

DATE: December 29, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-10904

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's wife is a citizen of the Russian Federation and resides with him in the U.S. Applicant's father-in-law, mother-in-law, and sister-in-law are citizens and residents of the Russian Federation. Applicant owns a U.S. company that contracts with a company in Romania for software services. Applicant's company is the Romanian company's sole customer, and he transfers approximately \$3,000 electronically to the Romanian company's bank each month for its services. Applicant failed to mitigate Guideline B security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On January 19, 2006, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing on February 7, 2006, and elected to have a hearing before an administrative judge. On September 26, 2006, the case was assigned to me. The parties agreed to a hearing date of November 8, 2006, and a hearing was convened on that date to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. At the hearing, the Government called no witnesses, submitted 11 exhibits for identification and admission into evidence, and offered 10 official U.S. documents containing facts for administrative notice. Applicant did not object to the admission of the Government's exhibits, which were identified as Ex. 1 through 11, and they were admitted into evidence. Applicant did not object to the factual documents, identified as Government Documents for Administrative Notice I through X, and they were admitted to the record. Applicant appeared as a witness on his own behalf and called no other witnesses. He introduced seven exhibits, which were identified as Applicant's Ex. A through G, and they were admitted to the record without objection. On November 28, 2006, DOHA received the transcript (Tr.) of the proceedings.

FINDINGS OF FACT

The SOR contains seven allegations of disqualifying conduct charged under Guideline B, Foreign Influence. In his

answer to the SOR, Applicant admitted all allegations and offered mitigating circumstances. His admissions are incorporated as findings of fact.

Applicant was born in 1974 in Romania. In 1988, he immigrated to the U.S. with his parents and sister. He and his parents became U.S. citizens in 1994; his sister became a U.S. citizen in 1995. Applicant is now 32 years old and holds a Ph.D. in electrical and computer engineering from a university in the U.S. Applicant is married, and he and his wife own their own home. Applicant also owns a home he purchased from his parents in another state. (Ex. 1; Tr. 78, 82,102.)

Applicant is employed as an electrical engineer by a government contractor. His job responsibilities require that he possess a security clearance. He holds patents on inventions relating to computer technology, and he has several patents pending. Additionally, he maintains a list of ideas he thinks could be developed into future patents. Applicant attributes the development of his entrepreneurial spirit and inventiveness to his parents: his father is also an engineer and inventor, and his mother is an artist. (Tr. 78-79, 103-106.)

In addition to his job with the government contractor, Applicant is the sole owner of a business that sells and licenses computer software programs using open source algorithms. He operates the company from his home computer in his spare time on evenings and weekends. He has an intellectual property agreement with his employer regarding inventions resulting from his work as an employee and inventions and ideas that belonged to him before he became an employee of the company. Applicant has also disclosed to his employer the nature of his personal software business, and the employer has determined there is no conflict between its work and Applicant's business. (Ex. A through D; Ex. 4; Tr. 74.)

Applicant outsources programming work for his business to a small company in Romania, which he helped to establish. In 2003, Applicant provided start-up capital to a friend, a citizen and resident of Romania, who established the business. The friend's company employs approximately five other people, all of whom are citizens and residents of Romania. Applicant's friend hired the five people. Applicant knows their names but does not know them personally. Applicant's U.S. company is the Romanian company's sole customer, and each month Applicant sends an electronic transfer of approximately \$3,000 to the Romanian company's bank account in payment for software customizing services. Applicant estimates the Romanian company's rates for software customizing services are about ten times lower than those charged by a U.S. company. (Ex. 3 at 3-4; Tr. 83-90, 113-115; 121-122.)

Applicant communicates with the Romanian programmers by e-mail, over the Internet, and sometimes by telephone. The Romanian company writes the programs requested by Applicant to a server, located in Romania. Applicant can access the server from his computer in the U.S., and he then retrieves the programs supplied to him by the Romanian programmers and provides them to his customers. (Tr. 122-124.)

Applicant's wife attended high school in the U.S. as a foreign exchange student for one year, and she earned an undergraduate degree from a U.S. university in 1997. Applicant met his wife, who was then living in the U.S., on the Internet in 2000. Applicant's wife is a citizen of the Russian Federation and has permanent U.S. resident status. In 2001, after they became engaged, they traveled to Russia so Applicant could meet his fiancée's parents. The couple returned to Russia in 2002 for a traditional religious wedding ceremony. In 2004, she earned a graduate degree at a U.S. university and is employed as a business consultant. (Ex. 1, Ex. 8; Tr. 68-70, 119-120.)

Applicant's father-in-law, mother-in-law, and sister-in-law are citizens and residents of the Russian Federation. Applicant's father-in-law is a retired mechanical engineer. His mother-in-law is a professor of English at a technical college, and his sister-in-law teaches English to high school students in Russia. Applicant has infrequent communication with his wife's family members in Russia. However, his wife stays in touch with her parents and sister once or twice a week by e-mail, and she travels to Russia to see them approximately once a year. (Tr. 69-71, 91-94, 120-121.)

Applicant has weekly contact by e-mail with his business associates in Romania. Applicant has seven aunts and three uncles who are citizens and residents of Romania. These relatives are retired or work as farmers and maintenance people. Applicant traveled to Romania in 1998, 2002, 2005, and 2006. He visited some of his aunts and uncles and other unspecified relatives each time he traveled to Romania, but he has no written correspondence with them and does not communicate with them by telephone or e-mail. He visited his business associates in Romania in 2005 and 2006, and he

stayed in the home of the friend who owns the Romanian business that does his software programming. (Ex. 3 at 3; Tr. 98-100, 116-117.)

Applicant presented three letters of character reference from managers and co-workers. The three letters described Applicant's character, work ethic, and patriotism in superlative terms. (Ex. E, F, and G.)

I take administrative notice of political and economic instability in the Russian Federation, conditions which raise security concerns for U.S. citizens visiting or residing there, and, by extension, for those U.S. citizens who have family members residing in the Russian Federation. A U.S. Department of State Public Announcement, dated April 4, 2006, warned U.S. citizens traveling or living in Russia of a heightened potential for terrorist actions, including attacks against civilians such as hostage taking, and bombings. (Government Document for Administrative Notice V at 1). A Consular Information Sheet on the Russian Federation, prepared by the U.S. Department of State and dated November 23, 2005, alerts U.S. citizens that although they may not be targets, they may be victims of indiscriminate terrorist attacks and should therefore avoid large crowds and exercise a high degree of caution when patronizing restaurants, theaters and other public places. (Government Document for Administrative Notice IV at 5.) Additionally, tensions exist between the Russian military and the civilian government over resource allocation, restructuring, and reform. (Government Document for Administrative Notice VI, Summary.) Russian and other foreign intelligence agents use the Internet and Internet service providers to acquire and exploit critical information posted by U.S. businesses that can be used to their economic or military advantage. (Government Document for Administrative Notice III at 3-5.)

I also take administrative notice that Romania is a constitutional democracy with a market economy and a staunch ally of the U.S. in the global war on terror. In 2004, Romania formally joined the North Atlantic Treaty Organization (NATO). Internal human rights problems exist, however, and include political influence over the judiciary, widespread corruption, and lack of enforcement of labor laws. Romania is largely a cash economy. A U.S. Department of State Consular Information Sheet on Romania warns U.S. citizens traveling to Romania to be alert to credit card fraud, attempts at extortion, and Internet confidence scams. (Government Documents for Administrative Notice VIII, IX, and X.)

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.

CONCLUSIONS

Guideline B - Foreign Influence

In the SOR, DOHA alleged, under Guideline B of the Directive, that Applicant's wife is a citizen of Russia residing with him in the U.S. (¶ 1.a.); that Applicant's father-in-law, mother-in-law, and sister-in-law are citizens and residents of Russia (¶ 1.b.); that Applicant has seven aunts and three uncles who are citizens and residents of Romania (¶ 1.c.); that Applicant owns a company that contracts with a Romanian company (¶ 1.d.); that Applicant's six business associates are citizens and residents of Romania (¶ 1.e.); that Applicant traveled to Romania in 1998-1999 and in 2002 (¶ 1.f.); and that he traveled to Russia in 2001 and 2002. Applicant admitted all SOR allegations.

A Guideline B security concern exists when an applicant's immediate family, including cohabitants, and other persons to whom he or she might be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. A person who places a high value on family obligations or fidelity to relationships in another country may be vulnerable to duress by the intelligence service of the foreign country or by individuals engaged in industrial espionage, terrorism or other criminal activity. The more faithful an individual is to family ties and obligations, the more likely the chance that the ties might be exploited to the detriment of the United States.

Applicant's case requires the recognition that the Russian Federation is politically and economically unstable, conditions that have been exploited by criminal and terrorist groups. Their actions threaten U.S. security interests. American citizens with immediate family members who are citizens or residents of the Russian Federation could be vulnerable to coercion, exploitation, or pressure.

Additionally, while the U.S. and Romania have friendly relations, Romania has internal problems with corruption, credit card fraud, and Internet confidence scams -- issues that could give rise to exploitation or pressure.

Applicant's admissions raise several possible Guideline B security concerns. Applicant's wife is a citizen of the Russian Federation and resides with him in the U.S. His father-in-law, mother-in-law, and sister-in-law are citizens and residents of the Russian Federation. The citizenship and residency of these immediate family members raise security concerns under E2.A2.1.2.1. and E2.A2.1.2.2. of Guideline B. Applicant's frequent trips to Romania and his substantial business relationship with citizens and residents of Romania raise security concerns under E2.A2.1.2.6. and E2.A2.1.2.8. and suggest he could be vulnerable to coercion, pressure or exploitation, and foreign influence.

An applicant may mitigate foreign influence security concerns by demonstrating that immediate family members, cohabitants, or associates are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force an applicant to choose between loyalty to the foreign associates and loyalty to the U.S. Mitigating Condition (MC) E2.A2.1.3.1.

Foreign connections derived from marriage and not from birth can raise Guideline B security concerns. In reviewing the scope of MC E2.A2.1.3.1, DOHA's Appeal Board has stated that the term "associate(s)" reasonably contemplates in-laws and close friends. ISCR Case No. 02-12760, at 4 (App. Bd. Feb. 18, 2005). While the evidence does not establish that Applicant's wife, father-in-law, mother-in-law, and sister-in-law are agents of a foreign power, they are citizens of the Russian Federation, and Applicant's in-laws are residents of the Russian Federation. The Russian Federation is a country with an uncertain political and economic future where groups engaged in criminal and terrorist activities are not constrained from acting against U.S. interests. Applicant offered no evidence to rebut the Government's assertion that his wife, her parents, and her sister could be exploited by these groups in a way that could force him to choose between loyalty to his family and the security interests of the United States. ISCR Case No. 03-15485, at 4-6 (App. Bd. Jun. 2, 2005)

Additionally, Applicant has seven aunts and three uncles who are citizens and residents of Romania. He also has associates in Romania with whom he has a substantial business relationship. Even though Romania is essentially

friendly to the U.S., the possibility of exploitation exists through Applicant's business contacts. Applicant did not know five of the six individuals with whom he does business in Romania, and he therefore was unable to rebut the assertion that his relationship with his business associates could make him vulnerable to foreign influence or pressure. His contact with these associates is not the result of official U.S. government business. His financial interests with the Romanian software company are not minimal and have the potential to affect his security responsibilities. Accordingly, MC E2.A2.1.3.1., MCE2.A2.1.3.2., and E2.A5.1.3.5. do not apply to Applicant's case.

An applicant may also mitigate foreign influence security concerns if he shows his contacts and correspondence with foreign citizens are casual and infrequent. MC E2.A2.1.3.3. While Applicant's contacts with his Russian in-laws appear to be infrequent, his wife's contacts with her family members are neither casual nor infrequent. She is in e-mail contact with her family once or twice a week, and she travels to Russia to visit them about once a year. Her closeness with and fidelity to her family members in the Russian Federation raise security concerns for Applicant.

Applicant visited some of his seven aunts and three uncles in Romania in 1998, 2002, 2005, and 2006. He testified credibly that his contacts with these extended family members, while relatively frequent, are casual. (3) However, Applicant's contacts by e-mail and on the Internet with his business associates in Romania are frequent and not casual. Accordingly, mitigating condition E2.A2.1.3.3 does not apply to Applicant's relationship with his business associates in Romania, and it does not apply to Applicant's relationship with his wife or with his wife's relationships with her parents and her sister, a circumstance that has considerable impact on Applicant's relationship with his wife. MC E2.A2.1.3.3. applies only in part to Applicant's relationship with his aunts and uncles in Romania.

Whole Person Analysis

Paragraph E2.2 of the Directive requires that the adjudicative process in a security clearance case not only assess conduct under the adjudicative guidelines, but it must also reflect a careful weighing of a number of variables known as the whole person concept. The factors to be considered in a whole person analysis include the nature, extent, and seriousness of the conduct (E2.2.1.1); the circumstances surrounding the conduct, to include knowledgeable participation (E2.2.1.2); the frequency and recency of the conduct (E2.2.1.3); the individual's age and maturity at the time of the conduct (E2.2.1.4.); the voluntariness of participation (E2.2.1.5.); the presence or absence of rehabilitation and other pertinent behavioral changes (E2.2.1.6); the motivation for the conduct (E2.2.1.7); the potential for pressure, coercion, exploitation, or duress (E2.2.1.8.); and, the likelihood for continuation or recurrence (E2.2.1.9).

The record reflects that Applicant is a young man of exceptional ability and accomplishment. His government contractor colleagues attest to his outstanding character and integrity. As an entrepreneur, he has the potential to make important contributions in his discipline. Of particular concern in this case, however, is the potential for Applicant to be subject to pressure, coercion, exploitation, or duress as a result of the citizenship of his wife and the citizenship and residency of his in-laws. Applicant's business relationship with residents of Romania also raise security concerns for pressure or coercion. These circumstances heighten the risk for the protection of classified information.

Nothing in Applicant's answers to the Guideline B allegations in the SOR suggested he was not a loyal American citizen and a credit to his adopted country. However, he failed to rebut or mitigate the security concerns alleged in subparagraphs 1.a. through 1.f. of the SOR and to demonstrate he would not be vulnerable to foreign influence that could result in the compromise of classified information.

Applicant's allegiance, loyalty, and patriotism are not at issue in this proceeding. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Therefore, nothing in this decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

I have reviewed and considered all of the evidence, and I have assessed Applicant's credibility and demeanor. After weighing the applicable Guideline B disqualifying and mitigating conditions, and after considering all relevant factors in the whole person analysis, I conclude the Guideline B allegations in the SOR against the Applicant.

FORMAL FINDINGS

The following are my conclusions 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.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

DECISION

In light of all of 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.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. MC E2.A2.1.3.3. reads: "Contact and correspondence with foreign citizens are casual and infrequent." Thus, the facts of Applicant's case meet only one of the mitigating condition's two-prong test.