DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-02236
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: ----------, Personal Representative

January 28, 2008

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted her Security Clearance Application (SF 86) on March 23, 2005. On August 17, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing security concerns under Guidelines C (Foreign Preference) and B (Foreign Influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on August 21, 2007. She answered the SOR in writing on October 2, 2007, and requested a hearing before an administrative judge. DOHA received the request on October 3, 2007. Department Counsel filed notice that he was ready to proceed on November 26, 2007, and I received the case assignment on November 28, 2007. DOHA issued a notice of hearing on November 30, 2007, and I convened the hearing as scheduled on December 19,

2007. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified on her own behalf, offered the testimony of one witness, and submitted Applicant's Exhibits (AX) A through F, which were admitted without objection.

I granted Applicant's request to keep the record open until January 4, 2008, to submit additional matters. On December 28, 2007, she submitted AX G, which was admitted without objection. Department Counsel's response to AX G is attached to the record as Hearing Exhibit (HX) II. The record closed on January 4, 2008, and DOHA received the transcript of the hearing (Tr.) on the same day. Based on the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Evidentiary Ruling

Department Counsel requested that I take administrative notice of adjudicative facts about relating to the Republic of Belarus. The request and the attached documents were not admitted into evidence but were attached to the record as HX I. I granted Department Counsel's request, without objection from Applicant (Tr. 22). The facts administratively noticed are set out below.

Findings of Fact

In her answer to the SOR, Applicant denied the factual allegations in the SOR and offered explanations. Her explanations are incorporated in my findings of fact. I make the following findings:

Applicant is a 43-year-old consultant for a federal contractor. She was born in Russia and was 16 years old when the Soviet Union broke up (Tr. 53-54). She became a citizen of Belarus after it became independent. She met her husband, a U.S. citizen and career foreign service officer, after she was employed by the U.S. Agency for International Development in 1997 to help bring democracy to Belarus. Her husband has been a Foreign Service officer for 26 years and held security clearances for much of his career (Tr. 31-32). Applicant taught Belarusian journalists how to use international internet sources to break through the government's monopoly on information (Tr. 43). She and her husband were married in January 1999. She came to the U.S. in June 1999, and became a U.S. citizen in February 2004.

A former U.S. ambassador to Belarus, now the ambassador to another country, observed that Applicant "displayed the keen eye of a business manager, the political instincts I expect from experienced diplomats, and cooperative and persuasive interpersonal skills." The former ambassador trusted Applicant, described her as "a person of the highest character and integrity," and strongly recommended that she be granted a security clearance (AX A).

A journalist who worked with Applicant in Belarus and has continued their friendship described her as "someone of thoughtful, sincere, and committed conviction."

She described the great personal risks Applicant took on behalf of an independent press in an atmosphere of government oppression (AX C).

Applicant worked at the Defense Contract Management Agency from early 2004 to 2006. Her supervisor described her as intelligent, capable, and a "particularly honest" employee (AX B). She worked for the TRICARE Management Activity from January 2006 to October 2007, where her TRICARE supervisor spoke highly of her honesty, integrity, and good judgment (AX D).

Applicant obtained a Belarusian passport in April 1999, before she came to the U.S. and became a U.S. citizen. The passport does not expire until 2009. She formally renounced her Belarusian citizenship and surrendered her passport in September 2007 (Tr.49-50; AX G). She has no documents reflecting surrender of the passport, but her husband corroborated her testimony about surrendering it (Tr. 47). She was advised by embassy officials that it could take up to two years for the Belarusian government to provide her with a document reflecting that she is no longer a citizen of Belarus (Tr. 49-50). The Belarusian consul tried to persuade her to retain dual citizenship, but she insisted she wanted nothing to do with Belarus (Tr. 53).

Applicant owned an apartment and a house in Belarus for use by her parents, but she transferred title to both properties to her parents in September 2007 (AX E and F). The value of Applicant's Belarusian property was about $40,000. By comparison, her assets in the U.S. are worth about $1.4 million (Tr. 51).

Applicant did not relinquish the property earlier because she was advised by her lawyer to keep it in her name until her parents, then citizens of Russia, became Belarusian citizens. They became Belarusian citizens in July or August 2007 (Tr. 50).

Applicant's parents have been retired for about ten years. They have never been involved in politics or connected with the government of Belarus (Tr. 51). Her mother was a kindergarten music teacher, and her father was an equipment engineer at a meat packing factory in Russia. Both receive pensions from the government of Belarus (Tr. 56). She has telephonic contact with her parents once a week (Tr. 52).

Applicant has considered what she would do if her parents were subjected to pressure by the Belarusian government. She has decided she would never deal with the Belarusian government because it is so untrustworthy (Tr. 51).

I take administrative notice of the following facts. Belarus declared its sovereignty in July 1990 and its independence from the Soviet Union in August 1991. The U.S. recognized Belarus as an independent state in December 1991. It is nominally a democratic republic, but it is in fact an autocratic regime ruled by its president, who has systematically undermined its democratic institutions and concentrated power in the executive branch of government by flawed referenda, manipulated elections, and arbitrary decrees. Belarusian authorities have severely restricted the constitutional rights of its citizens. There have been sweeping violations of human rights during

elections, including disregard for freedom of assembly, association, and expression. Elections have been conducted in a climate of insecurity, fear, and problematic vote counts. Belarus exports significant quantities of defense materials, dual-use items, weapons, and weapons-related technology to countries of concern to the U.S., including state sponsors of terrorism. It has attempted to expand relations to countries of concern, including Iran, Sudan, and Syria. Naturalized U.S. citizens from Belarus do not automatically lose Belarusian citizenship. Children born before August 15, 2002, even if born in the U.S. and in possession of a U.S. passport, are considered Belarusian citizens until 16 and will not be given a Belarusian visa for travel to Belarus. Such children cannot leave Belarus without a Belarusian passport.

Department Counsel's request to take administrative notice did not address economic or military espionage. No evidence was presented that Belarus actively collects economic or military intelligence. Applicant's husband testified he was not aware of any "significant history" of Belarusian attempts to cultivate intelligence sources in the U.S. (Tr. 44).

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the 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.

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline C, Foreign Preference

The SOR alleges Applicant exercises dual Belarus-U.S. citizenship (SOR ¶ 1.a), possessed an active Belarusian passport after becoming a U.S. citizen (SOR ¶ 1.b), and owns property in Belarus (SOR ¶ 1.c). The concern under Guideline C is as follows: "When 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." AG ¶ 9. A disqualifying condition may arise from "exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen," including but not limited to "possession of a current foreign passport." AG ¶ 10(a)(1). A disqualifying condition also may arise from "using foreign citizenship to protect financial or business interests in another country." AG ¶ 10(a)(5).

Dual citizenship standing alone is not sufficient to warrant an adverse security clearance decision. ISCR Case No. 99-0454 at 5, 2000 WL 1805219 (App. Bd. Oct. 17, 2000). Under Guideline C, "the issue is not whether an applicant is a dual national, but rather whether an applicant shows a preference for a foreign country through actions." ISCR Case No. 98-0252 at 5 (App. Bd. Sep 15, 1999).

Applicant's possession of an active Belarusian passport after becoming a U.S. citizen is sufficient to raise AG ¶ 10(a)(1). However, there is no evidence she used her dual citizenship to protect her property in Belarus. Possession of property in a foreign country is not an enumerated disqualification under Guideline C. There is no evidence that citizenship is a requirement for ownership of property in Belarus, and there is no evidence that Applicant held onto the property in anticipation of living in Belarus. Therefore, I conclude AG 10(a)(5) is not raised. Except for AG ¶ 10(a)(1), no other enumerated disqualifying conditions under Guideline C are raised by the evidence.

Since the government produced substantial evidence to raise the disqualifying condition in AG ¶10(a)(1), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated by evidence that "dual citizenship is based solely on parents' citizenship or birth in a foreign country." AG ¶ 11(a). Applicant was born in Russia of Russian parents. Her parents recently became citizens of Belarus. The record is sparse on this issue, but at some point after her sixteenth birthday Applicant became a citizen of Belarus, even though her parents continued to be citizens of Russia. It is not clear whether Applicant became a citizen of Belarus by operation of law when Belarus became independent, or whether she took some affirmative action to become a citizen of Belarus. I conclude AG ¶ 11(a) is not established.

Security concerns under this guideline also may be mitigated by if "the individual has expressed a willingness to renounce dual citizenship." AG ¶ 11(b). This mitigating condition is established by Applicant's renunciation of her Belarusian citizenship in September 2007.

Security concerns may be mitigated by showing that "exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor." AG ¶ 11(c). Applicant acquired her Belarusian passport before she became a U.S. citizen, but she retained it until September 2007, long after she became a U.S. citizen. I conclude AG ¶ 11(c) is not established.

Finally, security concerns based on possession or use of a foreign passport may be mitigated if "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated." AG ¶ 11(e). This mitigating condition was established by Applicant's surrender of her passport to the Belarusian consul. Although Applicant has no documentary proof that she surrendered her passport, her testimony and answer to the SOR declaring that she surrendered it was corroborated by the testimony of her husband, a U.S. senior foreign service officer. I found her testimony credible.

Guideline B, Foreign Influence

The SOR alleges Applicant's parents of citizens of Russia residing in Belarus (SOR ¶ 2.a), Applicant owns an apartment and a house in Belarus valued at about $40,000, and her parents manage the properties and reside in the house (SOR ¶ 2.b). The concern under this guideline is set out in AG ¶ 6 as follows:

> Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Three disqualifying conditions under this guideline are relevant to this case. First, a disqualifying condition may be raised by "contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." AG ¶ 7(a). Second, a disqualifying condition may be raised by "connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information." AG ¶ 7(b). Finally, a security concern may be raised by "a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation." AG ¶ 7(e).

Applicant's weekly contacts with her parents and continued concern for them are sufficient to raise AG ¶¶ 7(a) and (b). However, AG ¶ 7(e) is not raised because she has transferred ownership of her Belarusian property to her parents.

Security concerns under this guideline can be mitigated by showing that "the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S." AG ¶ 8(a).

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it,

regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

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

Applicant has regular, weekly contact with her parents, and she remains concerned for their welfare, as evidenced by her transfer of ownership in two properties in Belarus to ensure that her parents have a place to live. Her parents are retired and have never been politically active. They receive government pensions, but have also received substantial assistance from Applicant through the transfer of the two properties in Belarus. The extent to which they are dependent on their government pensions is unclear. They live under an oppressive government with a poor human rights record. However, government oppression has been directed at stifling dissent and enhancing presidential power. There is no evidence of Belarusian economic or military intelligence operations against the U.S. Thus, Applicant's parents are vulnerable to government oppression and coercion, but such abuse is not likely to be intelligence-related. I conclude AG ¶ 8(a) is established, because it is not likely that Applicant would have to choose between the interests of her parents and the interests of the U.S.

Security concerns under this guideline also can be mitigated by showing "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest." AG ¶ 8(b). Under the old adjudicative guidelines, a disqualifying condition based on foreign family members could not be mitigated unless an applicant could establish that the family members were not "in a position to be exploited." Directive ¶ E2.A2.1.3.1. The Appeal Board consistently applied this mitigating narrowly, holding that its underlying premise was that an applicant should not be placed in a position where he or she is forced to make a choice between the interests of the family member and the interests of the U.S. *See* ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006); ISCR Case No. 03-24933 at 6 (App. Bd. Jul. 28, 2005); ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2005); ISCR Case No. 03-15205 at 3 (App. Bd. Jan. 21, 2005). Thus, an administrative judge was not permitted to apply a balancing test to assess the extent of the security risk. Under the new guidelines, however, the potentially conflicting loyalties may be weighed

to determine if an applicant "can be expected to resolve any conflict of interest in favor of the U.S. interest."

Applicant feels no loyalty to Belarus. Her testimony at the hearing, combined with her body language and vocal inflection, made her distaste for the current regime in Belarus obvious. However, she does have strong feelings of obligation to her parents. As noted above in the discussion of AG ¶ 8(a), government oppression or abuse against her parents is not likely to be intelligence-related. Furthermore, Applicant's relationships and loyalties in the U.S. are very strong. She has been married for nine years to a senior Foreign Service officer with a security clearance. She has been a U.S. citizen for four years. While working in Belarus from 1997 to 1999, she demonstrated great courage by teaching journalists how to overcome the Belarusian government's monopoly on information. She has earned a reputation from numerous supervisors, including a former ambassador, for strength of character, integrity, and good judgment. She does not trust the current Belarusian government. Because of her distrust, I am satisfied she would not yield to duress applied through her parents, in part because she would not trust any Belarusian promises to refrain from abusing her parents in return for her disloyalty to the U.S. Although a conflict of interest in this case is extremely unlikely, I am satisfied that any Applicant would resolve any conflict of interest in favor of the U.S. Accordingly, I conclude AG ¶ 8(b) is established.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(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) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. Some of these factors were addressed above under Guidelines C and B, but some warrant additional comment.

Applicant is a mature woman of extraordinary courage and strong convictions. She has witnessed Belarusian oppression first hand and confronted it. She has worked for the U.S. in various capacities since 1997. She has thoughtfully considered the potential impact of her security clearance application on her parents. She was sincere, candid, and credible during her testimony at the hearing.

After weighing the disqualifying and mitigating conditions under Guidelines C and B, and evaluating all the evidence in the context of the whole person, I conclude

Applicant has mitigated the concerns based on foreign preference and foreign influence. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

My 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 as follows:

Paragraph 1, Guideline C:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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LeRoy F. Foreman
Administrative Judge