



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

KEYWORD: Guideline B

DIGEST: Applicant’s choice is to reside in Ukraine (in and of itself, a perfectly valid choice) where he has multiple contacts. Although Ukraine is a friendly country, its current geopolitical circumstances are problematic from a security perspective. Russia, a hostile power, is next door. Russia invaded Ukraine in 2014. It occupies Crimea and other portions of Ukraine. Tensions remain high between these countries. Having invaded once, the possibility exists that Russia may intervene militarily in Ukraine again. Applicant’s relatives in Ukraine could become a means through which Russia or its surrogates exert pressure on him to compromise U.S. protected information. Such geopolitical circumstances warrant a heightened level of scrutiny in analyzing the mitigation evidence. From our review of the record, the evidence is not sufficient to demonstrate that, given the potential for a significant conflict of interest in this case, Applicant’s obligation to the U.S. would necessarily outweigh his ties to wife, stepchild, and mother-in-law in Ukraine. As noted above, any doubt must be resolved in favor of the national security. Favorable Decision is Reserved

CASENO: 19-03991.a2

DATE: 12/14/2021

Date: December 14, 2021

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 In the matter of:)
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 Applicant for Security Clearance)
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ISCR Case No. 19-03991

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Andrea M. Corrales, Esq., Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 10, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On March 18, 2021, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On July 6, 2021, the Appeal Board remanded the decision to the Judge to address Department Counsel’s contention that the “very heavy burden” standard should be applied in analyzing Applicant’s mitigation evidence due to the geopolitical situation in Ukraine. On September 1, 2021, the Judge issued a Decision on Remand in which he again granted Applicant’s request for a security clearance. Department Counsel timely appealed the Decision on Remand.

In the latest appeal, Department Counsel raised the following issue: whether the Judge’s decision is arbitrary, capricious, and contrary to law. Consistent with the following discussion, we reverse the Judge’s decision.

The Judge’s Findings of Fact

Born and educated in the United States, Applicant is in his late twenties. His parents and sibling are native-born U.S. citizens and residents. Applicant studied languages in college. He participated in a seven-month language program in Russia that was funded by the U.S. Government. During that period, he became friends with Russians who were part of this program. Following his graduation from college, Applicant served in the U.S. Peace Corps in the Ukraine for a little over two years. Since leaving the Peace Corps, he has been employed by a defense contractor and is awaiting an assignment in the Ukraine.

Applicant married a little over two years ago. His wife, her child, and her mother are citizens and residents of Ukraine. His wife and her child have no contact with the child’s biological father from whom she is divorced. She is self-employed and is not associated with any Ukrainian businesses. She has never worked for the Ukrainian Government. Applicant’s father-in-law passed away earlier this year. His father-in-law and mother-in-law worked in the performing arts field and have never been employed by the Ukrainian Government or any other government.

Applicant’s wife has never visited the United States, although she intends to apply for a U.S. visa “some years from now.” Decision at 3, quoting from Applicant’s security clearance application (SCA) (GE 4 at 34). Applicant resides with his wife in a small, one-bedroom apartment that she owns. It is worth about \$16,000. She has about \$7,500 in Ukrainian bank accounts. Because Applicant’s prospective supervisor informed him that he will be assigned to another

region in Ukraine if he is granted a security clearance, he and his wife plan to sell her apartment and rent a place in the other region.

Applicant has engaged in freelance employment projects in Ukraine to improve his financial situation. A Ukrainian company invited him for a final job interview but he declined that opportunity because he was pursuing employment with the defense contractor. During a background interview, he indicated he would accept the Ukrainian company's offer if it called him again. In his SCA, Applicant listed that he had close or continuing contact with several Ukrainian and Russian citizens. He met those Ukrainian contacts, who are employed at a Ukrainian state university, while he was serving in the Peace Corps. He cut off contact with his Russian acquaintances and all but two of his Ukrainian acquaintances after becoming aware of the potential security concerns arising from those contacts. His remaining Ukrainian contacts are self-employed. Former Peace Corps colleagues submitted letters praising Applicant "for loyalty, integrity, sincerity, enthusiasm, and his passionate attitude about his service to the United States and the mission of the Peace Corps in Ukraine." Decision at 5.

Applicant maintains close relationships with friends and family in the United States. A college friend has visited him and his wife in Ukraine. Until the imposition of COVID travel restrictions, Applicant regularly traveled to the United States to visit family and friends. He has a ticket to travel to the United States for two weeks in 2022 to attend a wedding and visit family and friends. He is also an active alumnus of a U.S. university and recently received recognition for his participation in a mentorship program.

"The United States attaches great importance to the success of Ukraine as a free and democratic state with a flourishing market economy. The U.S.-Ukraine Charter on Strategic Partnership highlights the importance of the bilateral relationship and continued commitment to the United States to support enhanced engagement between the North Atlantic Treaty Organization (NATO) and Ukraine." Decision at 5. The United States is assisting Ukraine to fully integrate into the Euro-Atlantic community. Both countries belong to a number of the same international organizations. "There is no indication in the administrative notice documents indicating that Ukraine targets the United States for military or economic espionage." Decision at 6.

Since its independence from the Soviet Union in 1991, Ukraine has been undergoing profound political and economic changes as it moves towards a market economy and multiparty democracy. While its first presidential election was marred by governmental intimidation and electoral fraud, its most recent presidential and parliamentary elections were considered free and fair by international observers. Ukraine has significant human rights and police corruption problems.

The Judge's Analysis

The geopolitical situation in Ukraine is much different now than "in 2014 and 2015, when the level of unrest and Russian aggressiveness raised questions about the ability of the Ukrainian government to survive." Decision at 11. The "very heavy burden" mitigation standard does not apply to Ukraine.

Applicant's foreign contacts establish a "heightened risk" of foreign exploitation, inducement, etc., and a potential conflict of interest between his obligation to protect classified information and his desire to help foreign individuals. The evidence establishes Mitigating Condition 8(b), *i.e.*, "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest[.]" Applicant has deep and longstanding relationships and loyalties in the United States. His goal is for his wife and stepson to become U.S. citizens. He has terminated all contacts with Russian citizens and limited his contacts with Ukrainian citizens with the exception of his family members and two friends he met while working in the Peace Corps. Mitigating Condition 8(d), *i.e.*, "the foreign contacts and activities are on U.S. Government business or are approved by the agency head or designee[.]" applies to his Peace Corps involvement in Ukraine but not to his continuing contacts.

Discussion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government produces evidence raising security concerns, an applicant bears the burden of persuasion concerning mitigation. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions "is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Encl 2, App. A ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

In the latest appeal, Department Counsel states that, "although the Government is not appealing the Judge's determination that he would not hold Applicant to a very heavy burden, the onerous facts in this case – an applicant who has embraced life in a country occupied by Russia – creates a clear, present, and ongoing security risk that is not mitigated under any standard." Appeal Brief at 10. Department Counsel appears to be advocating for a *per se* bar to a security clearance under Guideline B. Neither the Judge nor the Appeal Board has the authority to create such a bar under the adjudicative guidelines.¹ *See, e.g.* ISCR Case No. 05-00951 (App. Bd. May 19, 2006) for the proposition that Administrative Judges are bound by agency policy.

¹ In our prior decision in this case, we noted that Department Counsel on appeal was proposing for the first time to apply a standard. As we commented then, ". . . this cannot become a practice in DOHA cases." *See* ISCR Case No. 19-03991 at 2, n.1 (App. Bd. Jul. 6, 2021).

In Guideline B cases, the current geopolitical conditions in a country are relevant considerations that must be brought to bear in making a security clearance determination. *See, e.g.*, ISCR Case No. 11-04980 at 6 (App. Bd. Sep 21. 2012). Furthermore, recent experience has shown that a friendly country in bad circumstances can very quickly become a new place. Developments over the summer in Afghanistan highlight this point. A country with a government that was allied with us fell very quickly, even unexpectedly, leaving an unknown number of persons with ties to the United States in a precarious situation. The Judge's decision alludes to these developments but draws no conclusions from them.

Applicant's choice is to reside in Ukraine (in and of itself, a perfectly valid choice) where he has multiple contacts. Although Ukraine is a friendly country, its current geopolitical circumstances are problematic from a security perspective. Russia, a hostile power, is next door. Russia invaded Ukraine in 2014. It occupies Crimea and other portions of Ukraine. Tensions remain high between these countries. Having invaded once, the possibility exists that Russia may intervene militarily in Ukraine again. Applicant's relatives in Ukraine could become a means through which Russia or its surrogates exert pressure on him to compromise U.S. protected information. Such geopolitical circumstances warrant a heightened level of scrutiny in analyzing the mitigation evidence. *See, e.g.*, ISCR Case No. 12-05092 at 5 (App. Bd. Mar. 22 2017). From our review of the record, the evidence is not sufficient to demonstrate that, given the potential for a significant conflict of interest in this case, Applicant's obligation to the U.S. would necessarily outweigh his ties to wife, stepchild, and mother-in-law in Ukraine. As noted above, any doubt must be resolved in favor of the national security.

Applicant's conduct and character are not an issue in this case. His circumstances create security concerns. Common sense and a knowledge of the ways of the world suggest that even those whose character is unimpeachable could be faced with circumstances that would seriously tempt them to place the safety of loved ones ahead of other competing interests. In this case, the record evidence, when viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard.

Order

The decision is **REVERSED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board