

DATE: October 24, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-04147

## **ECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Sabrina E. Redd, Esq., Department Counsel

#### **FOR APPLICANT**

Matthew J. Foster, Esq.

### **SYNOPSIS**

Applicant is married to a citizen of Russia who resides with him in the U.S. His mother-in-law is a citizen and resident of Russia. The security concern based on foreign influence is not mitigated. Clearance is denied.

### **STATEMENT OF THE CASE**

On April 7, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns raised under Guideline B (Foreign Influence). It alleges Applicant's spouse is a Russian citizen residing in the U.S. (§ 1.a); his mother-in-law and father-in-law are citizens and residents of Russia (§ 1.b); and he traveled to Russia in March 1999, June 1999, and July 2000 (§ 1.c). Applicant answered the SOR in writing on April 20, 2005, admitted the factual allegations in § 1.a, part of § 1.b, and § 1.c. He elected to have a hearing before an administrative judge. The case was assigned to an administrative judge on May 18, 2006, and reassigned to me on July 20, 2006, based on workload. The case was heard on August 22, 2006, as scheduled. DOHA received the hearing transcript (Tr.) on August 31, 2006.

### **FINDINGS OF FACT**

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 45-year-old nuclear physicist for a U.S. government contractor. His area of specific expertise is detection of nuclear materials in cargo entering the U.S. (Applicant's Exhibit (AX) A at 2). He is not involved in the development of weapons (Tr. 36), and all his current work is unclassified (Tr. 62).

Applicant received his Ph.D. degree in physics from a U.S. university in December 1990. He has worked for his current employer since August 2003. His current employer strongly supports his application for a clearance (AX A at 2). He has received numerous commendations (AX A at 7-10<sup>(1)</sup>). He was previously granted security clearances in 1982 and 1990.

Applicant was born in Germany in March 1961. His mother is a native of Germany, and his father is a native-born U.S. citizen who married Applicant's mother while serving in the U.S. Forces in Germany. Applicant and his family came to the U.S. in 1965 (Tr. 31). His mother became a naturalized U.S. citizen in November 1975 (Government Exhibit (GX) 1 at 11). He served in the U.S. Navy from January 1982 to August 1984 and received an Honorable Discharge (AX A at 3).

In July 1999, Applicant married a Russian citizen. The record contains little information about his spouse's personal history before their marriage. The record does not reflect how he met his spouse, who resided in Russia until their marriage. His spouse has been a permanent U.S. resident since January 10, 2000, and she has applied for U.S. citizenship (AX A at 17, 18; Tr. 32). She is employed as a draftsman by a U.S. company that manufactures microwave wave guides for ships (AX A at 25; Tr. 40). She is regarded as a pleasant and dependable employee (AX A at 25). They have a son, born in January 2001 (AX A at 5). Applicant adopted his spouse's daughter in October 2000 (AX A at 6; Tr. 29). His adoptive daughter's natural father is a Russian businessman currently residing in Ukraine, but his contact with her is limited to annual birthday greetings (Tr. 59).

Applicant's 62-year-old mother-in-law is a citizen and resident of Russia. She worked as a mechanical engineer in a truck manufacturing plant in Russia until she retired about 10 years ago (Tr. 33, 49). She receives a pension, but the record does not reflect whether it is from the Russian government. Other than this possible pension, she has no connections with the Russian government (Tr. 33-34). The only other family member related to Applicant's spouse is her uncle (her mother's brother), who is a retired engineer (Tr. 34). Applicant's mother-in-law was divorced long before he met his spouse. Neither Applicant nor his spouse has any contact with her father (Answer to SOR).

Applicant's spouse has visited her mother in Russia three times since June 1999, and her mother has visited Applicant and his spouse in the U.S. twice (Tr. 44-45). His spouse talks with her mother on the phone about once a week and occasionally talks to friends in Russia (Tr. 43). Applicant has virtually no conversation with his mother-in-law because of the language barrier (Tr. 47). Applicant's adopted daughter and natural son are able to speak some Russian and are close to his mother-in-law (Tr. 65). Applicant and his spouse hope to bring his mother-in-law to the U.S. so that she can be closer to her daughter and grandchildren.

Applicant traveled to Russia three times. In March 1999, he went to Russia to visit his future spouse and to present a seminar at a Russian university. He proposed marriage to his future spouse during this trip. He worked for a government contractor at the time and also used the visit to facilitate an exchange program between his employer and their Russian counterparts. In June 1999, he escorted his fiancé and her daughter to the U.S. In July 2000, he helped his wife dispose of her Russian apartment. He has not visited Russia since July 2000 (Tr. 42-43).

Applicant does not believe he is vulnerable to direct or indirect exploitation or coercion, because his in-laws in Russia are retired and he does not work on weaponry. If anyone attempted to use his family ties to obtain information, he would report it to the appropriate authorities (Tr. 50). He is aware that Russia is "a bit chaotic," but he and his spouse have never encountered any problems while visiting Russia (Tr. 56).

At Department Counsel's request and without objection from Applicant, I have taken administrative notice of adjudicative facts pertaining to Russia, based on official U.S. government documents. The Russian Federation emerged after the December 1991 dissolution of the Soviet Union, inheriting the permanent seat on the United Nations Security Council and the bulk of its foreign assets and debt. The 1993 constitution established a strong executive branch and a considerably weaker legislative branch. In spite of efforts to foster judicial independence, many judges still see their role as protectors of state interests. The precise distribution of powers between the central government and regional and local authorities is still evolving. Russia's human rights record is uneven, especially in the treatment of prison inmates and detainees. U.S. Dept. of State, *Background Note: Russia* at 4-6 (Aug. 2005), attached to the record as Hearing Exhibit (HX) I.

Although the Russian constitution guarantees its citizens the right to choose where they live and to travel abroad, some city governments have restricted this right through residential registration rules. U.S. citizens who previously held Russian citizenship often must formally renounce their Russian citizenship before applying for a Russian visa, lest they be considered Russian citizens and not permitted to leave without a Russian passport. U.S. Dept. of State, *Consular Information Sheet, Russia Federation* at 4 (Jun. 7, 2005), attached to the record as HX II.

Because of continued civil and political unrest, the U.S. Department of State strongly discourages U.S. citizens from traveling in or near Chechnya. There is a heightened potential for terrorism, including bombings and hostage taking, throughout Russia. U.S. Dept. of State, *Public Announcement, Russia Federation* (Mar. 30, 2005), attached to the record as HX III. Violent crime is a problem, especially in large cities. Extortion and corruption are common in the business community. It is not uncommon for foreigners to be harassed or mistreated by law enforcement and other officials. HX II at 6-7.

The U.S. and Russia share common interests on a broad range of issues, including strategic arsenal reduction, the war on terrorism, controlling the proliferation of nuclear weapons, and resolving international conflicts. U.S. strategy is to assist Russia's transition to a democratic, free-market society and to promote establishment of lasting ties at all levels of society. *Id.* at 12. Notwithstanding its cooperation with the U.S. on controlling nuclear proliferation, Russia sells technology for weapons of mass destruction and missiles to other countries to generate revenue and gain diplomatic influence. The Russian government and non-government entities within Russian support missile programs and civil nuclear projects in China, Iran, India, and Syria. Vice Admiral Lowell E. Jacoby, U.S. Navy, Director, Defense Intelligence Agency, *Statement for the Record, Senate Armed Services Committee* at 13 (Mar. 17, 2005), attached to the record as HX IV.

## 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 authorized the Secretary of Defense or his designee to grant applicants 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). Each security clearance decision "must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy." Directive ¶ 6.3. 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 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, 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 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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; *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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

## CONCLUSIONS

### **Guideline B (Foreign Influence)**

The concern under this guideline is that a security risk may exist when an applicant's immediate family, or other persons to whom he or she may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. "These situations could create the potential for foreign influence that could result in the compromise of classified information." Directive ¶ E2.A2.1.1. A disqualifying condition (DC 1) may arise when "[a]n immediate family member [spouse, father, mother, sons, daughters, brothers, sisters], 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." Directive ¶ E2.A2.1.2.1.

A disqualifying condition (DC 2) also may arise when an applicant is "[s]haring living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." Directive ¶ E2.A2.1.2.2. Where the cohabitant is also an immediate family member under DC 1, both disqualifying conditions may apply. Both conditions are raised in this case.

Family ties with persons in a foreign country are not, as a matter of law, automatically disqualifying under Guideline B. However, such ties raise a *prima facie* security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. *See* Directive ¶ E3.1.15; ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 (App. Bd. Feb. 8, 2001). The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003).

"[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at \* 8 (App. Bd. Feb. 20, 2002). Applicant has rebutted the presumed ties of affection for his mother-in-law, but not the presumed ties of obligation. Based on evidence that Applicant has never had any contact with his spouse's father, and his mother-in-law was divorced long before Applicant met his future spouse, he has rebutted the allegation that he has a Russian father-in-law.

Since the government produced substantial evidence to establish DC 1 and DC 2, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

In cases where an applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members, cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States." Directive ¶ E2.A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1 ("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to chose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004).

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). The distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at \*\*15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S.

Neither Applicant's spouse nor his mother-in-law is an agent of a foreign power. His spouse resides with him in the U.S., and thus is somewhat insulated from the direct influence of the lawless, corrupt, and dissident elements of Russia. However, his spouse is vulnerable to coercion, exploitation, or duress exercised indirectly through her mother. Applicant has not carried his burden of showing that his spouse and mother-in-law could not be exploited in ways that could force him to choose between loyalty to his spouse and her mother and the security interests of the U.S. After evaluating each family member's individual circumstances as well as the totality of Applicant's family ties to Russia, I conclude MC 1 is not established.

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. Applicant has virtually no significant communication with his mother-in-law. Thus, MC 3 is established for him and his mother-in-law.

Foreign travel is not an enumerated disqualifying condition under this guideline. Applicant made three trips to Russia, all of which occurred in connection with his marriage. The first trip also was connected with his employment by a government contractor. I conclude his foreign travel has no independent security significance, and I resolve SOR ¶ 1.c in his favor.

### **Whole Person Analysis**

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered the general adjudicative guidelines in the Directive ¶ E2.2.1. I have considered: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

There is little evidence in the record regarding the personal history of Applicant's spouse before Applicant met her. There is no evidence of the circumstances in which they met and became sufficiently acquainted to decide to marry. The evidence concerning the personal history of Applicant's mother-in-law is sparse. Applicant's spouse clearly has strong ties of affection for her mother, and Applicant's children and his mother-in-law share strong ties of affection. These strong family ties make Applicant vulnerable to indirect coercion, exploitation, or duress exercised through his spouse and her mother. On the other hand, Applicant is a mature, well-educated adult who has devoted most of his adult life to using his education and skills to enhance the security of the U.S. He grew up in a military family and served honorably in the U.S. Navy. He has held a security clearance for many years. He was direct, sincere, and credible during the hearing. Nevertheless, he has not allayed the security concerns raised by his family ties. Close cases must be resolved in favor of denying a clearance.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on based on foreign influence. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the interests of national interest to grant him a security clearance.

### **FORMAL FINDINGS**

The following are my findings as to each allegation in the SOR:

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: For Applicant

### **DECISION**

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

LeRoy F. Foreman

Administrative Judge

1. The pages of AX A were numbered from 1-10 and 11-25. There is no page 11.