

DATE: January 31, 2007

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-14492

## **DECISION OF ADMINISTRATIVE JUDGE**

**MARK W. HARVEY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

#### **FOR APPLICANT**

William S. Aramony, Esq., Applicant's Counsel

### **SYNOPSIS**

Forty-two-year-old Applicant is a Russian-born, naturalized U.S. citizen, who has lived in the United States since 1989. She has substantially more connections to the United States than to Russia. Her mother, father and brother are Russian citizens and live in Russia. She has frequent, non-casual contact with them. Because of Russia's continuing efforts at espionage, there are enhanced security concerns. However under the "whole person" concept, she has mitigated security concerns pertaining to foreign influence because of her strong connections to the United States. Clearance is granted.

### **STATEMENT OF THE CASE**

On September 7, 2004, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86). <sup>(1)</sup> On January 19, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to her, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. <sup>(2)</sup> The SOR alleges security concerns under Guideline B (Foreign Influence). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for her, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer notarized on February 7, 2006, Applicant responded to the SOR allegations, and asked for a hearing. <sup>(3)</sup> The case was assigned to me on October 28, 2006. The hearing was held on November 21, 2006. DOHA received the hearing record on December 8, 2006, and I received the hearing record on December 11, 2006.

### **PROCEDURAL RULING**

At the hearing, Department Counsel asked for administrative notice of Exhibits (Ex.) 3 to 7, as listed on his exhibit list

(R. 11-12). U.S. Department of State publications pertaining to the Russian Federation are Exs. 3 to 5. The "Annual Threat Assessment of the Director of National Intelligence," dated February 2, 2006 is Ex. 6, and an excerpt concerning the Russian Federation from Interagency Operational Security Support Staff's "Intelligence Threat Handbook," published June 2004 is Ex. 7. Administrative or official notice is the appropriate type of notice used for administrative proceedings. *See* ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from government reports. *See* Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Applicant did not object to my consideration of Exs. 3 to 7 for purposes of administrative notice (R. 12). I took administrative notice of the facts under subheading "The Russian Federation" of this decision, which are from Exs. 3 to 7.

### FINDINGS OF FACT

As to the factual allegations, Applicant admitted the underlying facts alleged in the SOR ¶¶ 1.a, 1.b, and 1.e.<sup>(4)</sup> For SOR ¶¶ 1.c, she explained that her father is a retired forest engineer, and for 1.d, she said she buys her parents presents, but does not provide annual support to them. Her admissions are incorporated herein as findings of fact, and her clarifying remarks about security concerns will be discussed in detail, *infra*.

Applicant is 42 years old.<sup>(5)</sup> She was born and raised in a town (T) of about 600,000 inhabitants in the Soviet Union (R. 24). She considers herself to be Ukranian, not Russian, even though T is now in the Russian Federation (R. 47). Applicant was secretly baptized in the Russian Orthodox religion when she was three-years old (R. 26). She went to a large university in Kiev, Ukraine, earned top grades and received a Masters Degree in computer science and systems engineering in 1987 (R. 24-25, 27, 59, 63). After college, she worked for two years at a small software firm in Kiev (R. 41, 64). She came to the U.S. in 1989 (R. 41). She applied for a green card in 1991, and it was approved in 1995 (R. 46, 66). From 1992 to 1994, while living in the United States, she used email to work remotely for a small Jewish-owned, private company located in Russia (R. 42-45, 65). Most of the small company's employees subsequently emigrated to the United States (R. 43-45). She became a U.S. citizen in May of 2000 (R. 66). She was baptized as a Baptist five years ago in the United States (R. 26). She is currently divorced (R. 51). She has three children (R. 27). Her son is 16 years of age, and her twin daughters are 14 (R. 27, 48). Her children do not speak Russian, and their friends are American children (R. 48-49).

Applicant is currently employed as a project manager for a government contractor, and her company has employed her since May of 2001 (R. 20-21, 54). She had an interim security clearance from 2001 to 2005 (R. 22, 66). Her employment involves assistance to the Navy, Air Force and the Department of Homeland Security (R. 55). She enjoys working with military clients, and performing research (R. 61-62). There were no allegations of security violations against her, or other negative judicial involvement (R. 23). She was never a citizen of either Ukraine or Russia, having moved to the United States before the breakup of the Soviet Union (R. 67). When she came to the United States in 1989, she used her Soviet Union passport (R. 67-68). Her Soviet Union passport expired in 1994, she did not renew it, and she did not have any other foreign passport (R. 68). She retained the Soviet Union passport as a souvenir (R. 92). She has not returned to Russia or the Ukraine since leaving in 1989 (R. 78). She received a U.S. passport in September of 2000 (R. 73).

Applicant has voted in U.S. elections (R. 57). She prefers the United States over Russia because of the dishonesty and corruption of Russia (R. 58-59). She loves the United States, its political system, and it is her home (R. 60). If someone attempted to coerce her parents, she would report it to U.S. authorities (R. 60). She loves her parents, but would not want to negotiate with someone attempting to coerce her (R. 61). In any event, she would not jeopardize her livelihood and her children's welfare by violating U.S. laws (R. 61).

Applicant's father was born in Ukraine, and is now 70 years old (R. 25, 40, 75). He was a member of the Communist party. However, he had difficulties with the Soviet government, which resulted in his leaving Ukraine and moving to T (R. 26, 85). In 1991, he gave up his Communist party membership (R. 86). He worked the last forty years of his working life as an engineer in T (R. 25, 77). He assisted with resource planning (R. 29). He traveled throughout the province near T, an area the size of West Virginia, making plans and resource evaluations (R. 35-36). He worked for a

provincial government office (R. 29, 39-40). He never worked for the Soviet or Russian national government (R. 77). Her brother, father and mother did not serve in the Soviet or Russian military (R. 77).

Applicant's mother taught Russian language and literature at a middle and high school, and she is now retired (R. 36,76). Her parents speak very little English (R. 84). Her parents both receive a pension from a local government entity under the auspices of the Province of T, and are not paid by the Russian Federation government (R. 36, 76-77). Their pensions are adequate for their living expenses, and Applicant's financial support is unnecessary (R. 37). Her mother retired at the age of 52, and is now 70 years of age (R. 83). Her parents purchased their apartment and have lived in it over 30 years (R. 36). She does not provide financial support to her parents, but when they visit her she gives them gifts on an irregular basis (birthdays and Christmas) valued at about \$200 per year (R. 37, 81-82). She also gave her parents \$1,000 for an emergency fund (R. 37). Her parents do not plan to move to the United States (R. 37). They are aware that she is a software engineer, but not that she does U.S. government work (R. 40-41). Her parents visited her in the United States in 1999, 2001 and 2004 (R. 80). They usually stay at her house for four to six months (R. 81). She does not discuss politics with her parents (R. 86). If they became ill, she might go to visit them, although it is almost impossible for her to travel because of her responsibilities to her children (R. 89). If one of her parents died, she would like the other to move to the United States and stay with her (R. 90). She communicates with her parents once or twice a month, and to her brother by email twice a year (R. 92). She has not observed any indicia of pressure or coercion of herself or her parents (R. 49). Even if her parents were threatened by Russian authorities unless she provided software, she would not do so (R. 94). Instead, she would notify her security officer and police (R. 94). Moreover, she does not believe her parents would cooperate with those making the threats because of their concern for Applicant's welfare (R. 96). She does not have any foreign property (R. 96).

Applicant's brother works for a small company with about 20 employees ( R. 78). He makes industrial automation software (R. 28, 78). The last time she saw him was in 1989 (R. 28). He lives in a suburb of a large Russian city (R. 78). Her communications with him are limited to the exchange emails about twice a year on birthdays (R. 28-29). However, when her parents stayed with her and called him, she talked to him on the telephone (R. 29). She does not have any other relatives in Russia or the Ukraine such as uncles, aunts, or cousins (R. 84). She has no sisters (R. 85).

Applicant's former husband (L) is a Jewish-American citizen with a secret clearance (R. 30, 45). He was born in Kiev (Ex. I). Starting in 1986, they worked together for the same software firm in the Ukraine (R. 68; Ex. I). They were unable to get permission to marry before he left the Soviet Union (R. 69). In 1988, L came to America from the Soviet Union with political refugee immigration status, along with his mother and father (R. 45, 69). L is currently employed working for a U.S. government contractor (R. 70). She and L were divorced in June 2001 (R. 70). She has sole custody of her children, and they live with her. L pays child support to Applicant (R. 71). At the time of the hearing, L and his parents were staying at Applicant's residence with her children (R. 71). L's parents are U.S. citizens (R. 72). In 2001 or 2002, L returned to Ukraine and visited his family (R. 72). L provided a statement corroborating the information Applicant provided about T, and her relationship with her parents (Ex. I).

Applicant met a friend in Poland in 2002, who eventually moved to Kiev (R. 44). However, she has not subsequently contacted her friend because their interests and outlooks on life have changed (R. 44).

Applicant owns her home, which she received as part of the divorce decree and has lived there since 1996 (R. 51, 74). Her equity is about 50% of the value of her residence (R. 51). Her current salary is \$112,000 per year (R. 52). She invented a software application involving authentication of chat messages while she worked for a government contractor, and the U.S. government has primary ownership of this application (R. 52-53). Her job and child support are her only sources of income (R. 75).

The population of T has declined from 600,000 to about 400,000 (R. 30). It is located in central Russia about more than 200 miles from Moscow, and it is slightly further to Kiev (R. 30, 32-34). Travel to Moscow by train from T is necessary due to the absence of roads (R. 32, 34). Most of the terrorism in Russia occurs in the Caucasus Mountains, which is over 800 miles from T (R. 34). T has a very inexpensive cost of living of about \$100 per month for an adult (R. 30). The T area is economically depressed (R. 31). There is some street crime such as automobile theft, larceny and robbery, but no major economic crime (R. 31, 39). The Russian mafia is not active because there is little economic activity to exploit (R. 31, 39). Her grandmother, who lived in T was murdered in 1994 by a drunk neighbor looking for American dollars or

other cash to purchase vodka (R. 38-39, 86-88). The person who killed her grandmother was sent to prison (R. 88). Ethnically T is Russian and Ukrainian with a small Jewish community, but no Muslim population (R. 31-32). Exhibits G-J provide additional information about T.

One witness made a statement at her hearing, and Applicant provided seven written statements describing her on and off duty performance and character over many years (Ex. I, M - Q, S). Applicant is a highly qualified employee with unique skills, who provides an exemplary work product to her company and customers (R. 106, 108). She has written several successful proposals, resulting in growth to her employer's business. She carefully complies with company and security policies (R. 109-110). She is a team player and voluntarily works overtime to accomplish her mission (R. 110). She is reliable, courteous, honest, trustworthy and forthright (R. 110-111). She has received a performance bonus on several occasions (R. 111). She has strong integrity and values.

### **The Russian Federation**

The Russian Federation is a diverse and vast country.<sup>(6)</sup> It is 1.8 times the size of the United States, and has a population of 143 million people.<sup>(7)</sup> It achieved independence with the dissolution of the Soviet Union on August 24, 1991. *Id.*

There is a significant threat of terrorism in Russia, however, American institutions and citizens have not been specifically targeted.<sup>(8)</sup> Travel in the areas in the vicinity of Chechnya, and throughout the Caucasus region is dangerous due to continued civil and political unrest.<sup>(9)</sup> Acts of terrorism include taking hostages and bombings, and in October 2005, 200-300 gunmen in the North Caucasus region attacked police and military facilities.<sup>(10)</sup> The North Caucasus region is an area of particular danger and concern about terrorism. *Id.* Corruption and extortion are common in the business environment, particularly to resolve business disputes.<sup>(11)</sup> Organized crime and local police may target foreign businesses. *Id.*

Russia has recognized the legitimacy of international human rights standards, but in Chechnya the treatment of some prisoners and detainees is a problem.<sup>(12)</sup> Russia has a large prison population, and prison conditions are below international standards. *Id.* Local authorities may manipulate the judiciary, and lengthy pretrial detention is also a human rights problem. *Id.* at 6. There are some restrictions on religious activity, and the government has weakened freedom of the press by eliminating some television networks and by encouraging self-censorship. *Id.*

The Intelligence Threat Handbook (ITH) indicates the Russian Federation's intelligence capability is significant and focuses on collection of information from the United States.<sup>(13)</sup> The old Soviet Union engaged in a series of high profile espionage missions against the United States. *Id.* at 11, 15, 18-19. The Russian Federation continued in this tradition. *Id.* at 10, 12, 16-21. The ITH states, "The FBI estimates that more than 105,000 Russians immigrated to the United States in the late 1980s. The Russians, like many intelligence services have traditionally used émigrés to gather intelligence." *Id.* at 16. However, the specific espionage examples cited in the ITH involved native born U.S. citizens or Russian diplomats, and none involved Russian émigrés. *Id.* at 11, 13, 15, 18.

The U.S. State Department succinctly described the relationship between the United States and the Russian Federation as follows:

The United States and Russia share common interests on a broad range of issues, including the drastic reduction of our strategic arsenals. We are also allies in the global war on terrorism. Russia shares our basic goal of stemming the proliferation of weapons of mass destruction and the means to deliver them. We are working with Russia to compel Iran to bring its nuclear programs into compliance with International Atomic Energy Agency (IAEA) rules. On North Korea, Russia is a participant in the Six-Party Talks aimed at the complete, verifiable, and irreversible dismantling of North Korea's nuclear program. Russia also takes part in the Middle East Peace Process "Quartet" (along with the UN and the EU). Russia now interacts with NATO members as an equal through the NATO-Russia Council but without veto power over NATO decisions. During the past several years, Russia has intensified the efforts to combat trafficking in persons.<sup>(14)</sup>

## POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision in Section E2.2, Enclosure 2, of the Directive. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1: (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 individual'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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to the relevant adjudicative guidelines are set forth and discussed in the Conclusions section below. Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture. In the decision-making process, facts must be established by "substantial evidence."<sup>(15)</sup> The government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to the applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." The burden of disproving a mitigating condition never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).<sup>(16)</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides 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." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism.

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and



conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

**Foreign Influence** Under Guideline B, 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 obligation 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 interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure." Directive ¶ E2.A2.1.1.

Two of eight possible foreign influence disqualifying conditions (FI DC) could raise a security concern in this case. FI DC 1 applies where 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." Directive ¶ E2.A2.1.2.1. "Immediate family members" include a spouse, father, mother, sons, daughters, brothers, and sisters. Directive ¶ E2.A2.1.3.1. Applicant's father, mother, and brother are "immediate family members." The government produced substantial evidence to establish FI DC 1 because Applicant's mother, father and brother are Russian citizens, and they currently live in Russia. Moreover, she has close ties of affection or obligation to them.<sup>(17)</sup> FI DC 3 applies where an applicant has, "relatives, cohabitants, or associates who are connected with any foreign government." Directive ¶ E2.A2.1.2.3. FI DC 3 is applicable because her parents are retired and receiving a pension from the local government of T.

Although, the mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B, if only one relative lives in a foreign country, and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. *See* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001). Because FI DCs 1 and 3 apply, Applicant has the burden to present evidence of rebuttal, extenuation or mitigation that it is clearly consistent with the national interest to grant or continue a security clearance for her.

Security concerns based on foreign influence can be mitigated by showing the applicability of one or more foreign influence mitigating conditions (FI MC). FI MC 1 recognizes that security concerns are reduced when there is "[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." Directive ¶ E2.A2.1.3.1. Notwithstanding the facially disjunctive language of FI MC 1, the Appeal Board has decided that Applicant must prove that his family members, cohabitant or associates are not agents of a foreign power, and are not in a position to be exploited by a foreign power in a way that could force Applicant to choose between the person(s) involved and the United States. ISCR Case No. 02-14995 at 5 (App. Bd. July 26, 2004). Applicant satisfies the first prong of FI MC 1 even under the Appeal Board's very broad definition of "agent of a foreign power."<sup>(18)</sup> The Appeal Board has specifically indicated that receipt of a foreign pension does not cause a person to be an agent of a foreign power.<sup>(19)</sup>

The second prong of FI MC 1 provides that it is potentially mitigating where the "associate(s) in question are not . . . 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 involved and the United States." The Appeal Board interprets this language as establishing an absolute standard; i.e., an applicant must affirmatively prove that there is *no possibility* that anyone might attempt to exploit or influence a foreign relative or acquaintance in the future. *See* ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) ("[FI MC] 1 does not apply because, as is well settled, it requires that Applicant demonstrate that his relatives are not in a position which could force Applicant to choose between his loyalty to them and his loyalty to the United States."); ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2005).

The nature of a Russia's government, its competitive relationship with the United States, its history of espionage against the United States, its mixed human rights record, and the prevalence of terrorism are all relevant in assessing the likelihood that Applicant's family members are vulnerable to coercion, persuasion, or duress. As indicated in the statement of facts, the Russian Federation has a complicated relationship to the U.S. The Appeal "Board has warned

'against reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B,'" (20) and Russia cannot be labeled as "hostile" or as "friendly" to the United States. Russia is in competition with the United States in several areas, and is likely to continue to engage in espionage against the United States. Russia's future relationship with the United States may not be as congenial as it is today. In any event, Applicant should not be placed into a position where she may be forced to choose between loyalty to the United States and her relatives living in Russia. (21) Additionally, a foreign government could bring pressure on her by terminating her parent's pensions. *See* ISCR Case No. 03-06267 at 4 (App. Bd. Jan. 24, 2006); ISCR Case No. 02-30535 at 4 (App. Bd. May 4, 2005). Thus, FI MC 1 (22) cannot be applied.

FI MC 3 can mitigate security concerns where "contact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. Applicant has frequent contacts by telephone and when her parents visit her family in the United States. Additionally, she contacts her brother by email twice a year on birthdays. She also provides irregular financial support and gifts to her parents.

Applicant has failed to establish that her contacts with her parents and brother are casual. *See* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 7, 2007). The term "casual" means a contact that is "more fortuitous in nature than planned or designed" or "resulting from, or occurring by chance." ISCR Case No. 04-08870 at 3 n.1 (App. Bd. Nov. 29, 2006). Arguably this definition of "casual" is inconsistent with the Directive, as it so narrows the applicability of FI MC 3 that it would only be applicable in very rare circumstances. In any event, I must follow the directions of the Appeal Board and accordingly, I conclude that FI MC 3 cannot be applied.

Applicant does not have any financial interests in Russia. This fact does not mitigate the foreign influence concerns based on FI DC 1 or 3. *See* ISCR Case No. 04-02233 at 3 (App. Bd. May 9, 2006).

I conclude that no Guideline B Mitigating Conditions apply, and I expressly and specifically indicate that I have not relied "explicitly or implicitly" on any of the Mitigating Conditions listed under Guideline B of the Directive. *See* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 7, 2007).

### **Possession of Expired Soviet Passport**

When she came to the United States in 1989, she used her Soviet Union passport (R. 67-68). Her Soviet Union passport expired in 1994, she did not renew it, and she did not have any other foreign passport (R. 68). She retained the Soviet Union passport as a souvenir (R. 92). She has not returned to Russia or the Ukraine since leaving in 1989 (R. 78). She received a U.S. passport in September of 2000 (R. 73).

The Memorandum of Assistant Secretary of Defense Arthur L. Money, dated August 16, 2000 hereinafter "ASDC3 memorandum" mandates that, "consistent application of the guideline requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government."

The Appeal Board indicated in ISCR Case No. 03-10390 at 3-4 (App. Bd. Apr. 12, 2005) that the ASDC3 memorandum requirement to surrender a passport also applied to expired passports. Moreover, the passport cannot be surrendered to a Department of Defense security officer, it must be surrendered to the issuing authority. ISCR Case No. 03-06174 at 3-5 (App. Bd. Feb. 28, 2005). Of course, the "issuing authority" authority in the case of the Soviet Union no longer exists. Indeed the expired Soviet passport is a legal nullity.

There was no allegation concerning the failure to surrender the Soviet passport or any allegation under Guideline C (foreign preference) in this case. "[T]here is no question that Applicant was entitled to receive reasonable notice of the reasons why DOHA proposed to deny or revoke [her] access to classified information, as well as a reasonable opportunity to respond." ISCR Case No. 03-06174 at 3 (App. Bd. Feb. 28, 2005) (citations omitted). Moreover, neither counsel mentioned the issue of her expired Soviet passport in his closing argument (R. 118-144).

Applicant's counsel urged the application of the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005) (hereinafter "Revised Guidelines") (R. 125-126). Under Guideline C

(Foreign Preference) of the Revised Guidelines, paragraph 10 (a)(1) the first disqualifying condition states, "possession of a current foreign passport (emphasis added)," effectively overruling the Appeal Board's expansive interpretation of the ASDC3 memorandum as applicable to expired passports. The President's approval of revised adjudicative guidelines was forwarded in a Memorandum from the Assistant to the President for National Security Affairs to the Director, Information Security Oversight Office on December 29, 2005. This Memorandum asked the Director to, "[p]lease circulate the revised guidelines to all affected agencies for immediate implementation."

The revised guidelines were implemented within DoD by an Under Secretary of Defense Memorandum dated August 30, 2006. This Memorandum makes the revised Guidelines applicable to all adjudications and other determinations in which a SOR is issued after September 1, 2006, and requires that all SORs issued prior to September 1, 2006 be adjudicated under the previous Guidelines. Applicant's case must be adjudicated under the previous Guidelines because on January 19, 2006, Applicant's SOR was issued. ISCR Case No. 03-17839 at 8 (App. Bd. Nov. 24, 2006) (White, J. separate opinion) (explaining purpose for delayed implementation is to ensure applicant's have notice of particular guidelines in effect at the time the SOR is issued). However, assuming the Revised Guidelines improve and support National Security objectives, and an Applicant is not prejudiced by the change, an Applicant should be able to urge the DoD to apply the Revised Guidelines, when they are not inconsistent with the previous Guidelines, or when they clarify application of the Guidelines.

I conclude that the ASDC3 memorandum does not bar Applicant's clearance because of her possession of an expired Soviet passport.

### **"Whole Person" Analysis**

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under Directive ¶ E2.2.1. The Appeal Board has repeatedly held that a Judge may find in favor of an applicant where no specific mitigating conditions apply.<sup>(23)</sup> Moreover, "[u]nder the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant's life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant's security eligibility by considering the totality of an applicant's conduct and circumstances."<sup>(24)</sup> The directive lists nine adjudicative process factors (APF) which are used for "whole person" analysis. Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation and behavior changes, etc., the eighth APF, "the potential for pressure, coercion, exploitation, or duress," Directive ¶ E2.2.1.8, is the most relevant of the nine APFs to this adjudication.<sup>(25)</sup> In addition to the eighth APF, other "[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." Directive ¶ E2.2.1. Ultimately, the clearance decision is "an overall common sense determination." Directive ¶ E2.2.3.

The Appeal Board requires the whole person analysis address "evidence of an applicant's personal loyalties; the nature and extent of an applicant's family's ties to the U.S. relative to his [or her] ties to a foreign country; his or her ties social ties within the U.S.; and many others raised by the facts of a given case." ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007). In that same decision, the Appeal Board commended the whole person analysis in ISCR Case No. 03-02878 at 3 (App. Bd. June 7, 2006), which provides:

Applicant has been in the U.S for twenty years and a naturalized citizen for seven. Her husband is also a naturalized citizen, and her children are U.S. citizens by birth. Her ties to these family members are stronger than her ties to family members in Taiwan. She has significant financial interests in the U.S. , and none in Taiwan. She testified credibly that she takes her loyalty to the U.S. very seriously and would defend the interests of the U.S. Her supervisors and co-worker assess her as very loyal and trustworthy.

Four circumstances weigh against Applicant in the whole person analysis. First, Russia's government is a rival of the United States and in some instances has not conformed to widely accepted norms of human rights. More importantly for security purposes, Russia is actively involved in espionage against the United States, and may attempt to use émigrés such as Applicant for espionage. Second, Applicant had significant connections to the Soviet Union before emigrating to the United States in 1989. She was born and educated in the Soviet Union, and a Russian firm provided her first post-college employment. Third, her parents who are Russian citizens, and still live in Russia, are receiving government



pensions from T. Their pensions might be terminated to put pressure on Applicant. Fourth, She has frequent and non-casual contact with her mother, father, and brother. She provides irregular support or gifts to her parents of about \$200 per year, and she gave them a one-time gift of \$1,000 for emergencies. These gifts and contacts with her Russian relatives are manifestations of her affection and regard for them.

There are many other countervailing, positive attributes to Applicant's life as a U.S. citizen that weigh towards granting her clearance. Her Soviet passport is expired. She has strong links or connections to the United States: (1) Applicant moved to the United States in 1989; (2) she became a U.S. citizen in May 2000, and she swore allegiance to the United States; (3) she has resided in the United States for 18 years without returning to the Russian Federation or the Ukraine; (4) the father of her three children is a U.S. citizen who resides in the United States; (5) her three children are U.S. citizens, and all of them reside in the United States; (6) she owns a home and has financial connections in the United States; <sup>(26)</sup> and (7) she has credibly stated that she would report to U.S. authorities any attempt to threaten or coerce her or her family members living in Russia. There is no reason to believe that she would take any action which could cause potential harm to her U.S. family or to this country. She is patriotic, loves the United States, and would not permit Russia to exploit her. She has close ties to the United States. Her closest family members are her three children. They are U.S. citizens and live with her. Because her children live in the United States, they are not vulnerable to coercion or exploitation by a foreign power. The realistic possibility of pressure, coercion, exploitation or duress is low. I base this conclusion on her credible and sincere testimony, and I do not believe she would compromise national security, or otherwise comply with any Russian threats or coercion. Applicant has not been to Russia since 1989, and is unlikely to return to Russia. <sup>(27)</sup> Her supervisors, coworkers and friends describe her as very honest, loyal, and trustworthy. She volunteers for her church and is an asset to her community and company.

In a 2006 decision, the Appeal Board held the Judge properly determined under the "whole person" concept that an applicant with very significant connections to Russia had mitigated security concerns under Guideline B. In ISCR Case No. 03-04300, 2006 DOHA Lexis 264 at \*17-\*21 (App. Bd. Feb. 16, 2006), <sup>(28)</sup> the applicant had weekly contact with her mother (who lives in Russia), contact three times per year with her aunt (who lives in Russia); contact about four times per year with her father-in-law (who lives in Russia); and multiple annual contacts with other relatives living in Israel. She had visited her family in Russia and Israel, on more than one occasion, after emigrating to the United States. Moreover, she owned a half interest in her mother's apartment in Russia, and provided financial support to her mother and aunt. The Judge's whole person analysis (that the Appeal Board determined was sufficient to mitigate such significant foreign influence security concerns) provides:

Looking at all of [whole person] factors, I conclude Applicant has overcome foreign influence security concerns. Given her strong ties to the U.S. and her limited contact with Russia and Israel since she became a U.S. naturalized citizen, there is limited potential for coercion, exploitation or duress. (E.2.2.1.8. The potential for pressure, coercion, exploitation, or duress.) All of her immediate family are in the U.S., and the majority of her financial ties are in the U.S. Applicant has been a naturalized U.S. citizen for over fifteen years. She returned to Russia in April 2005 to abjure her Russian citizenship and has had limited visits with her mother, aunt and father-in-law in 1995 and 2002. She provides minimal support to her mother and aunt. She has only visited her sister and family in Israel in 1991, 1994, and 1997. While she has contact with her relatives in Russia and her relatives in Israel, that contact is limited. While her niece serves in the Israeli military, she has limited contact with her. Clearly, she put her interests in the U.S. ahead of her loyalty to her elderly mother when she chose to renounce her Russian citizenship.

Given her long history with her employer since April 2000, it is unlikely that she could be exploited by coercive or non-coercive means by the government in Russia or in Israel in a way that could force Applicant to choose between loyalty to her mother, aunt, father-in-law, her sibling and family and her loyalty to the United States. She stated that should any such attempt be made she would immediately contact the appropriate U.S. authorities. Thus, any risk of either coercive or non-coercive foreign duress or influence on Applicant and/or her immediate family would appear to be slight and clearly manageable. Contacts with citizens of other countries are relevant to security determinations only if they make an individual potentially vulnerable to coercion, exploitation, or pressure through threats against those foreign relatives.

While clearance decisions are inherently based on numerous facts, and as such are made after a case-by-case analysis, it is beyond debate that the applicant in ISCR Case No. 03-04300 had more significant connections to Russia than the

Applicant does in this case. Whereas, the applicant's connections to the United States connections in ISCR Case No. 03-04300 and in this case are similar. <sup>(29)</sup>

After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has mitigated or overcome the security concerns pertaining to foreign influence and foreign preference. I have no doubts concerning Applicant's security eligibility and suitability. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person

factors" <sup>(30)</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive. I conclude Applicant is eligible for access to classified information.

### **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, Guideline B: FOR APPLICANT

Subparagraph 1.a - 1.e: For Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Mark W. Harvey

Administrative Judge

1. Ex. 1 (Electronic Standard Form (SF) 86, Security Clearance Application is dated September 30, 2001, on the first page and dated October 4, 2001 on page 11). There is no allegation of falsification of this SF 86 in the statement of reasons (SOR).
2. Ex. 9 (SOR, dated January 19, 2006) at 1-2 is the source for the facts in the remainder of this paragraph.
3. Ex. 10 (Applicant's response to SOR, notarized February 7, 2006, and received at DOHA February 10, 2006).
4. *Id.* is the source for all factual assertions in this paragraph.
5. Ex. 1, *supra* n. 1, section 1.1, at 1.
6. Ex. 5 (U.S. Department of State Bureau of Consular Affairs, dated June 14, 2006), at 1.
7. Ex. 3 (U.S. Department of State Bureau of European and Eurasian Affairs, Background Note: Russia, dated July 2006), at 1.
8. Ex. 4 (U.S. Department of State Public Announcement, "Russian Federation," November 16, 2006), at 1.
9. Ex. 5, *supra* n. 6, at 4.
10. *Id.*; Ex. 5, *supra* n. 6, at 6.
11. Ex. 5, *supra* n. 6, at 6.

12. Ex. 3, *supra* n. 7, at 7.

13. Ex. 7 (Interagency Operational Security Support Staff's "Intelligence Threat Handbook," published June 2004), at 9.

14. *Id.* at 11-12; *See* Exhibit L (Listing several points of agreement and cooperation between the United States and the Russian Federation (July 15, 2006)); Exhibit 6 (The Director of National Intelligence's Annual Threat Assessment of the Director of National Intelligence for the Senate Select Committee on Intelligence (Feb. 2, 2006)) at 16.

15. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).

16. "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, [evaluates] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and [decides] whether Applicant [has] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

17. The fact that her parents visit the United States for lengthy periods of time does not mitigate the foreign influence security concerns. *See* ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005) (indicating low relevance if foreign relatives spend part of each year in the United States).

18. *Compare* ISCR Case No. 03-10954 (App. Bd. Mar. 8, 2006); *with* ISCR Case No. 03-10312 at 6-9 (A.J. May 31, 2006); ISCR Case No. 02-21927, 2006 DOHA Lexis 229, at \*15-\*45 (A.J. May 17, 2006) (discussing the parameters and application of FI MC 1, especially the scope and definition of "agent of a foreign power"). 50 U.S.C. § 1801(b) defines "agent of a foreign power." The statutory definition for "agent of a foreign power" was explicitly included in Executive Order 12968, Aug. 2, 1995, Part 1.1f, which established, "a uniform Federal personnel security program for employees who will be considered for initial or continued access to classified information." The Appeal Board's decision in ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 7, 2007) reiterating the broad definition of "agent of a foreign power" does not address why Executive Order 12968 is not controlling. *See* ISCR Case No. 04-03720 at 4 (App. Bd. June 14, 2006); ISCR Case No. 04-02233 at 3 (App. Bd. May 9, 2006), *see generally* *Nickelson v. United States*, 284 F.Supp.2d 387, 391 (E.D. Va. 2003) (requiring agency to follow own rules in security clearance determinations); ISCR Case No. 04-12648 at 10-13 (App. Bd. Oct. 20, 2006) (Harvey, J., dissenting) (explaining limitations on Appeal Board's authority to reverse).

19. *See* ISCR Case No. 03-17071 at 3 (App. Bd. Nov. 22, 2006), *see also* ISCR Case No. 02-2454 at 4-5 (App. Bd. June 29, 2004) (employee of a city government was an "agent of a foreign power").

20. ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005) (quoting ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002)).

21. The Appeal Board has not increased an applicant's burden of persuasion in cases involving contacts with family members living in Russia. This situation may be compared to the Appeal Board's decision to place a "very heavy burden of persuasion" on applicants to demonstrate that contacts with immediate family members living in Iran do not pose a security risk. *See* ISCR Case No. 02-13595 at 3 (App. Bd. May 10, 2005) (stating an applicant has "a very heavy burden of persuasion to overcome the security concerns" when parents and siblings live in Iran); ISCR Case No. 04-11463 at 4 (App. Bd. Aug. 4, 2006) (articulating "very heavy burden" standard when applicant's family members live in Iran).

22. Another less significant reason not to apply FI MC 1 is the history of terrorist activity in Russia. The Appeal Board has limited the applicability of FI MC 1 where there is a history of terrorist activity in the foreign country in question. ISCR Case No. 03-22643 (App. Bd. Jun. 24, 2005); ISCR Case No. 02-22461 at 5 (App. Bd. Oct. 22, 2005).

23. ISCR Case No. 02-30864 at 4 (App. Bd. Oct. 26, 2005); ISCR Case No. 03-11448 at 3-4 (App. Bd. Aug. 10, 2004); ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004); ISCR Case No. 02-32006 at 5 (App. Bd. Oct. 28, 2004).

24. ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)).

25. *See* ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006) (stating that an analysis under the eighth APF apparently without discussion of the other APFs was sustainable); ISCR Case No. 03-10954 at 5 (App. Bd. Mar. 8, 2006) (sole APF mentioned is eighth APF); ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (remanding grant of clearance because Judge did not assess "the realistic potential for exploitation"), *but see* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 5, 2007) (rejecting contention that eighth APF is exclusive circumstance in whole person analysis in foreign influence cases).

26. Department Counsel did not allege financial interests as a FI DC and as stated earlier, no FI MCs apply. However, I observe Applicant has no financial interests in Russia. *See* ISCR Case No. 04-02233 at 3 (App. Bd. May 9, 2006) (stating lack of foreign financial interests do not mitigate Guideline B security concerns based on an applicant's relationship with relatives); ISCR Case No. 03-04300 (App. Bd. Feb. 16, 2006), 2006 DOHA Lexis 264 at \*17 (accepting the Judge's conclusion applying FI MC 5 because that applicant's foreign financial interests were minimal and not sufficient to affect her security responsibilities).

27. I observe that there is no record evidence establishing: (1) any connection or contact between Applicant and any foreign government; (2) any financial interests between Applicant and any foreign nation, or any foreign business concern; (3) her failure to follow the rules or her failure to require those around him to do the same on projects requiring security clearances; (4) any lack of the respect and trust of her employer, her friends, or family; (5) a problem for Applicant in the areas of honesty or integrity; (6) her elderly father and mother, and her brother are or have been, political activists or journalists, challenging the policies of the Russian government, or that they otherwise engage in activities which would bring attention to themselves; (7) the Russian government has approached any of her Russian family for any reason; (8) that Russian officials are even aware of her work for a government contractor. As such, there is a reduced possibility that they would be targets for coercion or exploitation by the Russian government, which occasionally seeks to quiet those which speak out against it. I conclude, however, that the government has no burden to present such evidence, and the absence of evidence does not support application of any mitigating condition, or approval of a clearance. *See* ISCR Case No. 02-21927, 2006 DOHA Lexis 229, at \*39-\*41 (A.J. May 17, 2006) (discussing absence of evidence and relationship to burden shifting). Although Applicant previously had an interim clearance, there is no reason for Russia to contact or threaten her until she receives access to classified information. *See* ISCR Case No. 02-22461 at 10 (App. Bd. Oct. 27, 2005),

28. The Appeal Board reversed the Judge's decision to grant a clearance because of the strict requirements of the Money Memorandum (Applicant in ISCR Case No. 03-04300 had not turned in her Russian passport to the Russian government by the close of evidence).

29. In ISCR Case No. 03-04300 the applicant's connections to the U.S. are as follows: (1) the applicant's husband and son live in the United States, and they are both dual citizens of Russia and the U.S.; and (2) The applicant has lived in the U.S. since 1989. The applicant in ISCR Case No. 03-04300 is a professional with post-doctorate teaching employment.

30. *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).