SOR, and provided information in extenuation and mitigation. Department Counsel submitted the government's case on May 4, 2004. A file of relevant material (FORM) was received by Applicant on May 18, 2004. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant objected to Government Exhibits (GE)19 and 20 of the FORM, and submitted additional information. GE 19 and 20 are irrelevant to the issues in this case and were not considered. The case was originally assigned to another judge and due to case load considerations it was reassigned to me on March 25, 2005.

### **FINDINGS OF FACT**

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the

pleadings, exhibits, and statements, I make the following findings of fact:

Applicant is 40 years old and has worked for a federal contractor as a technical staff member since 1997. Applicant has held a top secret security clearance and has had access to secret compartmented information (SCI) since 1998. Applicant got married in March 2002, and his wife is a citizen of Russia. She currently resides with Applicant in the U.S.

Applicant traveled to the Ukraine once and Russia six times since 1999. Applicant met his wife on one of these trips and returned to Russia to spend time with her. Applicant later returned to arrange the appropriate visa, interview, and documents to satisfy the requirements for her to come to the U.S. and for them to get married. Applicant was very conscientious of his fiancée's ties to her family. He stated "instead of sending her a plane ticket and telling her to meet me in New York, I traveled to her city to be with her during the difficult time of saying goodbye to her family and leaving her entire life behind. Instead of denying her family the joy of their daughter's wedding, we traveled together to have a wedding ceremony in Russia in July 2002. Instead of expecting her to visit her family alone, we traveled together as any normal couple would to meet them after a year's

absence." <sup>(2)</sup> Applicant was very concerned about the difficult transition his new wife would have when moving away from her family.

Applicant's mother-in-law and sister-in-law are citizens and residents of Russia. Applicant's wife's step-father, with whom she has lived with since she was six and considers him her father, is also a citizen and resident of Russia. Applicant's father-in-law is a resident of Georgia. Applicant's wife purchased her family a computer and emails her mother and step-father a couple of times a week. Applicant's wife also receives emails from her family in Russia several times a week.

Applicant's mother-in-law is employed as an economist for the city government. Applicant's wife's step-father is a school teacher. Both accept Applicant and appreciate his good relationship with their daughter. <sup>(3)</sup> Applicant and his wife plan on visiting her family in Russia once a year. <sup>(4)</sup> Applicant describes his wife's relationship with her family as "normal family relations." <sup>(5)</sup> Applicant's sister-in-law is a college student. Applicant's wife has not seen her biological father since she was six years old. Applicant's wife has received three emails from her father in the past two years. Applicant's wife's father did not attend their wedding. Applicant's wife believes her father is a taxi driver. Applicant's wife maintains contact with several friends in Russia, via email.

In September 2000, while visiting Russia, Applicant purchased pirated commercial computer software. Applicant admitted he was aware that due to the drastically reduced cost of the software that he was buying pirated software. <sup>(6)</sup> Applicant attempts to minimize his conduct by saying he was doing what most tourist would do and that the only reason his actions are an issue is because he came forward with the information. <sup>(7)</sup>

Applicant received software in the mail with a free trial period. He was curious to see if the free time limit could be extended. He stated "[i]t was interesting to me that a company would provide such expensive software for free with a 'lock' that could be so easily defeated. Since I did not intend to use this software for any considerable period nor for any serious purpose, I did not consider my action to be illegal or unethical." <sup>(8)</sup> Applicant's altering of the computer software enabled him to permanently use the program on his personal computer without paying for the full version of the program. Applicant kept the software on his computer for three years, although he claims he

"most likely did not use" <sup>(9)</sup> it past the 30-day free period. Applicant admitted he did this to save money if he liked the software. <sup>(10)</sup> He claims his act of altering the software was an "engineering curiosity." <sup>(11)</sup>

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline B, pertaining to foreign influence, and Guideline E, personal conduct considerations, with their respective DC and MC, apply in this case. Additionally,

each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(12)</sup> The government has the burden of proving controverted facts.<sup>(13)</sup> The burden of proof is something less than a preponderance of evidence.<sup>(14)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.<sup>(15)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(16)</sup>

No one has a right to a security clearance<sup>(17)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(18)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(19)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>(20)</sup> 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.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline B-Foreign Influence-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 obligations 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 interest in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Guideline E-Personal Conduct-a security concern may exist when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guidelines are set forth and discussed in the conclusions below.

## CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline B and Guideline E.

"Russia is a vast and diverse nation that continues to evolve politically and economically."<sup>(21)</sup> In certain regions of the country there is civil and political unrest.<sup>(22)</sup> Throughout those regions criminal gangs have kidnaped foreigners, including Americans and Russians, for ransom.<sup>(23)</sup> "Acts of terrorism, including bombings and hostage taking, have occurred in large Russian cities over the last several years."<sup>(24)</sup> "Violent, racially motivated attacks on people of color and foreigners have become widespread in Russia."<sup>(25)</sup> "Extortion and corruption are common in the business environment."<sup>(26)</sup> "Organized criminal groups and sometimes local police target foreign businesses and demand

protection money." [\(27\)](#) Foreigners are frequently the "victims of harassment, mistreatment and extortion by law enforcement and other officials " [\(28\)](#)

Based on all the evidence, Foreign Influence Disqualifying Condition (FI DC) 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*), and FI DC E2.A2.1.2.3. (*Relatives, cohabitants, or associates who are connected with any foreign government*) apply. Applicant's wife, mother-in-law, sister-in-law, and step-father-in-law are all citizens of Russia. All but his wife are also residents of Russia. Applicant's father-in-law is a resident of Georgia. Applicant's mother-in-law works for the local city government. Applicant's wife stays in close contact on a weekly basis, with her family and friends in Russia through email. Applicant appreciated the close ties his wife has with her family and has been very conscientious in ensuring she maintains them. Applicant arranged for their wedding to take place in Russia so that her family could be part of the joyous event. Applicant and his wife visit her family yearly.

I have considered all the mitigating conditions and specifically considered Foreign Influence Mitigating Condition (FI MC) 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*), and conclude it does not apply. Applicant's mother-in-law is employed by the city government. No information was provided regarding how she is compensated and what relationship the city government has with the national government. Applicant's wife's step-father is employed as a school teacher. No information was provided regarding how he is compensated and what benefits he receives from the government. The limited information provided regarding the relationship with a foreign power creates a position of vulnerability for Applicant.

I have considered FI MC E2.A2.1.3.2. (*Contacts and correspondence with foreign citizens are casual and infrequent*), and conclude it does not apply. Applicant's wife is a citizen of Russia. They reside together in the U.S. Applicant's wife maintains close ties with all of her relatives in Russia. Applicant has ensured that his wife's family remains part of her life despite living so far away. Applicant and his wife visit her family in Russia annually and intend on doing so in the future. Applicant's wife has very little contact with her biological father and therefore subparagraph 1.e. of the SOR is mitigated.

Based on all the evidence Personal Conduct Disqualifying Condition (PE DC) E2.A5.1.2.4. (*Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which , if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*) and PE DC E2.A5.1.2.5. (*A pattern of dishonest or rule violations, including violation of any written or recorded agreement made between the individual and the agency*) apply in this case. Applicant admitted knowingly buying pirated commercial computer software while in Russia. Applicant also admitted illegally altering computer software.

I have considered all the mitigating conditions and specifically considered Personal Conduct Mitigating Condition (PE MC) E2.A5.1.3.5. (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*) and conclude it does not apply. Applicant used questionable judgment when he knowingly bought pirated software and altered computer software. Although Applicant's actions may be isolated, it is his attempt to minimize them that is most troubling. Applicant's perception that because it might be reasonable for other tourists to buy pirated software that this in some way should be sanctioned. Applicant's attitude regarding altering software was it was "likely" he didn't use it past the trial date and he was merely curious. Again, his attitude is one of justifying his questionable judgment and illegal actions. Applicant's conduct in both instances may elude criminal prosecution, but they raise issues of judgment that could potentially impact the conscientiousness required for protecting classified information.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into

consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered the whole person and I find Applicant has failed to mitigate the security concerns. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline B and Guideline E are decided against Applicant.

### **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 Foreign Influence (Guideline B) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. For the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

#### Paragraph 2 Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. 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. Clearance is denied.

Carol. G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Answer to SOR.

3. *Id.*

4. *Id.*, Applicant Memo dated April 23, 2003.

5. Answer to SOR.

6. Statement dated July 25, 2002 at 4.

7. Answer to SOR.

8. Answer to SOR.

9. *Id.*

10. Statement dated July 25, 2002 at 5.

11. Answer to SOR.

12. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

13. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.

14. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

15. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.

16. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.

17. *Egan*, 484 U.S. at 531.

18. *Id.*

19. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

20. Executive Order 10865 § 7.

21. U.S. Department of State, Consular Information Sheet: Russia, May 3, 2004.

22. *Id.* at 4.

23. *Id.*

24. *Id.*

25. *Id.* at 5.

26. *Id.*

27. *Id.*

28. *Id.*