

DATE: December 27, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 06-15779

DECISION OF ADMINISTRATIVE JUDGE

MARK W. HARVEY

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Forty-six-year-old Applicant is a Russian-born, naturalized U.S. citizen, who has lived in the United States since 1991. He has substantially more connections to the United States than to Russia. His mother is a citizen of Moldova, his aunt is a citizen of Ukraine, and his 17-year-old daughter is a citizen of Russia. He has no direct contact with his aunt, and his mother and daughter live in the United States. Applicant turned in his Russian passport to the Russian embassy. He offered to be debriefed about his Soviet military service. Because of Russia's continuing efforts at economic espionage, there are enhanced security concerns. However he has mitigated security concerns pertaining to foreign influence and foreign preference. 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).⁽¹⁾ On July 31, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, 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.⁽²⁾ The SOR alleges security concerns under Guidelines C (Foreign Preference) and 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 him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer notarized on August 21, 2006, Applicant responded to the SOR allegations, and asked for a hearing.⁽³⁾ The case was assigned to me on October 5, 2006. The hearing was held on October 27, 2006. DOHA received the hearing record on November 13, 2006.

PROCEDURAL RULING

At the hearing, Department Counsel asked for administrative notice of Items 3 to 12, as listed on his exhibit list (R. 14-15). Items 3 to 9 and 12 are Department of State publications pertaining to oldova and the Russian Federation. Item 10 is a Congressional Research Service (CRS) report on Russia, and Item 11 is a Department of Justice press release on Hanssen's guilty plea to espionage. 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 Items 3 to 12, and I approved administrative notice of Items 3-12.

FINDINGS OF FACT

Applicant agreed to many of the underlying facts alleged in SOR ¶¶ 1.a, and 2.a to 2.d. However, he explained why he retained a Russian passport, and that his connections to his Russian and oldovan relatives are not as extensive as listed in the SOR. (4) For SOR ¶ 1.a, he delayed returning his Russian passport to Russian authorities because he was unsure how to document its delivery to Russian authorities. For SOR ¶ 2.c, he did not have a Secret Clearance in the Soviet Union, as alleged; and for SOR ¶ 2.d he was willing to be debriefed about his military service in the Soviet Union. His admissions are incorporated herein as findings of fact.

Applicant is 46 years old (R. 36). (5) He was born in Russia, and he and his parents moved to Moldova in 1961 (R. 37). He did research in atomic energy from 1984 to 1991 and received his PhD at a Russian University in 1991 (R. 37-38). Prior to working with atomic energy he filled out a questionnaire, and he had a background check (R. 39-40). He also wore a special badge. *Id.* He did not have a Soviet security clearance, but he did have a special clearance to work with atomic energy. *Id.* His research with atomic energy was not classified or secret, and the results were published in open literature (R. 42; 43-44; 59).

For his military service, Applicant went to a training camp for one month (R. 42). He received training on nuclear ballistic missile systems. *Id.* He learned how to load and unload missiles from a silo, and about their engines. *Id.* His supervisors told him not to disclose information about the missiles, but he later found the information in open literature in the United States (R. 42-43).

In 1991, he left the Soviet Union and moved to the United States on a visa for his technical skills (R. 37, 66). He was unhappy as a Soviet citizen because he objected to Communist methods (R. 28, 45). He preferred the United States' political, cultural and economic systems (R. 45). He obtained a post-doctorate position at an American state university in 1991 (R. 38). In 1999, he became a permanent resident of the United States (R. 44-45). In March 2000, he married a 41 year old native born, U.S. citizen (R. 18, 29). (6) She has two children, one with Applicant (R. 19). His child with his wife is six years old (R. 19). In July 2004, he became a U.S. citizen (R. 44-45).

Applicant's daughter (C), who was born in Russia and is a Russian citizen, came to the United States eighteen months after Applicant when she was two years old (R. 34, 49, 51-52). Applicant and C went to Paris in 2000 (R. 50). C will be 18 in January 2007 (R. 20, 48). C is attending high school in the United States and lives with her mother (M) about 2,000 miles from Applicant (R. 48), but C visits Applicant and his family occasionally on holidays and during some summers (R.19-20; 49). He provides some financial support to M for C (R. 52). Applicant wanted C to move in with his family and become a citizen of the United States, but was unable to cause this to occur because of his divorce from M (R. 35). He has contact with C, about 2-3 times a month by telephone (R. 20). He separated from M in 1996 or 1997, and has very limited contact with M (R. 50-51). For example, he does not know how M is employed (R. 50-51). C's maternal grandmother still lives in Russia, but C has no contact with her and does not know her (R. 21, 52). M has applied for U.S citizenship, but it has not been approved (R. 20).

As to SOR ¶ 1.a, in 2005, Applicant traveled abroad to the United Kingdom and to France for a wedding (R. 22). That same year he used his Russian passport to go to Moscow for two days because his father was dying (R. 23). His wife accompanied him on the trip (R. 46-47). This is the only occasion he returned to Russia after leaving in 1991 (R. 48).

He did not go to Ukraine or visit his aunt (R. 27). He tried to return his Russian passport, but Russian authorities told him that he should just wait until it expired (R. 34). On October 10, 2006, he put his passport into an envelope, sealed it and surrendered it to the Russian embassy, "together with any claim for citizenship" (R. 34, Item B).

In February 2005, his father and mother moved to the United States, and then his father died (R. 24). She received social security-type payments from the Russian government until she emigrated to the United States (R. 54-55). His mother now lives with Applicant and his wife, and he provides financial support to her (R. 24-25). She was never a citizen of Russia, but his mother was a citizen of Moldova (R. 24). His mother has applied to be a U.S. citizen, but she does not currently have a green card (R. 25; Items C and D). She has not and does not intend to return to Moldova or Russia. Her only relative is a sister living in Ukraine, who is dying (R. 26). Applicant has no relatives in Moldova, Russia or Ukraine, except for his aunt living in Ukraine (R. 26). His only contact with his aunt is through his mother (R. 26-27). No other relatives except for his mother and father have visited Applicant while he has been living in the United States (R. 26).

In regard to SOR ¶ 1.d, Applicant said that he had no reservations about providing information about his Soviet military service to the United States (R. 59). He previously declined to provide information to an interviewer because the investigator said it was to satisfy his curiosity, and he did not perceive that the interviewer had an official need for the information (R. 35-36, 59).

Applicant owns a home in the United States (R. 29, 60). He has a retirement fund in the United States (R. 29). He does not own any property, stock or bank accounts in any foreign country (R. 60). He has voted in U.S. elections (R. 61). He is involved in two university-related committees (R. 61). He is also involved with his two children's activities, especially soccer, tennis, music and dancing (R. 62). Applicant said that he was bound by his oath to support and defend the U.S. Constitution, the laws of the United States, and was ready to bear arms and perform service on behalf of the United States (R. 63). If Russia was in a dire emergency and needed his military service, he would not go to Russia's aid (R. 63).

Applicant's mother is 72 years old (R. 63). She does not work outside his home (R. 64). She speaks very little English (R. 64). When his mother sold her residence in Russia for \$80,000 or \$90,000, she put the money she received into a U.S. bank account (R. 61). She has a nominal amount of stock in a Moldova company, valued at about \$120.00 (R. 68).

Applicant is currently a teacher and researcher employed by a large state university, but he is not a tenured professor (R. 30, 65). His university position is linked to a defense contractor (R. 65). He wants a security clearance because he wants to increase his contributions to the U.S. defense in the area of directed-energy research, particularly involving laser and microwave weapons (R. 64-66). Approval of a clearance would not result in a pay raise, but he would receive a qualitative change in his work (R. 65).

Moldova and the Russian Federation

Moldova has a freely elected government, and has been an independent nation since 1991.⁽⁷⁾ It has a population of about 3.4 million people.⁽⁸⁾ In 2001, the Communists were elected with a slight majority of the votes, but in 2005, they received 46.1% of the vote. *Id.* at 2-3. There were some local election irregularities. *Id.* at 3. Judges are subject to outside influence and corruption.⁽⁹⁾ The police also have a problem with corruption. *Id.* at 2. A separatist regime controls a portion of Eastern Moldova called Transnistria.⁽¹⁰⁾ The United States does not have diplomatic relations with Transnistria, and travelers to Transnistria should exercise extreme caution because of high crime levels. *Id.* at 2, 5. In Moldova, the level of street crime is similar to that of American cities. *Id.* Moldovan legislation permits dual citizenship. *Id.* at 4. Moldova issues its own passports, but does not require use of its passports to enter Moldova. *Id.*

The Russian Federation is a vast and diverse nation.⁽¹¹⁾ It is 1.8 times the size of the United States, and has a population of 143 million people.⁽¹²⁾ It achieved independence with the dissolution of the Soviet Union on August 24, 1991. *Id.* While much of the military threat to the United States from the old Soviet Union has disappeared, Russia remains a nuclear superpower.⁽¹³⁾ U.S. citizens visiting Russia must always possess a valid U.S. passport.⁽¹⁴⁾ "American citizens who also carry Russian passports face additional and complicated regulations. Dual citizen minors who travel on their

Russian passports also face special problems." *Id.* "U.S. citizens who have at one time held Russian citizenship are often required to renounce Russian citizenship before applying for a Russian visa in their U.S. passport. Unless a Russian citizen has formally renounced his or her Russian citizenship through a Russian Embassy or Consulate, he or she always risks being considered a Russian citizen." *Id.* at 3-4. Travel in the areas in the vicinity of Chechnya, and throughout the Caucasus region is dangerous due to continued civil and political unrest. *Id.* at 4. For example, "[i]n October 2005, 200 to 300 gunmen attacked police and military facilities in the city of Nalchik in the north Caucasus region of Russia, killing dozens before the authorities re-established control."⁽¹⁵⁾ The United States and Russia cooperate in their counter-terrorism efforts. *Id.* at 5. "Acts of terrorism, including bombings and hostage taking, have occurred in Russia over the last several years."⁽¹⁶⁾ Americans are at risk from this violence, but there is no evidence of Americans being special targets of such criminal activity.⁽¹⁷⁾ Corruption and extortion are common in the business environment, particularly to resolve business disputes. *Id.* at 6. 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.⁽¹⁸⁾ 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 a problem. *Id.* at 5. However, recently the judiciary has shown greater independence.⁽¹⁹⁾ 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.⁽²⁰⁾ "The freedom to travel abroad and emigrate is respected although restrictions may apply to those who have had access to state secrets." *Id.* at 6.

The U.S. State Department succinctly describes 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.

Id. at 9-10. Although President Bush and President Putin have had 15 meetings since 2001, there is some evidence of increasing strain in some areas of the U.S. relationship with Russia.⁽²¹⁾ Russia has provided nuclear technology to Iran. *Id.* at 18. Russia initially opposed the United States' military action in Iraq, but supported the U.N. Security Council resolution giving the United States broad authority in administering post-invasion Iraq. *Id.* Russia has made proposals to end the Iranian crisis, after contributing to the creation of the crisis. *Id.* The United States has generously supported positive aspects of Russian society, providing grants to Russia of more than 3 billion dollars for market reform, democratization support, and reduction of nuclear weapons. *Id.* at 20.

However the Russian Federation, at least as recently as 2001, engaged in espionage against the United States,⁽²²⁾ and continues to opportunistically engage in economic espionage against the U.S.

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."⁽²³⁾ The government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to 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).⁽²⁴⁾

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 Preference

Under Guideline C, "[w]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States." Directive ¶ E2.A3.1.1.

Three of nine foreign preference disqualifying conditions (FP DC) could potentially raise a security concern and may be disqualifying in this case. FP DC 1 applies where there has been an "exercise of dual citizenship." Directive ¶ E2.A3.1.2.1. FP DC 2 applies where there an applicant "possess[es] and/or use[s] a foreign passport." Directive ¶ E2.A3.1.2.2. FP DC 3 applies where an applicant has provided "[m]ilitary service or [shown] a willingness to bear arms for a foreign country." Directive ¶ E2.A3.1.2.3.

FC DCs 1-3 apply because Applicant used his Russian passport in 2005, and he served in the Soviet military prior to coming to the United States in 1991. FP DC 2 also applies because he retained or used his Russian passport until October 2006. Additionally, he had access to Soviet sensitive military or atomic energy information prior to emigrating to the United States in 1991.

Three of four foreign preference mitigating conditions (FP MC) could potentially reduce security concerns in this case. FP MC 1 applies where "[d]ual citizenship is based solely on parents' citizenship or birth in a foreign country." Directive ¶ E2.A3.1.3.1. FP MC 2 applies where "[i]ndicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship." Directive ¶ E2.A3.1.3.2. FP MC 4 applies where an applicant "has expressed a willingness to renounce dual citizenship." Directive ¶ E2.A3.1.3.4.

FP MC 1, 2 and 4 do not fully apply. Although Applicant's Russian or Soviet citizenship was based primarily on his parent's Russian, Soviet or Moldova citizenship as well as his birth in Russia, there are additional indicia of foreign preference, which must be considered to avoid piecemeal application. He briefly served in the Soviet military, and he had a Russian passport until October 2006. Similarly, FP MC 2 has only limited applicability to his foreign military service and access to sensitive Soviet atomic or military information because they occurred before he emigrated to the United States and obtained U.S. citizenship. FP MC 4 has limited applicability because he took action to renounce his Russian citizenship.

The Money 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." Applicant turned-in his Russian passport in 2006.⁽²⁵⁾ In ISCR Case No. 03-04300 (App. Bd. Feb. 16, 2006), 2006 DOHA Lexis 264 at *11-*12, the Appeal Board held the Judge did not err when she applied FP MC 4 stating:

In concluding Applicant had mitigated the security concerns raised by her acts of foreign preference by application of Guideline C Mitigating Condition 4, the Administrative Judge articulated a rational explanation for her determination-- basing it on such factors as the Applicant's strong ties and loyalties to the United States, the extensive effort undertaken by the Applicant to surrender her passport and renounce her Russian citizenship before the close of the record, and the fact that Applicant's lack of awareness concerning the requirements expressed in the ASDC3I memo and the Guideline C Mitigating Conditions may have affected the timing of her renunciation actions. There are no stated requirements in Guideline C Mitigating Condition 4 concerning when an applicant is required to comply with its provisions.

Applicant's "strong ties and loyalties to the United States" are discussed in the "whole person" section of this decision. As indicated in ISCR Case No. 03-04300, the timing of Applicant's relinquishment of his passport does not bar application of FP MC 4.

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.

One 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, former spouse (M) and daughter (C) are or were citizens of the Soviet Union, Russia or oldova. Under the literal terms of FI DC 1, this situation creates the potential for foreign influence and could result in the compromise of classified information. 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. ⁽²⁶⁾

The government produced substantial evidence to establish FI DC 1 because Applicant's mother is a citizen of Moldova and C is a Russian citizen, and he has close ties of affection or obligation to them. Accordingly, 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 him. ⁽²⁷⁾ Security concerns based on foreign influence can be mitigated by showing that any of the five Foreign Influence Mitigating Conditions (FI MC) apply.

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 chose between the person(s) involved and the U.S. ⁽²⁸⁾ The first prong of FI MC 1 is met because Applicant's mother and C are not employed by or agents of the governments of Russia or Moldova. His mother's receipt of social security payments from Russia ended when she emigrated to the United States.

Second, Applicant's family members are not in a position to be exploited by a foreign power. His father is deceased. Although his former wife is not "an immediate family member," and he is not close to her or bound to her by affection, he provides financial support to her. The location of his mother and C's birth is the basis for their citizenship in Moldova, and Russia, respectively. His mother has no relatives in Russia, Ukraine, or Moldova except for her sister. C has a grandmother living in Russia, but they are not close, do not communicate with each other, and do not know each other. Most importantly, his mother, former spouse and C all live in the United States, and are not vulnerable to coercion or exploitation by a foreign power. Although FI MC 1 has some limited applicability, it is insufficient to mitigate Guideline B security concerns.

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 numerous contacts by telephone annually with C, and she visits him several times a year. His mother lives with Applicant. He also provides financial support to his mother and to C. FI MC 3 does not apply because his contacts with them are not casual and infrequent. *See* ISCR Case No. 04-08870 at 3 n.1 (App. Bd. Nov. 29, 2006) (stating "casual" contacts are "fortuitous" or unplanned); ISCR Case No. 04-12500 at 2, 4 (App. Bd. Oct. 26, 2006) (finding contacts with applicant's parents and sisters in Iran a total of about 20 times per year not casual and infrequent); ISCR Case No. 04-09541 at 2-3 (App. Bd. Sep. 26, 2006) (finding contacts with applicant's siblings in Iran once every four or five months not casual and infrequent).

The nature of Russia's government, its mixed human rights record, its history of espionage, and its relationship with the U.S. create a significant burden of persuasion to overcome the security concerns raised by Applicant's frequent, non-casual contact with his mother and C, as well as his financial support of M. These factors make it more conceivable that Russia would target its citizens in an attempt to gather information from the United States using coercion, persuasion, or duress. The future relationship of Russia to the U.S. may not always be as congenial as it is today. The rivalry between Russia and the U.S. makes espionage probable, and Applicant has a significant burden to demonstrate that his relationships with his mother, C and M do not pose a security risk. He should not have the potential of being placed in a position to be forced to choose between loyalty to the U.S. and these two family members and M.

After considering all the circumstances including those listed under both Guideline B, I cannot conclude that Applicant has mitigated the government's security concerns by applying FI MC 1-3 because of the necessity to avoid piecemeal analysis. Moreover, the absence of evidence⁽²⁹⁾ under the Appeal Board's jurisprudence is of very limited probative value. However, the circumstances discussed above are not determinative. These circumstances must be considered together under the "whole person concept," which is discussed in the next section, *infra*.

"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.⁽³⁰⁾ 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."⁽³¹⁾

The directive lists nine adjudicative process factors which are used for "whole person" analysis. Because foreign influence and foreign preference do not involve misconduct, voluntariness of participation, rehabilitation and behavior changes, etc., the eighth and ninth adjudicative process factors (APF) are the most relevant to a Guideline B adjudication.⁽³²⁾ The eighth APF, "the potential for pressure, coercion, exploitation, or duress" and the ninth APF, "the likelihood of continuation or recurrence" are particularly relevant to "whole person" analysis in this case. Directive ¶¶ E2.2.1.8 and E2.2.1.9. In addition to these two APFs, 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.

Three factors weigh against approval of Applicant's clearance. 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 economic espionage against the United States. Second, Applicant had significant connections to the Soviet Union especially before emigrating to the United States in 1991. He served for one month in the Soviet military, and had access to sensitive, but unclassified military and atomic information. Moreover, he possessed a Russian passport until a month before his hearing. Third, he had frequent and non-casual contact with his mother, a citizen of Moldova, and his daughter, C, a Russian citizen, and paid child support to his former spouse M, a Russian citizen.

Multiple circumstances, including the unlikely possibility of pressure, coercion, exploitation or duress and the unlikelihood of Applicant's return to Russia, more than counterbalance these three factors. His Russian passport was returned the Russian Federation, and Applicant advised Russia that he renounced his Russian citizenship. He stated he would not defend Russia, even if Russia were attacked. He has strong links or connections to the United States: (1) Applicant became a United States citizen in 2004, and he swore allegiance to the United States; (2) his 15-year residence in the United States; (3) his spouse is a U.S. citizen who resides in the United States; (4) his 6-year old daughter is a U.S. citizen who resides in the United States; (5) he owns a home and has financial accounts in the United States;⁽³³⁾ (6) his mother lives in the United States, has applied for U.S. citizenship, and has no reason to return to Russia or Moldova; (7) his daughter C lives in the United States, has no reason to go to Russia or Moldova, and he intends for her to apply for U.S. citizenship; and (8) his former spouse, M, lives in the U.S. and has applied for U.S. citizenship.

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),⁽³⁴⁾ 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. The applicant's U.S. connections in ISCR Case No. 03-04300 and in this case are similar. [\(35\)](#)

Applicant's statement about his loyalty to the United States is credible, and there is no reason to believe that he would take any action which could cause potential harm to his United States family or to this country. If the Russian government should threaten harm to his family members living in the United States to obtain classified information from him or otherwise contact him, I am persuaded that he would report this activity to the U.S. authorities.

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"⁽³⁶⁾ 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 C: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2, Guideline B: FOR APPLICANT

Subparagraph 2.a-d: 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. Item 4, Electronic Standard Form (SF) 86, Security Clearance Application is dated September 15, 2004, on the first and last pages. There is no allegation of falsification of this SF 86 in the statement of reasons (SOR).
2. Item 13 (SOR, dated July 31, 2006) at 1-2. Item 13 is the source for the remainder of this paragraph.
3. Item 14 (Applicant's response to SOR, dated August 21, 2006).
4. Item 14, *supra* note 3, is the source for all factual assertions in this paragraph.
5. Item 4, *supra* note 1, section 1.1, at 1.
6. His wife contended that Applicant was a citizen of the USSR, not of Russia (R. 28). Applicant said he automatically became a Russia citizen after the Soviet Union dissolved (R. 44). Although the Soviet Union no longer exists, Applicant's birth in territory now constituting part of the Russia Federation, and his relationships with foreign citizens retain security significance. When Applicant obtained and used a Russian Federation passport, he reestablished his dual citizenship.
7. Item 3, U.S. Department of State Consular Information Sheet Moldova, dated May 25, 2006, at 1.
8. Item 4, U.S. Department of State Bureau of European and Eurasian Affairs, dated August 2006, at 1.
9. Item 5, U.S. Department of State Country Reports on Human Rights Practices on Moldova in 2003, at 1.
10. Item 3, *supra* note 7, at 1.
11. Item 6, U.S. Department of State Bureau of Consular Affairs, dated June 14, 2006, at 1.
12. Item 7, U.S. Department of State Bureau of European and Eurasian Affairs, Background Note: Russia, dated July 2006, at 1.
13. Item 10, Congressional Research Service Report for Congress, Russia, dated May 8, 2006, at 5.
14. Item 6, *supra* note 11, at 1.
15. Item 9, Embassy of the United States Moscow - Russia, "Russia Country Report on Terrorism - 2005," dated April 28, 2006, at 2-3 (providing a list of recent, serious terrorism incidents in Russia). *See also* Item 10, *supra* note 12, at 9-10 (describing the war in Chechnya).
16. Item 6, *supra* note 11, at 5. *See also* Item 8, U.S. Department of State Public Announcement Russian Federation, April 4, 2006, at 1.
17. Item 6, *supra* note 11, at 5.
18. Item 7, *supra* note 12, at 5.
19. Item 12, U.S. State Dept. Country Reports on Human Rights Practices - Russia, dated Mar. 8, 2006, at 1.
20. Item 7, *supra* note 12, at 5-6.

21. Item 10, *supra* note 13, at 17-20.

22. *See, e.g.*, Item 11, Department of Justice Press Release on Hanssen Guilty Plea, July 6, 2001, at 1 (describing Robert Hanssen's guilty plea to a 15-year conspiracy to provide classified information to the Soviet Union and the Russian Federation.)

23. "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 (4th Cir. 1994).

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

25. The Appeal Board thoroughly discusses the applicability to the Money Memorandum in ISCR Case No. 03-10390 (App. Bd. Apr. 12, 2005).

26. ISCR Case No. 99-0424, 2001 DOHA LEXIS at 33-34 (App. Bd. Feb. 8, 2001).

27. *Id.*

28. *Compare* ISCR Case No. 03-10954 (App. Bd. Mar. 8, 2006); *with* ISCR Case No. 02-21927, 2006 DOHA Lexis 229, at *15-*45 (A.J. Breslin May 17, 2006) (both discussing in detail the parameters and application of FI MC 1).

29. 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) his failure to follow the rules or his failure to require those around him to do the same on projects requiring security clearances; (4) any lack of the respect and trust of his employer, his friends, or family; and (5) a problem in the areas of honesty or integrity. 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 conditions. *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). For example, as indicated in ISCR Case No. 02-22461 at 10 (App. Bd. Oct. 27, 2005), there is no reason for Russia or Moldova to contact him until he receives access to classified information, and lack of foreign financial interests do not mitigate Guideline B security concerns based on an applicant's relationship with relatives. *See* ISCR Case No. 04-02233 at 3 (App. Bd. May 9, 2006).

30. 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).

31. 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)).

32. *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 also* *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).

33. Department Counsel did not allege financial interests as a FI DC, but I observe Applicant has no financial interests in Russia or Moldova, and his mother's financial interests are minimal. *See* 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).

34. The Appeal Board reversed the Judge's decision to grant a clearance because of the strict requirements of the Money Memorandum (Applicant had not turned in her Russian passport to the Russian government by the close of evidence).

35. 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 applicants in ISCR Case No. 03-04300 is a professionals with post-doctorate teaching employment.

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