DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

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

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: *Pro se*

09/01/2021

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Decision on Remand

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence), based on Applicant's connections to Ukraine. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on February 26, 2019. On April 20, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline B. The CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR in an undated document and requested a hearing before an administrative judge. On August 17, 2020, he withdrew his request for a hearing

and requested a decision on the written record without a hearing. Department Counsel submitted the Government's written case on October 7, 2020, and sent a complete copy of the file of relevant material (FORM) to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He responded to the FORM on October 16, 2020, and the case was assigned to me on February 25, 2021. On March 18, 2021, I issued my decision granting Applicant's application for a security clearance.

Department Counsel appealed my decision. In her appeal brief, she argued that I erred by failing to apply the "very heavy burden" standard in analyzing Applicant's evidence in mitigation, citing ISCR Case No. 14-02563 at 3 (App. Bd. Aug 28, 2015). The Appeal Board noted that Department Counsel raised the applicability of the "very heavy burden" standard for the first time on appeal, and that she had not asserted that it should be applied in the FORM or her request for administrative notice. Because Department Counsel did not give Applicant or me notice of the Government's position on the issue, the Appeal Board remanded the case on July 6, 2021, and directed me to reopen the record, address the applicability of the "very heavy burden" standard, and issue a new decision in the case.

On August 5, 2021, I notified Applicant of the Appeal Board's decision and requested that he submit any additional evidence and arguments for my consideration within 30 days. He responded on August 9, 2021, and submitted Remand Exhibit (RX) I. On August 10, 2021, I furnished Department Counsel with a copy of RX I and requested that she submit any comments by August 18, 2021. She submitted RX II on August 17, 2021. The record closed on August 18, 2021.

Findings of Fact

For clarity, I have repeated my previous findings of fact in this decision on remand. I adhere to the findings of fact in my previous decision and incorporate them in this remand decision, with the following additions and modifications.

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a-1.f, with explanations, and he denied the allegation in SOR ¶ 1.g. His admissions are incorporated in my findings of fact.

Applicant is a 28-year-old linguist sponsored by a defense contractor for a position in Ukraine. He was born and educated in the United States. His parents and sister are native-born U.S. citizens and residents.

Until the recent COVID travel restrictions were imposed, Applicant regularly returned to the United States to visit family and friends. He maintains close contact with a college friend and former roommate in the United States, who has visited him and his wife in Ukraine.

Applicant lived in Russia from June to December 2014 to participate in a Critical Language Scholarship Program, funded by the U.S. Department of State. During this time, he studied Russian language and literature in a study-abroad program organized by the Council on International Educational Exchange (CIEE) and funded by U.S. sources. He was paired with Russian "partners" during his classes, some of whom became friends.

Applicant graduated from a U.S. college in May 2015, with bachelor's degrees in Spanish and Russian. He served as a U.S. Peace Corps volunteer in Ukraine from September 2016 to November 2018. The Peace Corps is an independent agency in the executive branch of the U.S. Government, and Applicant's participation in the Peace Corps activities in Ukraine was U.S. Government business. He has been employed by a defense contractor since December 2018, awaiting an assignment as a linguist in Ukraine in support of a U.S. Armed Forces multilateral training mission.

Applicant married a citizen and resident of Ukraine in January 2019. He lives in Ukraine with his wife and her 14-year-old son. In his response to the FORM, he stated that he married in June 2019, which apparently is a mistake, because it is inconsistent with his SCA and the counterintelligence screening interview report, which reflect a January 2019 marriage. (FORM Item 4 at 34; Item 5 at 1-2.) His wife's son was born during his wife's previous marriage to a citizen and resident of Ukraine. His wife divorced her first husband when her son was an infant. She and her son have no contact with her son's biological father. (Answer at 8.) His wife's mother, also a citizen and resident of Ukraine, lives across the street from them. (FORM Item 4 at 37-40.) Applicant's father-in-law passed away on April 16, 2021.

Applicant's wife owns an apartment in Ukraine where Applicant and she live, and she has several Ukrainian bank accounts worth about $7,500. Her apartment is a 45-square meter, one-story, one-bedroom apartment worth about $16,000. (FORM Item 5 at 12.) She intends to dispose of it if Applicant receives a security clearance and is eligible to assume his new position.

Applicant's wife has never visited the United States. Although she intends to apply for a U.S. visa, Applicant stated in his SCA that it will be "some years from now."

Applicant's wife works as a freelance translator and is not associated with any Ukrainian business. She has never worked for the Ukrainian government or any foreign intelligence entities. (Answer to SOR at 3.) Before Applicant became acquainted with her, she voluntarily provided translation services for the Peace Corps and received a letter of appreciation for her support. (Answer to SOR at 15-16.)

Applicant's father-in-law and mother-in-law directed a children's folk dance ensemble for 24 years. (FORM Item 4 at 39-40.) They were never employed by the Ukrainian government, any other foreign government, or any foreign intelligence entities. (Answer to SOR at 5-6.)

Applicant's prospective supervisor has informed him that if he receives a clearance and is hired, he will be required to move to another region in Ukraine. Anticipating a favorable clearance decision, he and his wife intend to sell his wife's apartment and rent another apartment in the region where he will be assigned. (Answer at 7.)

During a counterintelligence screening interview in February 2019, Applicant stated that he would like to work for the U.S. Government in Ukraine for about ten years. (Item 5 at 5.) He also told the interviewer that his financial situation was "a perilous one," because he was unemployed and dependent on his parents and his savings for living expenses and student loan payments. (FORM Item 5 at 12.) He has improved his financial situation since the screening interview by working as a freelance translator. As of October 16, 2020, when he responded to the FORM, he had worked as a freelance translator since January 2017 and been paid $5,451 since November 1, 2019; $3,032 since May 1, 2020; $2,376 since August 1, 2020; and $1,685 since October 1, 2020. (FORM Response at 5.) He also had contracted with a U.S.-based museum to work on a project for an honorarium of $2,019. (Attachments to FORM Response.) In his response to the remand, he provided evidence that he had paid off a student loan and increased his assets in the United States by about $8,000. (RX I, Appendices III and IV.)

In Applicant's SCA, he disclosed that he received a job offer in January 2019 from a Ukrainian company. The job involved customer support and consulting in "virtual data rooms." He stated that he was never "technically offered" a position, but was invited for a final candidacy interview. He declined the interview because he was pursuing employment with a defense contractor. (FORM Item 4 at 77.) In his response to the FORM, he stated that the Ukrainian company offered him an annual salary of $27,600, which he states is "astronomical" by Ukrainian standards. He stated that he rejected the offer in order to accept his current position with a defense contractor, realizing that there was no guarantee that he would be granted a security clearance. (FORM Response at 4.) During the counterintelligence screening interview in February 2019, he told the interviewer that he had been interviewed by the Ukrainian company and had declined a second interview in order to attend the screening interview. He also told the interviewer that if the Ukrainian company called him again, he would accept its offer. (FORM Item 5 at 9.)

When Applicant submitted his SCA, he listed several citizens of Ukraine and Russia in the section asking, "Do you have, or have you had, close and/or continuing contact with a foreign national within the last seven (7) years with whom you or your spouse . . . are bound by affection influence, common interest, and/or obligation?" In his response to the FORM, he described his current relationships with his Ukrainian and Russian contacts. Except for his wife, stepson, and in-laws, all of his Ukrainian contacts were related to his service in the Peace Corps and employed by a Ukrainian state university. As such, they were employees of the Ukrainian Minister of Education and Science. After learning that they raised security concerns, he cut off contact with all of his Russian contacts and all but two Ukrainian contacts. (FORM Response at 6-9). One of these two Ukrainian contacts is now a freelance web developer and the other is a self-employed illustrator. (FORM Item 4 at 44, 49.) The information about Applicant's

Ukrainian and Russian contacts is summarized in Appendix A, attached to my previous decision. Two of Applicant's Ukrainian contacts who are former Peace Corps colleagues (identified in Appendix A of my March 2021 decision as "AO" and "LK") left Ukraine and now reside in Germany. They are unable to leave Germany due to COVID restrictions. Applicant believes that they intend to seek Canadian citizenship and do not intend to return to Ukraine.

Two of Applicant's former colleagues in the Peace Corps submitted letters lauding him for his loyalty, integrity, sincerity, enthusiasm, and his passionate attitude about his service to the United States and the mission of the Peace Corps in Ukraine. One of his colleagues was impressed by the way Applicant handled a situation reflecting the endemic corruption in the Ukrainian education system. Applicant and several other Peace Corps volunteers had offered to serve as judges in a yearly Olympiad for Ukrainian students. When Ukrainian officials refused to correct a mistake in scoring, Applicant pulled all the Peace Corps volunteers out of judging the competition and did so in a way that did not damage the relations between the Peace Corps and the Ukrainian Ministry of Education and Science. (Attachments to FORM Response.)

At the request of Department Counsel and without objection by Applicant, I have taken administrative notice of relevant facts about Ukraine. I also have taken administrative notice on my own motion, without objection from either party, of the facts set out in the U.S. Department of State document, "U.S. Relations with Ukraine, Bilateral Relations Fact Sheet, dated December 18, 2020 (www.state.gov/u-s-relations-with-ukraine). The facts administratively noticed are set out below.

The United States established diplomatic relations with Ukraine in 1991, following its independence from the Soviet Union. 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 continue commitment of the United States to support enhanced engagement between the North Atlantic Treaty Organization (NATO) and Ukraine.

Ukraine has had a parliamentary-presidential type of government since becoming independent of the Soviet Union in 1991. It is undergoing profound political and economic change as it moves toward a market economy and multiparty democracy. Presidential elections in December 1991 were marred by government intimidation and electoral fraud. The presidential election in 2005 and local elections in March 2006 were markedly fairer. The presidential election in April 2018 and the parliamentary elections in July 2018 were considered free and fair by international and domestic observers.

Ukraine has significant human rights problems. Torture, arbitrary detention of persons critical of the government, and warrantless violations of privacy are illegal but common. Ukraine has substantial problems with the independence of the judiciary and widespread government corruption. The Ukrainian government generally fails to adequately investigate or take steps to prosecute or punish officials who commit human rights abuses, resulting in a climate of impunity.

U.S. Government assistance to Ukraine aims to support the development of a secure, democratic, prosperous, and free Ukraine, fully integrated into the Euro-Atlantic community. The United States has granted Ukraine market-economy status and given Ukraine permanent normal-trade-relations status. The United States and Ukraine have a bilateral investment treaty. The U.S-Ukraine Council on Trade and Investment has worked to increase commercial and investment opportunities by identifying and removing impediments to bilateral and investment flows.

Ukraine and the United States belong to a number of the same international organizations, including the United Nations, Organization for Security and Cooperation in Europe, International Monetary Fund, World Bank, World Trade Organization, and Euro-Atlantic Partnership Council. There is no indication in the administrative notice documents indicating that Ukraine targets the United States for military or economic espionage.

In my original decision I took administrative notice of the facts in the U.S. Department of State Travel Advisory dated August 24, 2020, which was included in the FORM. The Department of State issued a Level 3 Travel Advisory for Ukraine (reconsider travel) due to COVID, crime, and civil unrest. The travel advisory noted that crime targeting foreigners and property is common; that demonstrations, which have turned violent at times, regularly occur throughout Ukraine; that politically targeted assassinations and bombings have occurred; and that there were reports of violent attacks on minority groups and police by radical groups. The same travel advisory published Level 4 ("do not travel") warning for areas in Ukraine occupied by Russian authorities. The U.S. government prohibits its employees from traveling to Crimea or regions controlled by the Russians.

In this remand decision, I have also taken administrative notice of the facts set out in the U.S. Department of State Travel Advisory dated July 26, 2021, which was cited by Department Counsel RX II at 3 and Item II. The July 2021 travel advisory superseded the August 2020 Level 3 travel advisory ("reconsider travel"), which was applicable when my March 2021 decision was issued. The July 2021 travel advisory published a Level 2 advisory (exercise caution) for Ukraine, based on COVID, crime, and civil unrest, and published a separate Level 4 advisory ("do not travel") for Crimea and the Russian-occupied areas in eastern Ukraine.

Applicant is an active alumnus of the U.S. university from which he graduated in May 2015. He has been active in the university's alumni mentor program. In August 2021, he was nominated for "Mentor Spotlight" recognition for his "incredible work" with the mentor program. (RX I, Appendix II.)

Applicant maintains close relationships with his family and friends in the United States. He has purchased an airline ticket to attend his sister's wedding in the United States in May 2022, to visit a close friend who was the best man at his wedding, and to spend two weeks with his parent. (RX I, Appendix I.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition,

and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

Analysis

Guideline B, Foreign Influence

The SOR alleges that Applicant's spouse, stepson, father-in-law, and mother-in-law are citizens and residents of Ukraine (SOR ¶¶ 1.a-1.d) and that that his spouse owns an apartment in Ukraine (SOR ¶ 1.e). It also alleges that he has numerous foreign contacts who are Ukrainian nationals (SOR ¶ 1.f) and numerous foreign contacts who are Russian nationals. (SOR ¶ 1.g).

The security concern under this guideline is set out in AG ¶ 6:

> Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual maybe manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

The following disqualifying conditions under this guideline are relevant:

> AG ¶ 7(a): contact, regardless of method, 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;

> 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 classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology;

> AG ¶ 7(e): shared 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; and
>
> AG ¶ 7(f): substantial business, financial, or property interests in a foreign country, or in any foreign owned or foreign-operated business that could subject the individual to a heightened risk of foreign influence or exploitation or personal conflict of interest.

"[T]he nature of the foreign government involved and the intelligence-gathering history of that government are among the important considerations that provide context for the other record evidence and must be brought to bear on the Judge's ultimate conclusions in the case. The country's human rights record is another important consideration." ISCR Case No. 16-02435 at 3 (May 15, 2018).

When family ties are involved, the totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). "[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002); *see also* ISCR Case No. 09-06457 at 4 (App. Bd. May 16, 2011). Applicant has not rebutted this presumption.

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." ISCR Case No. 02-11570 at 5 (App. Bd. 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." ISCR Case No. 00-0317 (App. Bd. Mar. 29, 2002). 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 United States, and its human-rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. *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).

AG ¶¶ 7(a), 7(e) and 7(f) 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 greater than the normal risk inherent in having a family member living under a foreign government. *See, e.g.*, ISCR Case No. 12-05839 at 4 (App. Bd. Jul. 11, 2013). "Heightened risk" is not a high standard. *See, e.g.*, ISCR Case No.17-03026 at 5 (App. Bd. Jan. 16, 2019). It is a level of risk one step above a State Department Level 1 travel advisory ("exercise normal precaution") and equivalent to the level 2 advisory ("exercise increased caution") currently in effect for Ukraine.

AG ¶¶ 7(a) and 7(e) are established. Ukraine is a friendly country and the recipient of substantial assistance from the United States in economic and military matters. It does not have a history of targeting the United States for economic or military information. Nevertheless, Ukraine's civil unrest, domestic violence, crimes against foreigners, government corruption, significant human-rights violations, and the presence of nearby Russian occupying forces are sufficient to meet the low standard of "heightened risk." The "heightened risk" was recognized in the U.S. State Department Level 3 Travel Advisory (reconsider travel) in July 2020, which was in effect when my March 2021 decision was issued. The August 2021 Level 2 advisory (exercise increased caution) reflects increased stability in Ukraine but did not lower the level of risk below the "heightened risk" contemplated by this disqualifying condition.

AG ¶ 7(b) is established. The same factors that establish a "heightened risk" are sufficient to establish a potential risk of a conflict of interest.

AG ¶ 7(f) is not established. Applicant has no significant assets in Ukraine. His wife's modest apartment is of nominal value, and she intends to dispose of it. Her plans to dispose of the apartment have stalled because of the uncertainty about Applicant's ability to accept his new assignment.

The following mitigating conditions are potentially applicable:

> 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 United States;
>
> AG ¶ 8(b): 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;

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; and

AG ¶ 8(d): the foreign contacts and activities are on U.S. Government business or are approved by the agency head or designee.

Department Counsel asserts that the geopolitical situation in Ukraine is the equivalent of the situation in a hostile country, requiring the application of the "very heavy burden" standard to Applicant's mitigating evidence. She cited ISCR Case No. 14-02563 (App. Bd. Aug 28, 2015) in support of her assertion, and the Appeal Board noted its decision in ISCR Case No. 12-05092 (App. Bd. Mar. 22, 2017).

The Appeal Board decisions in these two cases are of reduced relevance because they were based on facts that have changed significantly. In both cases, an administrative judge denied a clearance to an applicant with family in Ukraine because of the geopolitical situation in 2014-2015, when the level of civil unrest and Russian aggressiveness raised questions about the ability of the Ukrainian government to survive. The administrative judge in ISCR Case No. 12-05092 commented: "Of significant note is the State Department's current warning against travel to Ukraine, a country that is essentially in the midst of a civil war where separatist forces are backed by a hostile foreign power. This significant change puts this close familial connection in a different light, requiring a heightened level of scrutiny." The current situation in Ukraine is not a Level 4 ("do not travel") situation; it is a Level 2 ("exercise increased caution) situation. Whether a foreign country is hostile to the United States is determined by the executive branch, not by judicial decisions. In this case the U.S. Department of State has recognized the division of Ukraine into safe and unsafe areas by issuing a two-part advisory, announcing a Level 2 situation for Ukraine and a separate Level 4 situation for Crimea and Russian-occupied areas of eastern Ukraine.

The Appeal Board decision in ISCR Case No. 19-01689 (App. Bd. Jun. 8, 2020) upheld an administrative judge's decision to grant a clearance to an applicant with ties to Afghanistan, until recently a friendly country, and declined to apply the "very heavy burden" to the applicant's evidence in mitigation. The decision is instructive for two reasons. First, it demonstrates how quickly the geopolitical situation in a country can change; and second, it articulates the factors to be considered in determining when the "very heavy burden" should apply The Appeal Board declined to apply the "very heavy burden" based solely on conditions in Afghanistan, such as terrorism, unrest, and instability, without consideration of actions taken by the Afghan Government. The Appeal board noted that Department Counsel had failed to show that the Afghan Government's interests are adverse to U.S. interests, that it has established policies or taken actions that threaten U.S. national security, or that it is involved in any form of espionage against the United States. Based on this guidance, I have concluded that the "very heavy burden" should not apply to Ukraine, because it would be inconsistent with the U.S. State Department's current assessment of the geopolitical situation in Ukraine.

My findings regarding the mitigating conditions in this case are as follows:

AG ¶ 8(a) is not established, for the reasons set out in the above discussion of AG ¶¶ 7(a), 7(b), and 7(e).

AG ¶ 8(b) is established. Applicant's loyalty to his wife, stepson, and mother in-law is not minimal. He lives with them in Ukraine because of his assignment as a linguist and not due to a preference for Ukraine over the United States. He has deep and longstanding relationships and loyalties in the United States. His parents and sister are native-born U.S. citizens and residents. He maintains contact with close friends from his college days, who live in the United States. He volunteered to serve with the Peace Corps in Ukraine to promote the values of the United States. Until the COVID travel restrictions were imposed, he frequently returned to the United States to visit family and friends. He has not sought Ukrainian citizenship. To the contrary, his goal is for his wife and stepson to move to the United States and become U.S. citizens.

AG ¶ 8(c) is not established. Applicant has terminated all his contacts with Russian citizens, which began while he was a student in Russia. He has terminated all his contacts with Ukrainian citizens, except for his wife, stepson, and mother-in-law, and two longtime friends that he met while working for the Peace Corps. His two Ukrainian friends no longer reside in Ukraine and do not intend to return. However, his contacts with his wife, stepson, and mother-in-law are not infrequent or casual.

AG ¶ 8(d) is established for Applicant's Peace Corps involvement in Ukraine, which was U.S. Government business. It is not established for Applicant's participation in the study of the Russian language or his continued contact with his wife, stepson, in-laws, or two Ukrainian friends.

Whole-Person Concept

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. In applying the whole-person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

> (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.

I have incorporated my comments under Guideline B in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his connections to Ukraine.

Formal Findings

I have reopened the record in accordance with the Appeal Board mandate, and I have adhered to my previous findings, which are as follows:

Paragraph 1, Guideline B (Foreign Influence): FOR APPLICANT

Subparagraphs 1.a-1.g: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge