



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



In the matter of: )  
)  
) ISCR Case No. 10-05699  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: Richard Murray, Esq.

May 11, 2011

**Decision**

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the security concerns under Guideline, C, Foreign Preference, but failed to mitigate the Guideline B, Foreign Influence and Guideline E, Personal Conduct concerns. Applicant's eligibility for a security clearance is denied.

**Statement of the Case**

On December 14, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines C, B, and E. 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on January 26, 2011, and requested a hearing before an administrative judge. The case was assigned to me on March 2, 2011. DOHA

issued a Notice of Hearing on March 29, 2011. Applicant requested a continuance until April 7, 2011, which was granted, and the hearing was convened as scheduled. The Government offered exhibits (GE) 1 through 3. Applicant did not object, and they were admitted into evidence. Applicant offered exhibits (AE) A through D into evidence, which were admitted without objection. Department Counsel requested administrative notice be taken of Hearing Exhibit I, which was granted without objection. Applicant and two witnesses testified on his behalf. DOHA received the hearing transcript (Tr.) on April 14, 2011.

### **Findings of Fact**

Applicant admitted all the SOR allegations except ¶¶ 1.a, 3.a, and 3.b. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 29 years old. He married in February 2011, and he and his wife are expecting their first child. He was born in the Ukraine and immigrated with his parents to the United States in 2000. Applicant has earned a bachelor's degree and doctorate degree. He has worked for a federal contractor since February 2010.<sup>1</sup>

Applicant became a citizen of the United States in October 2009. His parents are also naturalized citizens of the United States. His wife is a citizen of Bulgaria and is a permanent legal resident of the United States.<sup>2</sup> She has applied for citizenship and has received her confirmation letter and appointment with immigration officials.<sup>3</sup>

Applicant's paternal grandmother, his sister, and nephew are citizens and residents of the Ukraine. He has traveled to the Ukraine twice in 2003, twice in 2004, once in 2005, twice in 2006, and once in 2009 to visit them. He had a girlfriend in the Ukraine for a period of time and visited her, but the relationship ended in 2005. He talks to his grandmother about three times a year by telephone. She is a retired farmer. She does not have any affiliation with the government. His sister is completing her doctorate degree and does not have any affiliation with the government. Her husband is a computer scientist and works for a private company. His nephew is nine years old. He talks with his sister about once a month. She is married and chose to remain in the Ukraine when the family emigrated. She and her family have visited Applicant in the United States three times; the most recent was for his wedding in February 2011.<sup>4</sup>

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<sup>1</sup> Tr. 27-30.

<sup>2</sup> Tr. 29-30; The Government did not allege foreign influence concerns regarding Applicant's wife. Therefore, they are not addressed.

<sup>3</sup> AE D.

<sup>4</sup> Tr. 33-38, 51-58.

Applicant's Ukrainian passport was to expire in August 2009. He was still a Ukrainian citizen at the time, but was waiting for his United States citizenship to be completed. While in the Ukraine in March 2009, Applicant went to the appropriate office to retrieve a passport application. He then completed the application and went back to the passport office to file it. He returned to the office to retrieve the passport when it was issued. He received a new Ukrainian passport and was permitted to retain the old passport. The new Ukrainian passport was issued on March 16, 2009, and was to expire on March 16, 2019.<sup>5</sup>

Applicant completed a security clearance application (SCA) on February 12, 2010. Section 20B asked: "Have you ever held or do you now hold a passport that was issued by a foreign government?" Applicant responded "yes" and listed he held a Ukrainian passport issued in August 1999 with an expiration date of August 2009. He failed to disclose that he held an active Ukrainian passport that he had renewed in March 2009 and did not expire until March 2019. I find Applicant deliberately withheld this information.<sup>6</sup>

Applicant was interviewed, as part of his background investigation, by an authorized investigator on May 5, 2010. He advised the investigator that he did not possess dual citizenship or hold an active foreign passport. He admitted to the investigator that he held a Ukrainian passport that was issued in August 1999 and expired in August 2009. Applicant failed to disclose to the investigator that he also held a valid Ukrainian passport that did not expire until August 2019.<sup>7</sup>

At his hearing he stated:

When I was asked if I have an active Ukrainian passport, what I know is that Ukraine does not allow dual citizenship. And as soon as I became a United States citizen, I automatically refused my Ukrainian citizenship, and therefore, I believed my passport, whether the renewed one or the old one, both of them are invalid. And that's why I stated that I do not possess a valid or active Ukrainian passport.<sup>8</sup>

In his answer to the SOR, Applicant stated he made a mistake by not listing his valid Ukrainian passport on his SCA. He stated:

I have to acknowledge that I did in fact put old, which expired in August 2009, but I did it purely by mistake. I actually never used my other

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<sup>5</sup> Tr. 32-33, 58-61.

<sup>6</sup> Tr. 38, 61-63.

<sup>7</sup> Tr. 42, 63.

<sup>8</sup> Tr. 43.

Ukrainian passport. And when I was filling out the questionnaire, I just grabbed the passport and I, I put it in.<sup>9</sup>

\* \* \*

I just, I put, instead of my newest Ukrainian passport, I put the older one, and I didn't put the new Ukrainian passport into the question.<sup>10</sup>

He stated that he believed the Ukraine does not recognize dual citizenship and that, when he obtained United States citizenship, he automatically lost his citizenship with the Ukraine, which in turn made his Ukrainian passports invalid and inactive. He stated that this was the reason that he gave the answer he did to the investigator. His explanation does not explain why he disclosed his expired passport or why he did not disclose that he had another passport and the dates on it, as this was the passport that was valid when he became a U.S. citizen. Applicant did not reveal on his SCA or during his interview that he held a second Ukrainian passport that was not expired. Applicant could not remember the specifics of the interview. He did not think the investigator asked him if he had more than one passport from another country. When asked why he did not disclose to the investigator that he had a second Ukrainian passport, he stated because he was not asked about it. Applicant stated that when he was completing his SCA he retrieved his expired passport so he could verify the dates he traveled to the Ukraine. He kept both passports in the same safety box. He stated he did not recall seeing the new passport when he retrieved the old one. Applicant's explanations for not disclosing he had an active Ukrainian passport are not credible. I find he deliberately failed to disclose on his SCA and to the government investigator that he had an active Ukrainian passport.<sup>11</sup>

In October 2010, in response to government interrogatories, Applicant provided copies of both his expired and active Ukraine passports. He has since destroyed both passports. He never used his active Ukrainian passport after becoming a U.S. citizen.<sup>12</sup>

Applicant considers the United States his home and intends on remaining here and raising his family. He does not have any assets in the Ukraine. He has about \$20,000 in assets in the United States. He stated he is loyal to the United States.<sup>13</sup>

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<sup>9</sup> Tr. 39.

<sup>10</sup> Tr. 40.

<sup>11</sup> Tr. 42-44, 63-69, 71-75.

<sup>12</sup> Tr. 31-33; 41 GE 2.

<sup>13</sup> Tr. 47-49, 79-82.

Applicant's father testified on his behalf. He is proud of his son's academic accomplishments. He believes his son is a good person and student. He considers him honest and truthful.<sup>14</sup>

Applicant's wife testified on his behalf. She described him as honest person with a strong sense of morality. He does not succumb to temptation. He is family-oriented. She plans on staying in the United States where she and Applicant intend on raising their family together.<sup>15</sup>

Applicant provided a character letter from his coworker. He has worked with Applicant for a year. He considers him an excellent team member and contributor. He has volunteered to organize submissions for his employer and has co-authored research proposals. He is considered conscientious and thorough. His coworker has no reason to question his loyalty.<sup>16</sup>

### **Ukraine<sup>17</sup>**

Ukraine has a parliamentary presidential system of Government. It has been an independent state since 1991. The country is undergoing a profound political and economic change as it moves from its Soviet past toward a market economy and multi-party democracy. Although it held its first free election in December 1991, international observers have criticized aspects of subsequent elections. In October 2004, the presidential elections were characterized by government intimidation of the opposition and independent media. There were questionable abuses of state administrative resources, highly skewed media coverage, and many provocations. There were massive demonstrations against the former regime's electoral fraud. Subsequent parliamentary elections held in March 2006 and September 2007 were in conformance with international standards.

Ukraine inherited a military force of 780,000 from the Soviet Union. It is seeking to modernize the military and is looking to meet NATO standards. Security forces in the Ukraine are controlled by the president, subject to parliamentary investigation. Ukraine's foreign policy goals have been Euro-Atlantic integration and entry into the World Trade Organization. It also seeks to maintain good relations with Russia, referring to the country as their "permanent strategic partner." The relationship is strained due to energy dependence, the stationing of the Russian Black Sea Fleet in Sevastopol, and by Russia almost completely cutting off natural gas supplies in January 2009. Ethnic Russians, concentrated in the southern and eastern regions of the Ukraine, make up

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<sup>14</sup> Tr. 83-92.

<sup>15</sup> Tr. 93-104.

<sup>16</sup> AE C.

<sup>17</sup> HE I.

17.3% of the country's population. Ethnic Ukrainians in these regions tend to be Russian-speaking, and are suspicious of Ukrainian nationalism and support close ties with Russia.

Overall, the Ukrainian human rights record has many problems, including police abuse and an unsatisfactory penal system. The law prohibits the use of torture, but law enforcement personnel use force and mistreatment routinely to extract confessions and information from detainees. Police arbitrarily detain persons, although it is prohibited by law. There are also instances of government intimidation of the opposition and independent media and reports of government personnel engaged in unlawful surveillance and telephone tapping.

Ukraine does not recognize dual nationality. If a Ukrainian citizen uses a Ukrainian passport, they are treated as a Ukrainian citizen, which may include being required to perform mandatory military service.

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "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 has the ultimate burden of persuasion to obtain a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline C, Foreign Preference**

AG ¶ 9 expresses the security concern involving foreign preference:

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 ¶ 10 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(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; (2) military service or a willingness to bear arms for a foreign country; (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country; . . . (5) using foreign citizenship to protect financial or business interests in another country; . . . (7) voting in a foreign election.

Applicant possessed an active Ukrainian passport after he became a United States citizen. I find the above disqualifying condition applies.

I have considered all the mitigating conditions under AG ¶ 11 and the following is potentially applicable:

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

Applicant destroyed both his expired and active Ukrainian passport. He did not use his Ukrainian passport since becoming an American citizen. I find the above mitigating condition applies.

## **Guideline B, Foreign Influence**

AG ¶ 6 expresses the security concern regarding foreign influence:

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.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying. I have considered all of them and especially considered the following:

(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.

AG ¶¶ 7(a) and (b) require substantial evidence of a "heightened risk." The "heightened risk" required to raise one of these disqualifying conditions is a relatively low standard. "Heightened risk denotes a risk of greater than the normal risk inherent in having a family member living under a foreign government or owning property in a foreign country. The totality of Applicant's family ties to a foreign country as well as each individual family tie must be considered.

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."<sup>18</sup>

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<sup>18</sup> ISCR Case No. 02-11570 at 5 (App. Bad. May 19, 2004).



Furthermore, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.”<sup>19</sup> Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. 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 great if the foreign country has an authoritarian government, or the country is known to conduct intelligence operations against the U.S. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue.<sup>20</sup>

Applicant’s grandmother, sister, and nephew are citizens and residents of the Ukraine. From 2003 to 2009, he has traveled approximately nine times to visit them and maintains contact with them. Considering the Ukraine’s close ties with Russia and their poor human rights record, and government intimidation, I find there is a heightened risk of coercion, exploitation and manipulation. Therefore, I find AG ¶¶ 7(a) and 7(b) apply

I have also analyzed all of the facts and considered all of the mitigating conditions under AG ¶ 8. The following are potentially applicable:

- (a) the nature of the relationship 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 and 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 interests in favor of the U.S. interests; and
- (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.

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

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<sup>19</sup> ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at \*\*15-16 (App. Bd. Mar. 29, 2002).

<sup>20</sup> See generally, ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

family member is associated with or dependent upon the government, the country is known to conduct intelligence operations against the United States, or there is a serious problem in the country with crime or terrorism. Ukraine maintains a close and friendly relationship with Russia, although that relationship has sometimes been strained. Ukraine has some questionable human rights issues and some problems with the use of force by their police force. The Ukraine is seeking a broader acceptance through NATO and the World Trade Organization.

It does not appear that Applicant's family in the Ukraine has ties to the government. It appears he intends on remaining in the United States and raising his family here. Applicant maintains more than casual and infrequent contact with his relatives in the Ukraine. He has visited them numerous times since 2003. Although, it is unlikely that Applicant would be put in a position of having to choose between the interests of his relatives and that of the United States, the Ukraine's close ties with Russia and their human rights problems remains a security concern. I find AG ¶ 8(a) marginally applies. I find AG ¶ 8(c) does not apply.

Applicant has been a citizen of the United States since October 2009. His wife is not a citizen of the United States, but is a permanent resident. Due to the relatively short period of time Applicant has been a citizen, I cannot find he has a longstanding relationship to the United States. I have concerns about Applicant's failure to disclose he had a valid Ukrainian passport and his explanations for maintaining it were not credible. Applicant has made frequent trips to the Ukraine to visit his family. Based on his failure to be forthright about his Ukrainian passport, I am not convinced his sense of loyalty to the Ukraine is so minimal that he can be expected to resolve any conflict of interest in favor of the United States interests. I find AG ¶ 8(b) does not apply.

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern pertaining to personal conduct;

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have specifically considered:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, aware benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative:

Applicant was aware he held a second unexpired Ukrainian passport. He did not disclose he held this passport on his SCA or when questioned by a government investigator. I find Applicant deliberately omitted this information and misled the investigator. I find both disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following potentially mitigating conditions under AG ¶ 17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully; and

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

There is no evidence that Applicant made a prompt, good-faith effort to correct the omission before being confronted with the facts. I find AG ¶ 17(a) does not apply. There is no evidence that Applicant received improper or inadequate advice. The SCA question is clear and precise. It asked Applicant if he "ever held or do you now hold a passport that was issued by a foreign government?" Applicant was well aware he had two Ukrainian passports in his possession; one that was expired and one that was not. He chose to conceal the valid passport. He had an opportunity to explain to the government investigator that he had two passports and why he believed they were no longer valid, but he did not. Instead he chose to reveal the expired passport and conceal the unexpired passport. His explanations were not credible. His actions cast doubt on his reliability, trustworthiness and good judgment. I find AG ¶¶ 17(b) and 17(c) do not apply.

### **Whole-Person Concept**

Under the whole-person concept, the 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. The 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) the 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline B, C, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is an educated man. He is married and is expecting his first child. He immigrated to the United States and in October 2009 became a citizen. Applicant did not disclose on his SCA or to the government investigator that he had a valid Ukrainian passport. I did not find his explanations credible. He has destroyed both the expired and unexpired Ukrainian passports. His actions are a concern, especially since he maintains ties with relatives in the Ukraine. Applicant failed to meet his burden of persuasion. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns under Guideline C, Foreign Preference, but failed to mitigate the security concerns arising under the Guidelines B, Foreign Influence, and Guideline E, Personal Conduct.

### **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:	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	Against Applicant

Paragraph 3, Guideline E:

AGAINST APPLICANT

Subparagraphs 3.a-3.b:

Against Applicant

**Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Carol G. Ricciardello  
Administrative Judge