DATE: December 29, 2006

In Re:

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

Applicant for Security Clearance

CR Case No. 04-04583

DECISION OF ADMINISTRATIVE JUDGE

JOHN GRATTAN METZ, JR

APPEARANCES

FOR GOVERNMENT

Sabrina E. Redd, Esquire, Department Counsel

FOR APPLICANT

William F. Savarino, Esquire

SYNOPSIS

The government's evidence did not establish that Applicant had immediate family members living in Russia. Alternatively, Applicant demonstrated that those family members were not agents of a foreign government or so situated as to provide a point of influence on Applicant. However, Applicant's deliberate falsification of clearance applications in January 1987, February 2001, and June 2003, makes him unsuitable for a security clearance. Clearance denied.

STATEMENT OF THE CASE

Applicant challenges the 25 May 2005 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of foreign influence, personal conduct, and criminal conduct.[(1)] Applicant submitted an undated answer in June 2005, and requested a hearing. DOHA assigned the case to me 23 January 2006 and I convened a hearing 13 March 2006. DOHA received the transcript 21 March 2006.

FINDINGS OF FACT

Applicant admitted the SOR allegations, except SOR 2.d. and 3.b. Accordingly, I incorporate those admissions as findings of fact. He is a 48-year-old computer engineer for a defense contractor seeking to retain the clearance he has held, as needed, from approximately 1978.

Applicant is a U.S. citizen, born, raised, and educated in the U.S. In 1999, Applicant, through an internet marriage agency, began corresponding with a Russian national by e-mail and regular mail. In August 2000, Applicant traveled to Russia to meet his prospective bride and her family.[(2)] She immigrated to the U.S., and married Applicant in March 2001. She went to school in the U.S. and obtained certification as a physical therapy assistant. They have no children together, but Applicant's son from another relationship lives with them. She has not returned to Russia since immigrating to the U.S.

Applicant's wife applied for U.S. citizenship as soon as she was eligible. In February 2006, she was notified by the

Immigration and Naturalization Service (A.E. E), that she had passed her English and U.S. history and government tests, and her application for citizenship had been recommended for approval. Presumptively, she is awaiting a date for her swearing in.

When Applicant was in Russia in August 2000, he met his prospective in-laws and his wife's sole sibling, a sister. They are all citizens and residents of Russia. None of them speak English. Applicant's father-in-law served approximately 18 months in the Russian Navy when he was young. He is a construction manager, currently not working because of a broken ankle. Applicant's mother-in-law is a food distribution manager for a public school system. His sister-in-law runs an optometry shop with her husband.

Russia is a technologically advanced country with an active and sophisticated intelligence agency that targets U.S. government information. Russia and the U.S. have been principal military and political rivals for over fifty years. Although Russia has moved in more democratic directions since the fall of the Soviet Union, it has a poor human rights record, and Russian emigres to the U.S. may be subject to coercive and non-coercive influence.

Applicant enlisted in the U.S. Marine Corps in November 1975, served four years on active duty and two years inactive reserve, and was honorably discharged in March 1981 (A.E. C). When he first completed his enlistment papers, he disclosed his substantial marijuana use while in high school. The recruiter tore up that application, and had Applicant complete another one--this time omitting the marijuana use.[(3)] The record reflects that despite knowing that marijuana use was prohibited in the military, he continued to use marijuana while in the Marine Corps. In addition, he continued to use marijuana after he left the military until he was arrested for marijuana possession in February 1996.[(4)]

Applicant first applied for an industrial clearance in January 1987 (G.E. 3). When asked about his criminal record (question 14), he disclosed a 1973 trespassing arrest. However, he failed to disclose more relevant and more recent misconduct.[(5)] In March 1976, he was punished at a summary court-martial for marijuana possession. In September 1977, he received non-judicial punishment (Article 15, Uniform Code of Military Justice), for false official statement, unauthorized absence, and uniform violations.[(6)] In April 1978, he was arrested for marijuana possession and deadly weapon possession. Applicant omitted this information because he was afraid his company would become aware of this information and fire him. He claims he reported this information when he was interviewed by the government investigator, but he has provided no information to corroborate this claim. As a result of this investigation, Applicant was granted a clearance.

Applicant next completed a clearance application in February 2001 (G.E. 2). He answered "no" to a question asking him to disclose any arrests, charges, citations, or detentions within the last seven years, regardless of disposition of the charges (question 20). Applicant failed to disclose a February 1996 arrest for marijuana possession, a May 1996 assault arrest, and an August 1999 arrest for failing to obey a lawful order and obstructing and hindering.[(7)] Applicant omitted this information because he did not get along with his immediate supervisor, and feared that the supervisor would use the information against him. Again, he claims he reported this information to the government, but provided no corroboration of the claim. As a result of this investigation, Applicant continued his clearance.

Applicant completed a third clearance application in June 2003 (G.E. 1). Asked again about his criminal record (question 20), he disclosed the August 1999 failure to obey/obstructing-hindering charge, but failed to disclose a fall 2001 arrest for assault. The assault arose out of his contentious relationship with the mother of his son. Although Applicant strongly denies that he assaulted his girlfriend, and intended to fight the charges vigorously, he took a plea deal when the alleged victim showed up in court with numerous witnesses he did not expect. The plea deal resulted in Applicant obtaining probation before judgment and an order to complete anger management counseling, which he did, and the charges were dismissed (A.E. S, T).

Applicant has received uniformly excellent performance appraisals (A.E. E-R). The two employment references who testified consider him an honest and trustworthy employee.

POLICIES AND BURDEN OF PROOF

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for

access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guidelines are Guideline B (Foreign Influence), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.[(8)]

CONCLUSIONS

The government failed to establish a case for disqualification under Guideline B. Although Applicant's wife is a Russian national, she is a legal permanent resident of the U.S., residing in the U.S. (1.a.), and awaiting a date for her nationalization ceremony. Further, none of the allegations of paragraphs 1.b.-1.d. raise security concerns under Guideline B.

The plain language of the stated concerns and disqualifying factors of Guideline B may (or may not) raise concerns and may (or may not) be disqualifying. This implies that mere citizenship of, or residence in, a foreign country of an immediate family member does not automatically establish the disqualifying conditions precedent to shift the burden to Applicant to mitigate the government's case.

In this case, the evidence establishes that Applicant has no immediate family members living in Russia. His wife, a Russian national, is a legal permanent resident of the U.S., residing in the U.S. She has met all the requirements for U.S. citizenship and is awaiting a date for her naturalization ceremony. However, his in-laws are not his immediate family members and there is nothing in this record to suggest that Applicant has any ties of affection or obligation to them based on his visits with them during his trip to Russia in August 2000. Further, while it may make sense to presume that his wife has close ties of affection or obligation to her parents and grandmother, and even that he has close ties of affection or obligation to his wife, it does not make sense to impute her familial obligations to him--particularly where his contacts with his in-laws and his wife's friends are casual and infrequent and burdened by language barriers. Nor is there any compelling reason to impute his wife's real estate interest to him, particularly where it is minimal.

Even if I concluded that the government established a case for disqualification under Guideline B regarding Applicant's in-laws, Applicant's mitigation is established. None of his in-laws are connected to the Russian government, none are agents of the Russian government, and none appears positioned to be exploited in such a way as to influence Applicant to disclose classified information. Thus, I conclude that it is unlikely Applicant can be pressured based on his in-laws living in Russia. I resolve paragraphs 1.b.-1.m. for Applicant.

Similarly, Applicant's wife is not at risk to pressure from Russian authorities. She is a legal permanent resident of the U.S. and has completed all the requirements for her U.S. citizenship. She needs only final approval of her application and a date for her naturalization ceremony. She is highly unlikely to be a potential focus point to pressure Applicant. I resolve Guideline B for Applicant.

[(9)]

The government established a case for disqualification under Guideline E disqualifying condition 2, and Applicant did not mitigate the security concerns. Applicant provided false answers on three clearance applications between 1987 and 2003. On the 1987 and 2003 applications, he reported a minor criminal offense while omitting more serious charges. On his 2001 application, he failed to report any of his relevant criminal charges. This conduct demonstrates a lack of candor required of cleared personnel and suggests he is willing to put his personal needs ahead of legitimate government interests. The government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision, and relies on applicants to truthfully disclose that adverse information. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the government relies on in order to perform damage assessments and limit the compromise of classified information. I resolve Guideline E against Applicant.

The government established a case for disqualification under Guideline J disqualifying conditions 1 and 2,[(10)] but Applicant mitigated the security concerns. Although his seven criminal offenses between 1976 and 2001 (fairly summarized as occurring in two distinct periods: late 1970s and late 1990s) establish a pattern of misconduct, the misconduct itself is relatively minor and now dated--the most recent of the offenses having occurred over five years ago. I resolve Guideline J for Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline B: FOR APPLICANT

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Subparagraph c: For Applicant

Subparagraph d: For Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Paragraph 3. Guideline J: FOR APPLICANT

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Subparagraph c: For Applicant

Subparagraph d: For Applicant

Subparagraph e: For Applicant

Subparagraph f: For Applicant

Subparagraph g: For 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 denied.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).

2. A trip required by INS to ensure the marriage was legitimate and not a visa scam.

3. Although this omission was not alleged in the SOR, and I will not consider it as a falsification, the incident demonstrates that Applicant knew that disclosing certain adverse information on government applications might result in his being denied whatever benefit the application was for.

4. Guideline H (Drug Involvement) was not alleged in the SOR, and accordingly, I have not considered this information on the merits of the case. However, Applicant's drug history is relevant to provide background for the criminal conduct and falsifications alleged in the SOR.

5. He also failed to disclose his extensive marijuana use, an omission not alleged in the SOR, but relevant on the issue of Applicant's credibility in general.

6. In essence, Applicant failed to report for guard duty on time, showed up in a sloppy uniform, and then lied to his superiors about the reason he did not show up on time.

7. Applicant was acquitted of the assault charge, and the failure to obey/hindering and obstruction were nolle prossed.

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

9. E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts

from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . .;

10. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; E2.A10.1.2.2. A single serious crime or multiple lesser offenses.