

DATE: December 20, 2007

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In re: )	
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----- )	ISCR Case No. 07-05179
SSN: ----- )	
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Applicant for Security Clearance )	
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**DECISION OF ADMINISTRATIVE JUDGE  
JUAN J. RIVERA**

**APPEARANCES**

**FOR GOVERNMENT**

Emilio Jaksetic, Esquire, Department Counsel

**FOR APPLICANT**

James G. Beach, III, Esquire

**SYNOPSIS**

Applicant is serving probation for his third DUI which took place in August 2006. His last relapse shows he has not learned from his mistakes and casts doubts on his ability to comply with the law, to follow rules and regulations, and on his reliability and judgment. He also failed to mitigate the foreign influence security concerns raised by his relationship with his girlfriend, a naturalized U.S. citizen with family ties in Russia. Clearance is denied.

## **STATEMENT OF THE CASE**

On March 14, 2006, Applicant submitted a security clearance application (GE 1).<sup>1</sup> On August 2, 2007, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a statement of reasons (SOR) alleging facts and security concerns under Guideline G (Alcohol Consumption) and Guideline B (Foreign Influence). The SOR informed Applicant that DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information and submitted the case to an administrative judge for a security determination.<sup>2</sup> On August 17, 2007, Applicant answered the SOR and requested a hearing.

The case was originally assigned to another administrative judge and reassigned to me on October 22, 2007, due to caseload considerations. DOHA issued a Notice of Hearing on October 29, 2007, convening a hearing on November 15, 2007. The hearing was convened as scheduled. At the hearing, the government presented five exhibits, marked GE 1-5, to support the SOR. GE 1-4 were admitted without objection. GE 5 was considered for administrative notice purposes only, over Applicant's objection. Applicant testified on his own behalf, and presented one witness and three exhibits, marked AE 1-3, that were admitted without objection. DOHA received the transcript (Tr.) on November 28, 2007.

## **FINDINGS OF FACT**

Applicant admitted all the SOR allegations with explanations, except for SOR ¶ 1.f, which he denied. His admissions are incorporated herein as findings of fact. After a thorough review of all evidence of record, I make the following additional findings of fact.

Applicant is 64 years old. He served in the U.S. Air Force from 1961 to 1965, and was honorably discharged with the rank of senior airman (pay grade E-4). He held a secret security clearance from 1962 to 1965 as a result of his Air Force service. He attended college from 1962 to 1964, and earned approximately 33 credit hours. Additionally, through the years he has participated extensively in courses and training related to his area of expertise. He married his wife in November 1977, and they were divorced in January 2003. He has one adult son of this marriage.

After leaving the Air Force, Applicant worked for a defense contractor from 1966 to 1971. He held a security clearance at the secret level during that period. In 1977, Applicant established his own company. He worked as a sub-contractor for a larger defense contractor. In

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<sup>1</sup> Office of Personnel Management Security Clearance Application, Standard Form (SF) 86.

<sup>2</sup> See Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended and revised. On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended, in which the SOR was issued on or after September 1, 2006.

1985, his company was granted a facility security clearance, and he held access to classified information at the secret level from 1985 to 2002. His access to classified information was administratively terminated when his need for access ended.

There is no evidence to suggest, and the Government does not allege, that Applicant has ever compromised or caused others to compromise classified information. Nor does the record evidence show that Applicant has ever failed to follow the rules and regulations required to protect classified information.

In 2005, Applicant was hired by a defense contractor as a test specialist of communications, navigation, and identification systems. He requires access to classified information to perform the full extent of his duties. During the two years he has been working for his current employer, Applicant established a favorable reputation as a professional and dedicated employee. The vice-president of Applicant's company endorses him for his loyalty, professionalism, and his ability to manage his personal affairs (AE 1).

Applicant has been involved in three alcohol related incidents. In 1965, he was found guilty of driving under the influence of alcohol (DUI). He was sentenced to pay a fine. In May 2000, Applicant drove his car while under the influence of alcohol, and was charged with DUI. He was allowed a pre-trial diversion and given probation before judgment. He completed one year of supervised probation (Tr. 49). Additionally, he underwent alcohol evaluation and completed a twelve week alcohol education program that included an orientation into Alcoholic Anonymous (AA). He successfully completed the program in October 2000. Applicant was diagnosed as a non-problem drinker.<sup>3</sup> He claimed he abstained from alcohol use for the next two years and then resumed consuming alcoholic beverages, mostly wine (Tr. 50). In March 2006, he submitted a security clearance application in which he disclosed the circumstances surrounding his May 2000 DUI and resulting alcohol counseling.

In August 2006, Applicant drove his car while under the influence of alcohol, and was convicted of DUI. He explained that after leaving work, he stopped for dinner at a restaurant in his way home and had a couple of glasses of wine with dinner. He claimed he felt okay after dinner and drove home. On his way home, he felt tired and parked his car in the parking lot of convenience store. A police officer found him asleep behind the wheel of his car with the engine running. A subsequent test determined his blood-alcohol content to be .13.

In December 2006, Applicant was convicted of DUI, served 10 days jail, and was placed on two years unsupervised probation. He was still on probation at the time of his hearing. In October 2006, Applicant self-referred himself to a 26 week substance abuse counseling program, which he successfully completed. He was diagnosed as an alcohol abuser. His prognosis was considered "fair" based on his exceptional participation on the program. The counselors recommended Applicant remain alcohol abstinent and that he continued his participation in AA.<sup>4</sup>

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<sup>3</sup> See letter from Help and Recovery Today, dated October 6, 2000, included in Applicant's response to DOHA interrogatories.

<sup>4</sup> Discharge summary, dated June 2007, attached to Applicant's answer to the SOR.

Applicant continues to participate in AA and intends to continue to do so in the future (Tr. 61). He recently received a one-year-coin for having maintained one year of sobriety (Tr. 62). Notwithstanding, Applicant did not recognize the Serenity Prayer (Tr. 106), and testified he did not have a AA sponsor. Applicant claimed he has changed his lifestyle since October 2006. He no longer attends parties, bars, or events where alcohol is served. His live-in girlfriend is aware of Applicant's alcohol problems, that he is on probation, and that he is trying to remain sober. Although she continues to consume alcohol in his presence, she is supportive of Applicant's efforts to remain abstinent (Tr. 64).

Concerning his history of alcohol consumption, Applicant stated he began consuming alcohol at age 19. In his younger days he was the skipper of a racing boat and drinking and partying hard was part of his lifestyle. At his hearing, he testified he recognizes he has an alcohol problem and has changed his lifestyle to correct his problem. Applicant believes his alcohol incidents do not show his judgment is impaired. He believes his past drinking habit should not be a security concern.

In March 2003, Applicant met his 49-year-old living-in girlfriend (G) at a singles' meeting in a restaurant. They have been living together since the summer of 2003. She considers Applicant an occasional drinker. She has not seen Applicant consume alcoholic beverages since August 2006 (Tr. 169). She believes Applicant feels guilty and disappointed at himself because of his 2006 DUI.

G is a Jewish national. She was born, raised, and educated in what is now the Russian Federation (Russia) (Tr. 140). Her father enlisted in the Russian Army at age 17, and retired with the rank of colonel in 1971. After his retirement, her father received a government/military pension and worked for the Russian government as a hospital administrator. He passed away in 2005. Her 82-year-old mother is a citizen and resident of Russia. She is a retired teacher, and receives her late husband's pension (Tr. 178-179).

G left Russia in 1990 with her then husband and two children (Tr. 143). They emigrated to Israel where she became an Israeli citizen, obtained a master's degree in education, and worked as a teacher. In 1998, G and her family emigrated to the United States (Tr. 145). In 2002, she divorced her husband. In 2003, G became a naturalized U.S. citizen. Her 18-year-old daughter, a college student in the United States, and her ex-husband also became naturalized U.S. citizens. Her son is a U.S. legal resident pending naturalization.

G teaches Hebrew and Judaic to children at a Synagogue, a school, and a congregation. She has been trying to convince her mother to move to the United States without success (Tr. 152). G has travelled to Russia twice since 1990, both times to see her parents. The last time was in 2005 when her father passed away. She has not been to Russia since 2005 and has no intentions of going back to Russia. During the summer of 2007, she sent her daughter and son to visit her mother in Russia (Tr. 206).

G has a 54-year-old brother who is citizen and resident of Russia. G testified she had a bad relationship with her brother for the last 16 years. At her father's insistence, G reconciled with her brother. They currently have contact three to four times a year (Tr. 159). Her brother served in the Russian Army for two years. Since then, he has been working for the Russian

government. He manages all public bus transportation for a city in Russia (Tr. 166). She claimed to have only one friend left in Russia. She has not been able to contact her for the last six years (Tr. 172). Occasionally, she sends money (\$50-\$100) to both her mother and brother as presents for birthdays and holiday celebrations. She does not provide financial support for either relative (Tr. 187). G averred she is a loyal U.S. citizen with personal and professional commitments in the United States. She stated having no ties or loyalty toward Russia or Israel.

I take administrative notice of the following facts. Russia is a federation made up of 21 republics. Its government has a poor human rights record and it is plagued with corruption, media suppression, politically motivated crimes, and human rights violations. Russia has a significant intelligence capability that it retained from the Soviet Union. Russia's intelligence efforts continue to increase in sophistication, scope, and number. It has an aggressive industrial espionage and intelligence collection program targeting sensitive and protected U.S. technology. Russia's government sells to other countries technology with application for weapons of mass destruction (nuclear and biotechnology) and missiles. It has provided technology and support to China, Venezuela, India, and Iran against U.S. wishes.

### **POLICIES**

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. Foremost are the disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. However, the guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive,<sup>5</sup> and the whole person concept.<sup>6</sup> Having considered the record evidence as a whole, I conclude Guideline G (Alcohol Consumption) and Guideline B (Foreign Influence) are the applicable relevant adjudicative guidelines.

### **BURDEN OF PROOF**

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.<sup>7</sup> The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish a prima facie case by substantial

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<sup>5</sup> Directive, Section 6.3. states, "Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2 . . ."

<sup>6</sup> AG ¶ 2(a). states, ". . . The adjudication process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ."

<sup>7</sup> See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

evidence.<sup>8</sup> The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries the ultimate burden of persuasion.<sup>9</sup>

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.<sup>10</sup>

The scope of an administrative judge's decision is limited. 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. Executive Order 10865, § 7.

## CONCLUSIONS

Under Guideline G (Alcohol Consumption), the government's concern is that excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness. AG ¶ 21.

The government established its case under Guideline G by showing that in 1965, 2000, and 2006 Applicant drove while under the influence of alcohol. He was convicted of DUI in 1965 and 2006. In 2000, he received probation before judgment. Applicant excessive alcohol consumption resulted in his exercising questionable judgment. Additionally, he was diagnosed as an alcohol abuser in June 2006. Guideline G disqualifying condition AG ¶ 22(a): *alcohol-related incidents away from work, such as driving while under the influence . . .*, and AG ¶ 22(e): *evaluation of alcohol abuse or alcohol dependence by a license clinical social worker who is staff member of a recognized alcohol treatment program, apply.*

There is no evidence that Applicant has been involved in any alcohol-related misconduct since August 2006. Applicant stopped consuming alcohol in October 2006, and has remained abstinent since. His company's vice-president statement shows Applicant's work behavior for the last two years has not been indicative of his having an alcohol problem. He is considered a valuable employee, who is loyal, reliable, dependable, and professional. His girlfriend corroborated he has abstained from alcohol since October 2006. Furthermore, Applicant received

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<sup>8</sup> Directive, ¶ E3.1.32.1; ISCR Case No. 02-12199 at 3 (App. Bd. Apr. 3, 2006) (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. 98-0761 at 2 (App. Bd. Dec. 27, 1999) (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.).

<sup>9</sup> *Egan, supra* n. 7, at 528, 531.

<sup>10</sup> *See id.*; AG ¶ 2(b).

a “fair” prognosis after he completed his 2006 alcohol counseling. At his hearing, Applicant acknowledged his issues of alcohol abuse, demonstrated remorse, and promised to continue his lifestyle changes and to remain abstinent.

There are four Alcohol Consumption Mitigating Conditions under AG ¶ 23 potentially applicable to these disqualifying conditions:

(a): *so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;*

(b): *the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);*

(c): *the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and*

(d): *the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.*

Considering the totality of the circumstances in this case, I find Guideline G mitigating conditions AG ¶ 23(a) does not apply. Applicant’s most recent DUI is temporally recent, and he has not completed his probation. Although Applicant is remorseful for his behavior and has initiated changes in his lifestyle, it would be premature to evaluate his ability to adhere to his stated sobriety plan, or to gauge his potential for success. In 1965 and 2000, Applicant engaged in serious criminal behavior by driving under the influence of alcohol. His 2006 relapse shows he has not learned from his mistakes and cast doubts on his ability to comply with the law and follow rules and regulations. The fact that Applicant did not recognize the Serenity Prayer and stated not having an AA sponsor create doubts as to his progress within the AA program and his rehabilitation. Applicant’s reliability, trustworthiness, judgment, and rehabilitation would be better evaluated after he serves his two year probation.

AG ¶ 23(c) partially applies because he is participating in counseling and seems to be doing well. However, Applicant received counseling after his 2000 DUI and that did not prevent his 2006 DUI relapse. AG ¶¶ 23(b) and (d) fully apply. On balance, however, not enough time has passed since Applicant’s last DUI for his favorable information to show it is unlikely his questionable behavior will not recur.

Under Guideline B (Foreign Influence), the government's concern is that foreign contacts and interests may be a security concern 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 ¶ 6.

AG ¶ 7 sets out conditions that could raise a security concern and may be disqualifying in this case, including:

*(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; \* \* \*, and*

*(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.*

Applicant has a close, intimate relationship with his live-in girlfriend. Because of the closeness of their relationship, G's relatives in Russia and her frequent contact with those relatives are sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. These contacts create a substantial risk of foreign pressure or attempted exploitation because there is the possibility that Russian agents may exploit the opportunity to obtain intelligence, classified, or economic information about the United States. His relationship with G is sufficiently close to raise a security concern about his desire to help G, or to help G help her relatives or the government of Russia by providing sensitive or classified information.

The Government produced substantial evidence raising these two potentially disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the Government.

Three Foreign Influence Mitigating Conditions under Guideline ¶ 8 are potentially applicable to these disqualifying conditions:

*(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; 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.*

After considering the totality of the facts and circumstances in Applicant's case, I conclude that none of the mitigating conditions apply. The evidence shows Applicant has strong feelings of affection for G. She, on the other hand, has a strong feelings and sense of obligation to her mother, and to a lesser extent to her brother and friend in Russia. The closeness of his relationships with G is shown by Applicant living with G and asking her to marry him. G has frequent contacts with her mother and occasional contact with her brother. She sends them presents for birthday and special occasions, and in 2007, G sent her two children to visit her relatives in Russia.

In deciding whether Applicant's family members are in a position to be exploited, I considered Russia's form of government.<sup>11</sup> Russia's government has a poor human rights record and it is plagued with corruption and politically motivated crimes. It has a significant intelligence capability that it retained from the Soviet Union with an aggressive industrial espionage and intelligence collection program targeting sensitive and protected U.S. technology. Russia's government provides other countries with technology and support against U.S. wishes.

Considering the totality of the circumstances, Applicant did not establish it is unlikely he will be placed in a position of having to choose between the interests of his girlfriend or her family and the interests of the United States. There is also an enhanced risk of potential exploitation or influence because of her late father's and brother's service in the Russian Army. Applicant did not meet his burden of showing there is little likelihood that his relationship with G and G's relationship with her family could create a risk for foreign influence or exploitation.

AG ¶ 8(b) partially applies because Applicant is a native born U.S. citizen with a strong relationship and loyalty to the United States. He can be expected to resolve any conflict of interest in favor of the United States' interest. Although this mitigating condition is partially applicable, these facts are insufficient to overcome the security concerns. AG ¶ 8(c) does not apply because G's contact with her mother and brother is not casual or infrequent.

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under AG ¶ 2(a). "Under the whole person concept, the Administrative Judge must not consider and weigh incidents in an applicant's life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant's security eligibility by considering the totality of an

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<sup>11</sup> The focus is not the country or its people. The focus of the analysis is on its rulers and the nature of the government they impose. This approach recognizes that it makes sense to treat each country in accordance with the level of security concern or threat it presents to the United States.

applicant's conduct and circumstances."<sup>12</sup> The directive lists nine adjudicative process factors (factors) which are used for "whole person" analysis. Additionally, other "[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." AG ¶ 2(a). Ultimately, the clearance decision is "an overall common sense determination." AG ¶ 2(c).

Applicant's testimony shows Applicant is a loyal U.S. citizen. There is no evidence he has ever taken any action which could cause potential harm to the United States. He takes pride on his years of military service, and his almost 35 years of working as a civilian on government related contracts.

Considering the totality of the facts and circumstances, including his military service, education, business success, and years of diligent service as a civilian employee, on balance his information is not sufficient to mitigate the alcohol consumption and foreign influence security concerns.

"Because of the extreme sensitivity of security matters, there is a strong presumption against granting a security clearance. Whenever any doubt is raised . . . it is deemed best to err on the side of the government's compelling interest in security by denying or revoking [a] clearance."<sup>13</sup> After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the foreign influence security concerns.

### **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 G:	AGAINST APPLICANT
Subparagraphs 1.a – 1.e	Against Applicant
Subparagraph 1.f	For Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraphs 2.a – 1.b	Against Applicant

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<sup>12</sup> ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)).

<sup>13</sup> *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1990).

**DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

Juan J. Rivera  
Administrative Judge