

DATE: August 17, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-27111

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Rita O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 31-year-old computer specialist for a federal contractor. In the past, during his military service he held a security clearance. Applicant is married to a Ukrainian citizen who lives in the United States with Applicant. Applicant's wife's family members are residents and citizens of the Ukraine. She maintains close personal communications with them on a regular basis and visits them annually. Applicant and his wife anticipate visiting her family in the Ukraine in the fall. Applicant had two criminal allegations against him dated 1996 and 2001. Applicant mitigated the criminal conduct that raised security concerns, but failed to mitigate the security concerns regarding foreign influence. Clearance is denied.

STATEMENT OF CASE

On February 23, 2005, 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. [\(1\)](#) On May 17, 2005, DOHA issued an amended SOR. The SOR and its amendment, which are in essence the administrative complaint, allege security concerns under Guideline B, foreign influence, and Guideline J, criminal conduct.

In sworn statements, dated March 1, 2005, and May 23, 2005, Applicant responded to the SOR allegations, and requested a hearing. In his SOR responses, Applicant admitting the allegations under Guideline B, foreign influence, and denied the allegations under Guideline J, criminal conduct, with an explanation.

The case was assigned to me on May 25, 2005. A notice of hearing was issued on June 3, 2005, scheduling the hearing for June 23, 2005. The hearing was conducted as scheduled. The government submitted four exhibits that were marked as Government Exhibits (GE) 1-4. Applicant objected to GE 3. The basis of the objection was the document (a military report of disciplinary action) was not complete because it did not include a page that included the disposition of the case. The government counsel's position was that this document was the complete document that was provided. I admitted the document, but would determine the appropriate weight to give it based on the issues raised. The other

documents were admitted into the record without objection. Applicant testified on his own behalf, and had four witnesses testify for him. Applicant submitted eleven exhibits that were marked as Applicant's Exhibits (AE) A-K, and were admitted into the record without objection. The transcript was received on July 5, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR, are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 31-year-old computer specialist who has worked for a federal contractor since 2001, and before that as a contractor for a federal contractor since 2000. Applicant served in the military from 1992 to 1997 and held a top secret clearance and access to sensitive compartmented information.

Applicant has been married three times and divorced twice. He was first married when he was 19 years old from 1993 to 1997. On July 19, 1996, Applicant was arrested by military police for assault consummated by a battery on his wife. Applicant denied the charge. He claims his then wife was living with a male companion and the companion called in a report to have Applicant arrested. The charges were forwarded to the Staff Judge Advocate of the base⁽²⁾ and no other evidence was presented regarding the final disposition of the case. Applicant claims the charges were dropped. Applicant and his first wife were divorced in August 1996.

In 1999, Applicant married an Australian woman and remained married until 2001. They lived in the United States. She remained in this country after they divorced and is seeking United States citizenship. While married to his second wife, and while separated (but still living together) and shortly before he filed for divorce, Applicant became acquainted with a Russian woman through an adult website. She is a Russian citizen and resident. Applicant developed a relationship over the internet with her and went to Russia to visit her 1-7 October, 2001. Although aware that their marriage was ending, Applicant's second wife was upset and confused. Shortly after his return from Russia, on October 18, 2001, Applicant filed for divorce from his second wife. Applicant believed there was a possibility that his relationship with the Russian woman might lead to marriage. Their relationship consisted of email correspondence, two or three phone calls, and his visit. The relationship last approximately three months.

On October 29, 2001, Applicant's wife filed an "adult abuse, ex parte order of protection."⁽³⁾ In the order she swore that Applicant had threatened her life and pushed her, and she was afraid for her life.⁽⁴⁾ At the hearing, Applicant's second wife testified that she had lied about the information contained in this order and filed for the order because she was advised and believed that this would allow her to remain in their marital dwelling. She claimed that she was afraid to be out on her own and support herself and thought this would ensure she had a place to stay. She also claimed she did not understand the serious ramifications of this order. Applicant and his second wife were divorced in December 2001. They have remained friends.

In March-April 2002, Applicant traveled to the Ukraine to meet a woman he met on the Internet. This woman became Applicant's third wife in August 2002. She is a Ukrainian citizen and lives in the United States with Applicant. Applicant's father-in-law, mother-in-law and sister-in-law are all Ukrainian citizens and reside in the Ukraine. His father-in-law completed compulsory military service with the then Soviet Union military and is now employed as a builder/construction worker. He does not work for the government. Applicant's mother-in-law is a seamstress and his sister-in-law is a 17-year-old student.

Applicant's wife contacts her parents and sister by telephone one or two times a week. She corresponds with them by email one or two times a month and has visited them annually in the Ukraine three times since 2002. Applicant and his wife send her family birthday and holiday gifts. Applicant and his wife have sent money to his in-laws three or four times in 2004, some of which was used to help pay medical expenses. Applicant and his wife are planning on visiting her parents and sister sometime in the fall of 2005 in the Ukraine. He also would love for them to come visit them in the United States, but obtaining a visa is very difficult. Applicant's wife currently works at a drugstore. She hopes to further her education and eventually become a United States citizen. Applicant's wife admits she misses her family in the Ukraine.

Applicant provided numerous character statements and witnesses that testified as to his character. Applicant is considered to be a loyal and trustworthy citizen. He is also considered truthful, dependable, and hardworking. He is considered to be conscientious, honest, reliable and responsible. He is not considered a violent person or one who would be involved in criminal activities.

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 J, criminal 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.⁽⁵⁾ The government has the burden of proving controverted facts.⁽⁶⁾ The burden of proof is something less than a preponderance of evidence.⁽⁷⁾ 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.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹²⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹³⁾ 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 guidelines most pertinent to the evaluation of the facts in this case:

Guideline B-Foreign Influence is a concern because 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 J-Criminal Conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling 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 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 J.

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*), applies. Applicant's wife is a Ukrainian citizen. The members of her whole family are residents and citizens of the Ukraine. Applicant's wife stays in very close contact with her family, talking to them by phone one or two times a week, corresponding by email and visiting them annually. Applicant and his wife send presents and help her family on occasion by sending them money. Applicant hopes they will visit them in the United States and they have plans to visit his wife's family in the fall of 2005.

I have considered all the mitigating conditions and especially 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 FI MC E2.A2.1.3.2 (*Contacts and correspondence with foreign citizens are casual and infrequent*), and conclude neither applies. Although there is no evidence that Applicant's wife's family are agents of a foreign power, there is ample evidence to support how close she is to her family and that Applicant maintains a friendly relationship with his in-laws. No evidence was provided as to the type of government the Ukraine is and what tactics it might use to obtain information from Applicant through his in-laws. However, the Ukraine was part of the former Soviet Union and Applicant's father-in-law actually served in its military. In today's world of information gathering it is common place for countries to seek information through illegal means from other countries. If Applicant has not established that his wife's family members in the Ukraine can not be exploited in such a way as to force Applicant to choose between loyalty to his wife and her family and his loyalty to the United States then the case must be resolved against him. Applicant has not provided any evidence to show that the family members of his wife are not a security risk under FI MC E2.A2.1.3.1.

Applicant's wife is close to her family and misses them while she is living in the United States. She visits them annually, communicates with them frequently, and she and Applicant have plans to visit them in 2005. Applicant has provided gifts and money to his in-law. Applicant has shown a concern for his in-laws. The relationship Applicant and especially his wife have with her parents and her sister could be exploited by the Ukraine and is a security concern. All of these factors show his relationship towards his in-laws and his wife's close relationship with her family and the possibility they can be exploited by the Ukraine to have him compromise his loyalty to the United States. Applicant has failed to raise any factors to mitigate concerns about his wife's family members in the Ukraine. Applicant has failed to mitigate the security concerns under Guideline B that pertain to his wife's family.

Applicant's relationship with a Russian woman marginally falls within FI DC E2.A2.1.2.1. Applicant had a short term relationship with her, visited her once and stayed in contact for approximately three months. I find FI MC E2.A2.1.3.2 applies. Applicant does not have a personal relationship or contact with her any longer. I find Applicant has mitigated the security concerns regarding his contact with a citizen and resident of Russia.

Based on all the evidence Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admission of criminal misconduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser charges*) applies. Applicant was arrested in 1996 for assault consummated by a battery. It is unclear what the final

disposition of the case was. He also had an ex parte order imposed on him in 2001. Both issues involved alleged incidents with his then wives.

I considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) E2.10.1.2.1 (*The conduct was not recent*); CC MC E2.10.1.2.2 (*The crime was an isolated incident*); and CC MC E2.10.1.2.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to*

recur). I conclude although there were two alleged incidents, both incidents involved women that Applicant is not longer involved with. I find these incidents were isolated. I also find that it has been between four and nine years since these incidents occurred and they are not recent and it is not likely these types of violations will recur. I find Applicant has mitigated the concerns regarding his criminal conduct.

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 considered Applicant's demeanor and credibility while testifying and considered the whole person. I find Applicant has failed to mitigate the security concerns regarding Guideline B. 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 J is decided for Applicant and Guideline B is 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. For the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Paragraph 2 Criminal Conduct (Guideline J) FOR THE APPLICANT

Subparagraph 2.a. For the Applicant

Subparagraph 2.b. For 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 a security clearance to 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. GE 3.

3. GE 4.

4. *Id.*
5. ISCR Case No. 96-0277 (July 11, 1997) at 2.
6. ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
7. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
8. ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
10. *Egan*, 484 U.S. at 531.
11. *Id.*
12. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
13. Executive Order 10865 § 7.