



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 07-17200
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: Michelle L. Perry, Esquire

September 25, 2008

Decision

HARVEY, Mark W., Administrative Judge:

Applicant mitigated security concerns regarding foreign influence and foreign preference. His sister and brother-in-law live in Russia and are Russian citizens. He destroyed his expired Russian passport. Because of his deep and long-standing relationships with his family in the United States and his other connections to this country, he will resolve any conflicts in favor of U.S. interests. Access to classified information is granted.

Statement of the Case

On June 19, 2005, Applicant submitted a Security Clearance Application (EPSQ 86) (GE 1).¹ On March 21, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,² pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as

¹There is no allegation of falsification of Applicant's EPSQ 86.

²Statement of Reasons (SOR), dated March 21, 2008, is the source for the facts in the remainder of this paragraph unless stated otherwise (Government Exhibit (GE) 4).

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.³ 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 him, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

On April 14, 2008, Applicant provided a response to the SOR allegations, and elected to have his case decided at a hearing (Government Exhibit (GE) 5). On April 30, 2008, Department Counsel indicated he was ready to proceed. On May 5, 2008, the case was assigned to an Administrative Judge. On May 21, 2008, the case was reassigned to another Administrative Judge. On June 24, 2008, Applicant's counsel requested a delay in Applicant's hearing. On August 6, 2008, the case was transferred to me.

The notices of hearing were issued on June 5, 6, and July 24, 2008 (GE 3). Applicant's hearing was held on September 10, 2008. I admitted GE 1 and 2 and Applicant's Exhibits (AE) A to J without objection (Transcript (Tr.) 17, 19-22, 29-32, 47, 59-60). I received the transcript on September 19, 2008.

Procedural Rulings

Administrative Notice

Department Counsel asked me to take administrative notice concerning materials related to the Russian Federation (Russia). Department Counsel did not object to my decision to take administrative notice of the facts in the 8-page document entitled Administrative Notice, dated September 4, 2008 (GE 6) (Tr. 9-10). Applicant's Counsel requested Administrative notice of facts in addition to the GE 6 (Tr. 10-11; AE M, N). Department Counsel did not object to my administrative notice of the facts in AE N (AE M). I took administrative notice of the facts in GE 6 and AE N as indicated in the Russian Federation portion of the Statement of Facts section of this decision.

In support of the requested administrative notice of facts concerning Russia, supporting documents show detail and context for those facts (Ex. I to VIII—listed in Request for Administrative Notice at 7-8). Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); 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.*

³On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines (AGs) are applicable to Applicant's case because his SOR was issued after Sep. 1, 2006.

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). Exhibits I to VIII are attached to GE 6 to ensure the administrative record is complete.

SOR Amendment

At his hearing, Applicant disclosed that he used his Russian passport to travel to Russia in 1997 (Tr. 62). On April 23, 2002, his Russian passport expired (Tr. 63, AE L). His passport was in storage about a 6-hour drive from his residence (Tr. 63). At Department Counsel's request and without objection, I granted the motion to amend the SOR to include an allegation concerning Applicant's continued possession of an expired Russian passport under Guideline C (Tr. 76-79). Guideline C is designated paragraph 2 and Applicant's continued possession of an expired Russian passport is designated subparagraph 2a.

Findings of Fact⁴

As to the SOR's factual allegations, Applicant admitted the allegations in SOR ¶¶ 1.a to 1.c in his response to the SOR. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 57 years old (Tr. 23). He was born in the Union of Soviet Socialist Republics (USSR) (hereinafter referred to as Russia) (Tr. 23). He is not currently married (Tr. 40). He lives alone (Tr. 69). His wife passed away from cancer 11 years ago (Tr. 40). She is buried in the United States (Tr. 40). Applicant purchased a burial plot for himself in the same cemetery where his wife is buried (Tr. 41). He owns a home nearby valued at about \$200,000 (Tr. 41, 45). He rents his home to tenants because he was transferred, but he plans to eventually return to living in it (Tr. 45). He currently lives in an apartment (Tr. 44). Applicant also owns a timeshare in another U.S. state (Tr. 45). He has a 401K plan with a U.S. contractor valued at about \$60,000 (Tr. 45).

Applicant attended school in Russia up to the Ph.D degree level in science (Tr. 24). He never served in the Russian military (Tr. 24). He was exempt from military service because of his eyes (Tr. 24). Applicant has never held a Russian security clearance or worked on classified projects (Tr. 80). In 1992, he left Russia and went to Germany (Tr. 24). In 1993, he immigrated to the United States to begin employment at NASA (Tr. 25). In 1994, a U.S. national laboratory wrote the U.S. Immigration and Naturalization Service, and asked that Applicant receive special immigration consideration because "he is an accomplished scientist of international stature" (AE E). This letter suggested he could make significant contributions to NASA and the Department of Defense (AE E). Another 1994 letter from an American physicist described Applicant's character, dedication, and desire to support U.S. scientific

⁴ The facts in this decision do not specifically describe employment or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.

endeavors (AE F). Applicant subsequently obtained a green card as a person with exceptional ability in science (Tr. 25). He became a U.S. citizen in 2001 as soon as he was eligible (Tr. 33). Eventually, Applicant gravitated to working as a senior assistant analyst/programmer in the information technology area (Tr. 35, 39). He began employment for the current defense contractor on February 1, 2005 (Tr. 38). The only time he or his son returned to Russia was in 1997 to attend a conference, which was funded by NASA (Tr. 48, 73). He used his Russian passport to enter Russia in 1997 (Tr. 62). He brought his son with him when he went to Russia (Tr. 73). Applicant has not voted in any Russian elections (Tr. 49, 60-61). He has not been contacted by any Russian companies or state representatives since immigrating to the United States (Tr. 49). He has never committed a security violation (Tr. 40). He is loyal to the United States (Tr. 49). If he were contacted and asked to reveal classified information, he would report the contact to U.S. law enforcement authorities (Tr. 50, 65). If it was a serious matter, he would call the FBI (Tr. 65). He has received training from contractors on what to do if contacted for classified information (Tr. 65).

Although Applicant had a Russian passport, he traveled using his U.S. State Department travel document and then his U.S. passport (Tr. 34). Aside from his trip to Russia in 1997, his only other travel outside the United States was to India (Tr. 64). He used his U.S. passport to travel to India on NASA business (Tr. 34). His Russian passport expired on April 23, 2002 (AE L). On September 15, 2008, Applicant's security office destroyed his expired Russian passport (AE L). He does not intend to return to Russia (Tr. 71). When interviewed by an Office of Personnel Management (OPM) investigator, he offered to renounce his Russian citizenship (Tr. 81). He has not actually renounced Russian citizenship because he did not see how he could claim Russian citizenship without proper documentation (Tr. 71-72). At his hearing, he reiterated that if necessary, he would formally renounce his Russian citizenship (Tr. 75).⁵

Applicant's mother passed away in 2007 (Tr. 79). Applicant's sister (SA) is a citizen and resident of Russia (SOR ¶ 1.a, Tr. 50-51). SA is 60 years old, holds a PhD in chemistry and works at a government-related institute (Tr. 51). The institute provides scientific support based on contracts, and has performed work for the United States (Tr. 52). The institute belongs to or is owned by the Russian government (Tr. 52). SA is best described as a contractor doing projects for non-Russian as well as Russian entities (Tr. 66). The institute's applications are industrial (Tr. 79). Applicant described the frequency of his communications with SA as about once or twice a month (Tr. 69-70) and the content of his communications with his sister as follows (Tr. 55):

Holidays, birthdays, if there are any house concerns, you know. And then my sister, she likes to brag about, you know, her garden, you know, her country house. Yes, she likes, she has all kind of questions, you know, what should I do? Should I paint it or should I –you know, all that.

⁵ ISCR Case No. 03-04300 (App. Bd. Feb. 16, 2006) describes a protracted process for revocation of Russian citizenship, and states, "According to Russian Federation Law, Applicant's citizenship will be 'irrevocably annulled by the decision of the presidential committee' which takes up to six months." The rules for Russian citizenship revocation may be different now than when ISCR Case No. 03-04300 was heard in 2004 or 2005.

They also discuss Applicant's son and health issues (Tr. 56). SA has visited Applicant and his son four times in the United States since 1993 (Tr. 56, 66). SA most recently visited the United States in May 2008 (Tr. 65). SA will probably not emigrate to the United States because she lacks English language skills (Tr. 71). SA is aware Applicant works with computers and is a system administrator (Tr. 56). Applicant does not discuss work projects with SA or SA's common-law husband (SH) (Tr. 57). SA and SH are not really aware of what is involved in being a system administrator (Tr. 56).

SH is a citizen and resident of Russia (SOR ¶ 1.b, Tr. 50-51). SH is 70 years old and employed at the same government-related institute as SA (Tr. 51). SA and SH are semi-retired (Tr. 53). SA and SH receive an old-age type pension similar to U.S. social security (Tr. 53). SA and SH have worked at the same place for many years (Tr. 53). Their friends and social network are work-oriented, and they did not want to totally cut their ties with the institute (Tr. 53). Applicant does not send funds to SA or SH (Tr. 54). SA and SH do not hold Russian security clearances (Tr. 79).

Applicant maintains contact with a former classmate (CM) and CM's wife. They both work at Russian facilities connected to the Russian government (SOR ¶ 1.c). He has been a friend of CM since Applicant and CM were 14 or 15 years old (Tr. 57). Usually he spoke to CM "almost every New Year" (Tr. 57). His last communication with CM was around New Years 2006 (Tr. 58, 73-74). When they did communicate, the conversation focused on their children (Tr. 58). CM knows Applicant is a systems administrator, but CM is unaware of details about Applicant's employer (Tr. 58-59).

The SOR alleges Applicant may receive a pension from Russia based on the 15 years he was employed in Russia (SOR 1.d). Applicant explained he was not aware of any such pension (Tr. 67). He has never checked on whether a pension was available (Tr. 67). He has no property and no stocks or investments in Russia (Tr. 68).

Applicant's most important family connection to the United States is his son (SN), who is 26 years old (Tr. 41). SN was 10 when he moved to the United States (Tr. 41). SN is a U.S. citizen (Tr. 41). SN last lived with Applicant in 2002 (Tr. 74-75). SN can speak a little Russian, but SN's English is much better than his Russian language skills (Tr. 42). SN has a masters degree, works for a U.S. state government, and is financially independent from Applicant (Tr. 42, 55). SN married a woman from Ukraine (SU), but they do not have any children (Tr. 43, 74). SU has a green card, and has lived in the United States for three years (Tr. 74). Applicant is very close to SN and he frequently visits SN and SU (Tr. 43-44). Applicant has other more distant relatives who are U.S. citizens and live in the United States, with whom he maintains contact (Tr. 46-48, 61).

Recommendations and Work Performance

The government employee who supervises the contractor's performance (MA) and Applicant's direct supervisor (SD) made statements on Applicant's behalf at his hearing (Tr. 84-96). MA and SD have known Applicant since he came to work for the contractor in February 2005 (Tr. 87). MA had daily contact with Applicant for the first two

years and then weekly contact after 2007. Applicant and MA were required by Base Closure and Realignment requirements to work at different locations after 2007 (Tr. 88). SD has daily contact with Applicant (Tr. 105). Applicant is entrusted with millions of dollars of contractor and government equipment. MA and SD described Applicant as trustworthy, conscientious and responsible about compliance with security requirements (Tr. 88-90, 94-95, 106, 108). Applicant is diligent and meticulous in his work performance (Tr. 88-91, 106). Applicant is a “top notch” employee (Tr. 91). MA believes Applicant prefers living in the United States as opposed to Russia (Tr. 93). SD indicated Applicant criticized Russia for its recent invasion of Georgia (Tr. 107). Applicant prefers the political stability of the United States (Tr. 108).

An affidavit from a senior systems analyst, who has known Applicant since 2005, describes him as “an outstanding employee, dedicated, loyal, on-time, seldom takes leave, very good about getting the job done, and easy to manage. In fact, I cannot say enough good things to describe [his] character and performance” (AE J at 1). He also emphasized Applicant’s careful, diligent and conscientious handling of sensitive and classified materials and devices (AE J at 1). He recommended Applicant receive a clearance because of his confidence that Applicant is a trustworthy person (AE J at 2).

Applicant provided a 2006 certificate of appreciation which noted, “He demonstrated superb engineering and technical skills” and lauded his hard work and contributions to the mission (AE A). He also provided a 2007 certificate of completion for a course (AE B), and two 2006 certificates of training (AE C, D).

Russian Federation

The Russian Federation is a vast and diverse nation composed of 21 republics (GE 6 at 1). Its population of 142 million people is multinational and multi-ethnic. *Id.* Russia achieved independence with the dissolution of the Soviet Union in August 1991 (AE N at 1). Russia has retained a powerful military and remains a nuclear superpower (GE 6 at 2). The Russian government consists of a strong executive branch, a bicameral legislature and a weak judiciary (GE 6 at 1, AE N at 1).

U.S. citizens visiting Russia must always possess a valid U.S. passport (AE N at 1). “U.S. citizens who are former Russian citizens should be aware that they may be viewed as Russian citizens and not allowed to leave Russia except on a Russian passport. Also, males who are considered Russian citizens may encounter problems if they did not satisfy Russian military requirements prior to leaving for the United States” (GE 6 at 7).

“Although there is a general risk of U.S. citizens being subjected to indiscriminate acts of terror in Russia, there is no current indication that Americans are targets” (GE N at 1). Terrorist activity in Russia includes suicide bombings, hostage taking, especially in connection with the Chechen conflict (GE 6 at 4). Russian human rights abuses in the Chechen conflict include torture, summary executions, use of indiscriminate force and arbitrary detentions (GE 6 at 4). In addition to problematic behavior in the Chechen conflict, Russian authorities engage in arbitrary arrest and detention as well as torture

and abuse to obtain confessions (GE 6 at 5). Officials have illegally employed electronic surveillance, monitored internet, telephone and email communications, and entered residences without a warrant (GE 6 at 6). There is widespread government corruption and prison conditions are extremely harsh (GE 6 at 5). Government pressure and censoring of the media and endemic crime are also significant Russian problems (GE 6 at 5). The Russian legislature has passed a series of reforms in Russian criminal procedural laws, making their law more consistent with Western standards (AE N at 3). Russian human rights performance has improved in some areas (GE 6 at 4-5).

Russia has an active, ongoing collection program targeting sensitive U.S. industrial and military technology as well as commercial and dual-use technology (GE 6 at 2-3). Russia also targets national security and environmental researchers as well as signal intelligence (GE 6 at 3). Russia provides technology to other countries that has the potential to be used in the construction of weapons of mass destruction, biotechnology and missiles (GE 6 at 3). "Regional branches of the [Federal Security Service] reportedly continued to exert pressure on citizens employed by foreign firms and organizations, often to coerce them into becoming informants" (GE at 6).

Russia and the United States are frequently aligned on political initiatives and have joined in numerous international agreements, including efforts to resolve international political problems at the United Nations (AE N at 2-3). For example, the United States and Russia entered into a bilateral World Trade Organization accession agreement in 2006 (AE N at 4). In 2007, Russia imported U.S. goods valued at \$7.4 billion (AE N at 2). Russia and United States are allies in the war on terrorism, and both seek to suppress the proliferation of weapons of mass destruction. Both countries have specially emphasized the reduction of strategic arsenals (AE N at 2). "Since 1992, the United States has spent over \$7 billion in [Cooperative Threat Reduction or] CTR (or "Nunn-Lugar") funds and related programs to help Russia dismantle nuclear weapons and ensure the security of its nuclear weapons, weapons grade material, other weapons of mass destruction, and related technical know-how." (AE N at 2-3).

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.

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.”⁶ 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).⁷

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

⁶ “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).

⁷“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).

terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *a/so* Executive Order 12968 (Aug. 2, 1995), Section 3. 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.

Analysis

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

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

if the individual has divided loyalties or foreign financial interests, [he or she] 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.

AG ¶ 7 indicates two conditions that could raise a security concern and may be disqualifying in this case:

- (a) 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; and
- (b) 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.

Applicant’s sister (SA) and her common law husband (SH) are citizens and residents of Russia. SA has visited Applicant and his son four times in the United States since 1993. After moving to the United States, he has had periodic contact with a former classmate (CM) who is a citizen and resident of Russia. SA, SH and CM’s employment is linked with the Russian government through funding. Applicant last visited Russia in 1997. He possessed an expired Russian passport until September 15, 2008.

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. However, if only one relative lives in a foreign country, and an Applicant has frequent, non-casual 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).

The nature of a nation's government, its relationship with the United States, 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 United States. The complicated, competitive relationship of Russia with the United States places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his relationship with SA, SH, BA and SN does not pose a security risk and he is not in a position to be forced to choose between loyalty to the United States and these four persons.⁸ With its mixed human rights record, and political, economic and military rivalry with the United States, it is conceivable that Russia would target any Russian citizen or former citizen living in the United States in an attempt to gather valuable information from the United States.

There is evidence that Russian intelligence operatives seek classified or economic information from U.S. businesses and/or government agencies. Applicant's connections to SA, SH, BA and SN create a potential conflict of interest because these relationships are sufficiently close to raise a possible security concern about his desire to help three relatives living in the Russia and/or his son by providing classified information.

The Government produced substantial evidence of Applicant's contacts with SA, SH, BA and SN, his relationships with them, and his travel to Russia in 1997 to raise the issue of potential foreign pressure or attempted exploitation. AG ¶¶ 7(a) and 7(b) apply.

⁸An applicant with relatives in Iran, for example, has a heavier burden to overcome than an applicant with relatives living in Russia. 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). See *also* ISCR Case No. 04-11463 at 4 (App. Bd. Aug. 4, 2006) (articulating "very heavy burden" standard when an applicant has family members living in Iran); ISCR Case No. 07-12471 at 9 (A.J. May 30, 2008) (stating "Between January 9, 2007 and January 18, 2008, the Appeal Board decided 36 appeals involving Iran under the old guidelines, and it reversed 20 decisions granting clearances and affirmed 15 decisions denying clearances." And listing at 9 n.1 the pertinent cases). The Appeal Board has also articulated a "heightened risk" or "very heavy burden" in People's Republic of China (PRC) cases because of that country's hostility to the United States and aggressive intelligence collection efforts. See ISCR Case No. 06-24575 at 4 (App. Bd. Nov. 7, 2007) (articulating "very heavy burden" standard and reversing grant of clearance in case involving family members living in the PRC); ISCR Case No. 07-02485 at 4-5 (App. Bd. May 9, 2008); ISCR Case No. 07-02485 at 4-5 (App. Bd. May 9, 2008).

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns including:

(a) 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.;

(b) 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;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

AG ¶¶ 8(a), 8(b) and 8(c) apply with respect to Applicant's former classmate and friend of forty years (CM) because of his limited contacts with CM. In 1992, Applicant left Russia, and returned just once in 1997 on a trip sponsored by the U.S. government. He has not had any telephone or email contact with CM since January 2006, and they usually just exchange greetings on New Years. His relationship with CM is not a security concern. "It is unlikely [he] will be placed in a position of having to choose between the interests of [CM] and the interests of the U.S." See AG ¶ 8(a). His infrequent contacts with CM and not particularly close relationship with CM have a low potential of forcing him to choose between the United States and Russia. He met his burden of showing there is "little likelihood that [his relationship with CM] could create a risk for foreign influence or exploitation." See *generally* ISCR Case No. 03-04300 at 5 (App. Bd. Feb. 16, 2006) (citing ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002)). His contacts and communications with CM are sufficiently casual and infrequent as to not create a risk of foreign influence or exploitation.

AG ¶¶ 8(a) and 8(c) cannot be applied with respect to SA and SH. Applicant has an emotional bond with SA and SH. Applicant communicates with them regularly and frequently. Applicant's relationships with his sister and her common-law husband (SA and SH) require a closer examination than his relationship with CM because Applicant has greater contacts with them than with CM. SA is his relative by blood. SH is his relative by common-law marriage. Although Applicant's close relationship with these family members is an important positive reflection of his character, the same close relationships raise security concerns for possible foreign influence.

There is no evidence that SA and SH have been political activists, challenging the policies of the Russian Government. There is no evidence these relatives currently work for or have ever worked for the Russian Government or military or any news media. There is no evidence that terrorists or the Russian Government have approached or threatened Applicant, SA or SH for any reason. There is no evidence that these family members living in Russia currently engage in activities which would bring attention to them or that they or other Russian elements are even aware that Applicant works for a government contractor or might have access to classified information. As such, there is a reduced possibility that these relatives would be targets for coercion or exploitation. *But see* n. 9, *infra* (discussing limited weight that can be given to the absence of such information).

Applicant deserves some credit because of the reduced possibility that Russia will exploit SA and SH because of the low profile they have in Russian society. Applicant's close relationship with SA and SH, his frequent contacts with them, and the nature of the Russian Government and its complicated, and sometimes contentious relationship to the United States, all weigh against mitigating security concerns. See ADP Case No. 05-17812 at 2, 3 n.2 (App. Bd. Jun. 11, 2007) (finding contacts with siblings in PRC "once every two or three months" not to be casual and infrequent); ISCR Case No. 04-12500 at 2, 4 (App. Bd. Oct. 26, 2006) (finding contacts with applicant's parents and sisters 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 once every four or five months not casual and infrequent).⁹

⁹In ISCR Case No. 06-17838 at 4 (App. Bd. Jan. 28, 2008), the Appeal Board discussed the precedential value of the decisions predating the revision of the Adjudicative Guidelines indicated in n. 3, *supra*, and determined where the language of the Directive is unchanged or not substantively altered, the precedent remains valid. AG ¶ 8(c) apparently adopted the Appeal Board's interpretation of Foreign Influence Mitigating Condition 1 (FIMC 1) under the previous guidelines. The Appeal Board had determined that contacts with relatives living in a foreign country must be both casual and infrequent to apply FIMC 1. See ISCR Case No. 04-12500 at 4 (App. Bd. Oct. 26, 2006). Moreover, contacts with such family members are presumed to be "not casual." *Id.* In the analysis of countervailing evidence, it is legal error to give significant weight to any of the following facts or factors: applicant's ties to the United States (ISCR Case No. 02-13595 at 5 (App. Bd. May 10, 2005)); lack of prominence of relatives living in a foreign country (*Id.*); "family members' low-key and noncontroversial lifestyle, and the fact that the Iranian government has not contacted them about Applicant" (ISCR Case No. 04-12500 at 4 (App. Bd. Oct. 26, 2006)); one relative living in a foreign country may be sufficient to negate FIMC 1 (ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006)); a foreign relative's fragile health (ISCR Case No. 02-29403 at 4 (App. Bd. Dec. 14, 2004)), advanced age (ISCR Case No. 02-00305 at 7 (App. Bd. Feb. 12, 2003), financial independence (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005), or lack of financial dependency upon applicant (ISCR Case No. 03-15205 at 4 (App. Bd. Jan 21, 2005)); foreign relatives

Applicant's deep relationship with his son and his strong connections to the United States tends to mitigate foreign interest security concerns. Applicant has "such deep and longstanding relationships and loyalties in the U.S., [he] can be expected to resolve any conflict of interest in favor of the U.S. interest." His son is a U.S. citizen, and resides in the United States. Applicant and his son have lived in the United States since 1993 and are fully inculcated with U.S. values. Applicant frequently visits and communicates with his son, who lives hundreds of miles away in a different state. His son is Applicant's closest relative. Applicant has worked for government contractors with dedication and distinction. He has buried his wife in a cemetery in the United States and purchased a plot in the same cemetery for himself. He has substantial property and investments in the United States, and no property or investments in Russia. He has many friends and colleagues in the United States. He is a loyal, dedicated U.S. citizen. He has provided letters and witness statements to corroborate his loyalty and trustworthiness.

Foreign Preference

Under AG ¶ 9 the security concern involving foreign preference arises, "[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."

AG ¶ 10(a) describes one condition that could raise a security concern and may be disqualifying in Applicant's case, "(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport." Applicant possessed a Russian passport that was valid until April 23, 2002, establishing AG ¶ 10(a).

AG ¶¶ 11(b) and 11(e) provide two conditions that mitigate security concerns for foreign preference stating, "(b) the individual has expressed a willingness to renounce dual citizenship" and "(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated." Applicant credibly stated he was willing to renounce his Russian citizenship to an investigator from the Office of Personnel Management and subsequently at his hearing. At his hearing he was advised that there was a security concern under Guideline C because he retained his expired

spend part of each year in the U.S. (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the lack of any connection between the foreign relative and the foreign government in question (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the absence of any attempt at exploitation in the past (ISCR Case No. 03-15205 at 4 (App. Bd. Jan. 21, 2005)); a foreign country's friendly relationship with the U.S., its stable, democratic government, or its extensive foreign military agreements with the United States (ISCR Case No. 02-22461 at 5-6 (App. Bd. Oct. 27, 2005)) and an applicant's "refusal to travel to Iran" and "meticulous work habits and practice of strictly following the rules relating to his work" (ISCR Case No. 03-15205 at 3 (App. Bd. Jan. 21, 2005)). Notwithstanding the Appeal Board's position, I conclude that many of these attributes are pertinent to the analysis in this case under the whole person concept.

Russian passport. On September 15, 2008, he obtained his Russian passport and provided it to his security officer, who destroyed it (AE L).

Whole Person Concept

In all adjudications, the protection of our national security is the paramount concern. The adjudicative process is a careful weighing of a number of variables in considering the “whole person” concept. It recognizes that we should view a person by the totality of his or her acts, omissions, and motivations as well as various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances and applying sound judgment, mature thinking, and careful analysis. Under the whole person concept, the 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.

Under Directive ¶ E2.2.3, “The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration” of the guidelines and the whole person concept.

Applicant promised to report any Russian contact seeking information to law enforcement authorities. I found this promise to be sincere and credible. However, in ISCR Case No. 06-24575 at 4 (App. Bd. Nov. 9, 2007), the Appeal Board reversed an administrative judge’s decision to grant a PRC Applicant’s clearance because he gave too much weight to the Applicant’s “strong ties to the U.S.” and determined there was insufficient evidentiary support for the conclusion that he “can be trusted to resolve any conflict of interest . . . in favor of the U.S.” The Applicant in ISCR Case No. 06-24575 said he would not act against the U.S. if faced with the choice. However, the Appeal Board gives such promises little weight in their *de novo* review of the evidence,¹⁰ stating:

¹⁰ The Supreme Court in *United States v. Raddatz*, 447 U.S. 667, 690 (1980) succinctly defined the phrase “de novo determination”:

[This legal term] has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 23 [(1974)], the Court had occasion to define “*de novo* proceeding” as a review that was “unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency’s] determination is supported by substantial evidence.” And, in *United*

An Applicant's stated intention as to what he would do in the future is of relatively little weight, given the record in this case. See ISCR Case No. 03-09053 at (App. Bd. Mar. 29, 2006) ("An applicant's stated intention about what he or she might do in the future under some hypothetical set of circumstances is merely a statement of intention that is not entitled to much weight, unless there is record evidence that the applicant has acted in a similar manner in the past under similar circumstances.")

Id. at 4. See also ISCR Case No. 07-00029 at 4 (App. Bd. Dec. 7, 2007) (criticizing the administrative judge's reliance on PRC-Applicant's promise to choose the U.S. over PRC should a conflict arise, and reversing the administrative judge's decision to grant a clearance). I respect the Appeal Board's position and give little weight to Applicant's promise to report any such contacts that might occur.

A Guideline B decision concerning the Russia must take into consideration the geopolitical situation in Russia, as well as the dangers existing in Russia.¹¹ Russia is a diplomatic and strategic partner of the United States in some areas where both countries have mutual interests. For example, Russia is a key partner in efforts to reduce proliferation of weapons of mass destruction and control of nuclear materials. Russia's relationship with the United States has significantly changed over the decades and is likely to change again in the future. Russia was an important U.S. ally in World War II, and then an enemy of the United States during the Korean and Vietnam Wars. Russia was the United States' primary antagonist through the Cold war. Russia has a mixed to poor human rights record. Russia is one of the most aggressive nations in the collection of U.S. intelligence and sensitive economic information. Although terrorists in Russia are not known to target relatives of Americans such as SA and SH, there is a significant problem in Russia with terrorists, which is a factor in the analysis.

One element increasing the foreign influence security concern is Applicant's frequent contacts with SA and SH, and SA's four visits to the United States since 1993. Applicant clearly has a close relationship with SA and SN, and they are vulnerable to

States v. First City National Bank, 386 U.S. 361, 368 [(1967)], this Court observed that "review *de novo*" means "that the court should make an independent determination of the issues" and should "not . . . give any special weight to the [prior] determination of" the administrative agency.

(internal footnotes omitted). In ISCR Case No. 05-01820 (App. Bd. Dec. 14, 2007), the Appeal Board criticized the administrative judge's analysis, supporting grant of a clearance for a PRC-related Applicant, and then decided the case itself. Judge White's dissenting opinion cogently explains why credibility determinations and ultimately the decision whether to grant or deny a clearance should be left to the judge who makes witness credibility determinations. *Id.* at 5-7. See also ISCR Case No. 04-06386 at 10-11 (App. Bd. Aug. 25, 2006) (Harvey, J., dissenting) (discussing limitations on Appeal Board's authority to reverse hearing-level judicial decisions and recommends remanding cases to resolve material, prejudicial error).

¹¹ See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).

Russian coercion and non-coercive measures because of their Russian citizenship and where they live. They also receive a social security type pension, and the Russian government could exert pressure on them by threatening to stop or stopping their pensions. Because Russian government and intelligence personnel may violate Russian law, they are more likely to use improper and/or illegal means to obtain classified information through SA and SH.

There are significant factors supporting approval of Applicant's access to classified information. Applicant has lived in the United States since 1993 (except for his visit to Russia in 1997, which was sponsored by the U.S. government, and a brief visit to India). He became a U.S. citizen in 2001. His wife is buried in the United States and he has purchased a cemetery plot close to her, showing his intention to be buried in the United States. Applicant's closest relative is his son, who is a U.S. citizen with a career in the United States. Applicant is an excellent employee and U.S. citizen. He compellingly explained why his loyalty is to the United States, rather than to the Russia. The United States follows the Rule of Law, and Russian authorities do not necessarily do so. He thoroughly developed the evidence showing his connections to the United States and to the Russia. I found his statements to be honest, candid and credible. He provided corroborating statements concerning his loyalty and trustworthiness. He provided favorable recommendations of employers and friends going back to the time of his entry into the United States.

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),¹² 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 immigrating 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,

¹²The 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).

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 in ISCR Case No. 03-04300 and in this case are similar.¹³

After carefully weighing the evidence of his connections to Russia, and to the United States, I conclude Applicant has carried his burden of fully mitigating the foreign influence and foreign preference security concerns.

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"¹⁴ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

¹³In 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.

¹⁴See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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
Subparagraphs 1.a to 1.d:	For Applicant
Paragraph 2, Guideline C:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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 eligibility for a security clearance for Applicant. Clearance is granted.

Mark W. Harvey
Administrative Judge