



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 15-01243

**Appearances**

For Government: Nicole A. Smith, Esq., Department Counsel  
For Applicant: *Pro se*

03/13/2017

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**Decision**

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MARSHALL, Jr., Arthur E., Administrative Judge:

**Statement of the Case**

On August 27, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing concerns under Guideline B (Foreign Influence) regarding her eligibility to occupy a position of public trust designated ADP-I/II/III. The action was taken under 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 DOD on September 1, 2006.

In a letter dated November 7, 2015, Applicant admitted the allegations raised under Guideline B and requested a hearing. I was assigned the case on June 6, 2016. On September 8, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice setting the hearing for September 21, 2016. It was convened as scheduled.

The Government offered two documents, which were accepted into the record without objection, as exhibits (Exs.) 1-2. In addition, it offered a request for administrative notice concerning the Russian Federation (Russia), which was accepted into the record without objection as hearing exhibit (HE) I. Applicant gave testimony. The transcript of the proceeding (Tr.) was received on September 29, 2016. With no additional materials received by October 5, 2016, the record was closed. Based on a

thorough review of the case file, I find that Applicant carried her burden in mitigating trustworthiness concerns arising under Guideline B.

## **Procedural and Evidentiary Rulings**

### **Request for Administrative Notice**

Department Counsel submitted a written request that I take administrative notice of certain facts about Russia. The request materials were admitted in evidence and designated as hearing exhibit (HE) 1. Applicant posed no objection, and I have taken administrative notice of the information set forth therein.

Russia has a highly centralized, weak multi-party political system dominated by the president. It has significant human-rights problems, marked by restrictions on civil liberties, discrimination, denial of due process, torture, prisoner mistreatment, and the government's failure to prosecute officials who commit serious violations. Government officials also engage in electronic surveillance without proper authorization.

Russia is one of the most aggressive countries conducting espionage against the United States, focusing on obtaining proprietary information and advance weapons technologies beneficial to Russia's military modernization and economic development. Russia is one of the most capable and persistent intelligence threats and aggressive practitioner of economic espionage against the United States. Russia's intelligence services, as well as private companies and other entities, frequently seek to exploit Russian citizens or persons with family ties to Russia who can use their access to corporate networks to steal secrets. They have offered financial incentives to U.S. government officials and citizens to encourage the compromise of classified information.

Russia's attempts to collect U.S. technological and economic information represent a growing and persistent threat to U.S. security. In particular, many Russian immigrants with advanced technical skills who work for leading U.S. companies may be targeted for recruitment by Russian intelligence services.

### **Findings of Fact**

Applicant is a 32-year-old cardiac telemetry technician who has worked for her present employer for nearly three years. Originally from Russia, she is a naturalized United States citizen with family remaining in Russia as residents and citizens. Applicant has a United States passport. She is divorced and has a four-year-old child.

Born and educated in Russia, Applicant majored in linguistic studies. In June 2005, at the suggestion of an academic advisor, she undertook a foreign study program that would provide her with the opportunity to come to the United States to work and focus on English language skills. While traveling within the United States, she met a United States citizen, who she married in December 2005. They married due to mutual attraction, not "just to satisfy any type of residency requirement." (Tr. 25) After the

wedding, Applicant filed for a green card that was predicated on her remaining married for three years in order to become a citizen. (Tr. 23) The couple separated and divorced at the end of 2007.<sup>1</sup> Applicant returned to Russia to complete her degree in 2008, then returned and applied to remain in the United States permanently.

In 2012, Applicant and a subsequent boyfriend, a United States citizen, had a child. The boyfriend lives in Applicant's region and works for a private company. At present, the child lives with the now-former boyfriend. Arrangements regarding the child are made between the child's parents. Applicant is close to her young daughter and on good terms with the child's father. Applicant is free to visit at any time in a manner that works with her work schedule. At present, she only has one or two days free from work. (Tr. 37). Therefore, she visits with the child one or two days a week. (Tr. 26) Applicant provides her ex-boyfriend with \$300 a month for the child's upkeep.

Applicant's mother and father are 67 and 75 years of age, respectively. They are citizens and residents of Russia, where they have always lived. Both parents are retired. Applicant's mother worked in the private sector. Applicant's father is a medical practitioner who provided medical services while in Russian military service until he retired about 30 years ago. Subsequently, he worked in private practice. Both parents receive a pension from the government. Their overall income makes them "very middle class." (Tr. 30) They own an apartment in which they live. Applicant does not send them any money because they prefer Applicant spend her income on herself and on their grandchild. They maintain regular telephonic contact with Applicant, generally discussing health and Applicant's child.

Applicant also has a half-sister who is a citizen and resident of Russia. She is the child of Applicant's father from a previous marriage. This half-sibling lives far from Applicant's parents in Russia. Applicant and her step-sister were not raised together. Applicant maintains limited contact with the woman. (Tr. 32) She noted: "I'm just busy and, you know, she's older than me by 20 years. . . . We don't have really any interests, so we don't talk" (Tr. 23) They have not spoken in a number of months. (Tr. 32) Applicant does not have contact with any other individuals, family, or friends in Russia.

Applicant does not have any property or financial interests in Russia. At best, she could inherit her parent's apartment, or it might either pass to her half-sister or be split between the two women. Applicant does not know the value of the unit.

In the United States, Applicant rents an apartment. She has no significant savings and only recently gained access to a 401k retirement plan through her current position.<sup>2</sup> She currently earns about \$45,000 a year. She has a car. Applicant takes classes and enjoys ballroom dancing. Dancing is her hobby, as is working out at a gym. Most of all, her scant free time is spending time with her child.

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<sup>1</sup> Applicant noted: "We didn't get along. He wasn't treating me right. I couldn't stay . . . ." (Tr. 24)

<sup>2</sup> Applicant's present position is her first full-time employment. Previously, she balanced multiple part-time and on-call positions.

In 2013, Applicant became a naturalized United States citizen. She has not been to Russia in over two years. Having surrendered her Russian passport to her facility security officer at work, she was told by Russian authorities that she could not obtain a visa to visit Russia on a United States passport unless she first renounced her Russian citizenship. (Tr. 37-40) She informed the Russian Embassy she was willing to do so, but she has found the process confusing, complicated, and protracted. Without guidance, she is unsure as to how to proceed with a formal renunciation of citizenship. (Tr. 38-39)

Overall, Applicant asserts that she cannot be compromised by foreign interests because she does not possess or have access to any information or anything of interest. In her position, she cannot access patient information, noting that only the doctors and nurses have access to that information. (Tr. 42) She does not perform automated data processing, only cardiac telemetry studies.

It is Applicant's intent to remain in this country. She enjoys her work and her life in the United States, stating: "I love this country . . . I'm very loyal to it. . . ." (Tr. 47) Applicant loves this country because of its system of government, people, language, and opportunities. (Tr. 45) Her daughter is here, and her child is her focus. (Tr. 44) In concluding, she emphasized: "My life is here. My daughter is here. That's the most important thing to me." (Tr. 44)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a [position of public trust]." <sup>3</sup> 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 have access to such information. Positions designated as ADP-I and ADP-II are classified as "sensitive positions." <sup>4</sup> "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." <sup>5</sup> DOD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. <sup>6</sup>

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating

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<sup>3</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>4</sup> Regulation ¶¶ C3.1.2.1.1.7, C3.1.2.1.2.3, and C3.1.2.2. See also Regulation app. 10, ¶ 10.2.

<sup>5</sup> Regulation ¶ C6.1.1.1.

<sup>6</sup> Regulation ¶ C.8.2.1.

conditions, which are used in evaluating an applicant's eligibility for a public trust position.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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 common sense decision. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence." The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.<sup>7</sup>

A person who seeks access to sensitive 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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information. Furthermore, security clearance determinations, and by inference, public trust determinations, should err, if they must, on the side of denials.<sup>8</sup> 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.

## **Analysis**

### **Guideline B, Foreign Influence**

The SOR alleges that Applicant's parents and half-sister are citizens and residents of Russia. The ADP eligibility concern under this guideline is set out in AG ¶ 6 as follows:

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<sup>7</sup> See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

<sup>8</sup> *Egan*, 484 U.S. at 531.

Foreign contacts and interests may be a trustworthiness 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.

Two disqualifying conditions under this guideline are relevant:

AG ¶ 7(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

AG ¶ 7(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.

Thus, I have considered Applicant's relationships to her Russian parents and half-sister in relation to these conditions. The nature of a nation's government, its relationship with the United States, and its human rights record are also 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. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. AG ¶ 7(a) requires 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 greater than the normal risk inherent in having a family member living under a foreign government.

I am satisfied that the activities of Russian government agencies against U.S. interests are sufficient to establish the "heightened risk" in AG ¶ 7(a), and the potential conflict of interest in AG ¶¶ 7(b). Russia pursues active and aggressive intelligence activity against the United States, and is one of the most capable and persistent collector of economic espionage against the United States. Russia's intelligence services, as well as private companies and other entities, frequently seek to exploit Russian citizens or persons with family ties to Russia. It has been known to target Russian emigrants with advanced technical skills who work for leading U.S. companies

for recruitment by Russian intelligence services. In light of these circumstances, although Applicant's diagnostic studies are relatively mundane within a medical setting, the serious concerns that are raised by an individual with family members in Russia are still present in this case. Accordingly, Applicant's mitigation case must be examined through the lens of heightened scrutiny. (See ISCR Case No.01-22693 at 7 (App. Bd. Sep. 22, 2003); see *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision where an administrative judge was determined not to have considered terrorist activity in an area where family members resided)).

In meeting this higher standard of proof and persuasion, an applicant is not required to sever all ties with a foreign country before she can be eligible for a position of public trust. What factor or combination of factors will mitigate concerns raised by an applicant with family members in a foreign country, however, is not easily identifiable or quantifiable. An administrative judge's predictive judgment in these types of cases must be guided by a commonsense assessment of the evidence and consideration of the adjudicative guidelines, as well as the whole-person factors set forth in the Directive. A judge's ultimate determination must also take into account the overarching standard in these cases, namely, that any doubt raised by an applicant's circumstances must be resolved in favor of the national interest.

The following mitigating conditions are potentially relevant in this matter:

AG ¶ 8(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;

AG ¶ 8(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; and

AG ¶ 8(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.

Applicant was born in Russia, but came to this country in 2005 for collegiate study in English language. After a brief marriage in this country, she completed her degree in Russia, then returned to the United States with the goal of immigration. She applied for United States citizenship, which was granted in 2013. She surrendered her Russian passport to her facility security officer. She has expressed her willingness to renounce her Russian citizenship, but finds Russia's protracted process to be cumbersome and confusing. It is her sincere hope and goal to remain in this country with her daughter, and to continue her career and life in a country she loves.

Applicant's contacts with her parents are telephonic, and she is presently barred from returning to Russia to visit for technical reasons related to visa ineligibility. Applicant's mother worked in the private sector, but receives retirement income from the Russian government. Applicant's father, a medical provider, served in the Russian military in a medical capacity until retiring 30 years ago. He subsequently worked privately in his chosen field. He, too, receives a state retirement pension. Despite their pensioner status, their lifestyle and home ownership make them "very middle class."

Applicant has little contact with her Russian half-sister. There is no evidence suggesting any of these relations are currently influenced by Russian politics or are involved in government work. There is no evidence any of them are under scrutiny by a foreign government or foreign interests. As for her daughter, Applicant clearly has strong ties to her only child. Those ties are similarly possessed by the child's father, with whom she shares the responsibility of the child's rearing. In light of their present arrangement, it appears the parents are intent on both remaining in the child's life, emotionally and geographically. Given Applicant's sincere expressions regarding the child, her work, and her life, it seems clear that even in the unlikely event a risk should arise, she would choose in favor of the United States' interests. After weighing the evidence, both favorable and unfavorable, and considering the heightened risk of potential foreign influence raised by Applicant's family in Russia and in light of her life in the United States, I find that she met the standards set forth above and mitigated the foreign influence concerns. AG ¶¶ 8(a)-(c) 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 relevant 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 public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered all of the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.



Specifically, I considered those findings of facts and described above that are relevant in light of the AG ¶ 2(a) adjudicative factors. I have also considered them in light of AG ¶ 2(c) and the Guideline B considerations. In particular, I note that Applicant voluntarily sought to emigrate from Russia in order to start a new life. I am persuaded by Applicant's decision to immigrate to this country, enter her profession, and utilize her English language skills. I am also impressed by her devotion to her daughter, her putting the child's best interests over her own, and the amicable arrangement under which both Applicant and the child's father are raising the child. I am convinced that her contacts to Russia have been sufficiently mitigated in terms of risk. Overall, the record leaves me without questions about Applicant's eligibility to occupy a position of trust.

### **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-1.c:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of security to find Applicant eligible to occupy a position of public trust. Eligibility is granted.

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Arthur E. Marshall, Jr.  
Administrative Judge