



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



In the matter of:)
)
) ADP Case No. 06-13134
)
)
Applicant for Public Trust Position)

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: *Pro Se*

April 30, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the concerns raised by his foreign preference and foreign influence. Eligibility for access to sensitive information is granted.

On December 19, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline C, Foreign Preference and Guideline B, Foreign Influence. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on January 22, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on February 25, 2008. DOHA issued a Notice of Hearing on March 14, 2008. I convened the hearing as scheduled on April 9, 2008. The Government offered exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified on his own behalf, and submitted

Exhibits (AE) A through E, which were received without objection. DOHA received the transcript of the hearing (Tr.) on April 18, 2008.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Russia and Ukraine. Applicant did not object. The request and the attached documents were not admitted into evidence but were included in the record as Hearing Exhibits (HE) I through XV. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

Applicant is 29 years old. He was born in Russia. He came to the United States in 1997 and became a U.S. citizen in 2004. He is married with three children, ages seven, five, and three years old. All his children were born in the U.S. His wife is pregnant with their fourth child. He has an associate's degree from an American college.¹

Applicant's parents were born in Russia. They are both 66 years old. They brought Applicant and his three brothers to the U.S. in 1997, when he was 19 years old, and were accepted as refugees because of religious persecution. His parents both became U.S. citizens and reside in the U.S. His three brothers are also U.S. citizens and residents. His family members have not formally applied to renounce their Russian citizenship. His grandparents are deceased. He has some extended family in Russia, but he has not had any contact with them since his trip there in 2006.²

Applicant's wife was born in Ukraine. She came to the U.S. in 1995. She became a U.S. citizen in 2004. Her parents live in the U.S. as permanent residents. She has seven brothers and sisters. They all now live in the United States. Six of her siblings are U.S. citizens. One sibling is a permanent resident.³

Applicant had a Russian passport that was issued in 2002. He traveled to Russia in 2003, before he became a U.S. citizen, to obtain dental work. As a Russian citizen it was much less than he would have paid in the U.S. He spent about three weeks in Russia on that trip. He continued to possess the passport after he became a U.S. citizen. He used the Russian passport during a 2006 trip to enter and exit Russia. With a Russian passport, Applicant saved the cost of a visa to enter Russia. He visited Ukraine on the same trip and used his U.S. passport to enter and exit Ukraine. The

¹ Tr. at 26-29, 53; GE 1-3.

² Tr. at 26, 35-37, 42, 55; Applicant's response to SOR; GE 1, 3.

³ Tr. at 29 53-56; Applicant's response to SOR; GE 1, 3.

passport expired in 2007. He has no intention to renew the passport or obtain another Russian passport. He is willing to renounce his Russian citizenship.⁴

Applicant is very highly regarded by his current employer. He is described as an exemplary employee of the highest caliber, dependable, hard working, punctual, polite, dedicated, intelligent and ethical. His performance appraisals were very positive. The general manager of where he worked from 1998 to 2005, wrote that Applicant was promoted three times during his employment and that he was an extremely valuable asset because of his loyalty, work ethic, and cheerful demeanor. He was recommended "for any position where integrity and trust are required."⁵

The Russian Federation

The Russian Federation is composed of 21 republics. The Government consists of a strong president, a prime minister, a bicameral legislature and a weak judiciary. It is a vast and diverse country with a population of 142 million people. It achieved independence with the dissolution of the Soviet Union on August 24, 1991. It is a nuclear superpower that continues to develop politically, socially, and economically.

The threat of terrorism in Russia continues to be significant. Travel in the areas in the vicinity of Chechnya may be dangerous, despite Russian efforts to suppress the terrorists. Acts of terrorism include taking hostages and bombings.

Russia has recognized the legitimacy of international human rights standards, but human rights abuses continue. Both Russian federal forces and Chechen rebel forces act with impunity while engaging in torture, summary executions, disappearances, and arbitrary detentions. Additional problems include corruption, media suppression, life-threatening prison conditions, and corruption in law enforcement.

The Russian Federation's intelligence capability is significant and focuses on collection of information from the United States. As of 2005, Russia and China were the two most aggressive collectors of sensitive and protected U.S. technology and accounted for the majority of such targeting. Russia also provides technologies which could be used in the construction of weapons of mass destruction and missiles to other countries. It is a leading arms exporter, with major sales of advanced weapons and military-related technology to China, India, Iran, and Venezuela.

U.S. citizens who have at one time held Russian citizenship may be required to renounce Russian citizenship before applying for a Russian visa in their U.S. passport. Unless a Russian citizen has formally renounced his or her Russian citizenship, he or she risks being considered a Russian citizen and not allowed to depart except on a Russian passport.

⁴ Tr. at 31-33, 47, 51-52; Applicant's response to SOR; GE 1-4.

⁵ AE A-E.

Ukraine

Ukraine has 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. After the first free elections in December 1991, presidential elections were marred by government intimidation and electoral fraud. Subsequent parliamentary and local elections in 2006 and 2007 were in line with international standards. Ukraine has significant human rights problems. Even though prohibited by law, there have been instances of torture, arbitrary detention of persons critical of the government, and warrantless violations of privacy.

Ukraine inherited a military force of 780,000 from the Soviet Union, and is seeking to modernize with an eye toward achieving NATO standards. Ukraine participates in six United Nation peacekeeping missions and has a small number of troops serving in supporting roles with Coalition forces in Iraq.

Ukraine's foreign policy goals include membership in the World Trade Organization, the European Union, and the North Atlantic Treaty Organization. Ukraine has peaceful and constructive relations with its neighbors. Relations with Russia are difficult and complex, however, due to differing foreign policy priorities in the region, energy dependence, payment arrears, disagreement over stationing of Russian military forces, and some boundary disputes.

President Bush visited Ukraine on April 1, 2008. He praised Ukraine's democratic and military reforms and noted that Ukraine is the only non-NATO country supporting every NATO mission. He announced that the United States strongly supported Ukraine's request to join NATO.⁶

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "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." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an Applicant's suitability for a public trust position, the Administrative Judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the

⁶ I take administrative notice of this paragraph independent of the Government's request.

complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

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. The Government reposes a high degree of trust and confidence in 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 protect or 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.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline C, Foreign Preference

The security concern relating to the guideline for Foreign Preference is set out in AG ¶ 9:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

The guideline notes several conditions that could raise security concerns under AG ¶ 10. Two are potentially applicable in this case:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport;

(3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;

(b) action to acquire or obtain recognition of a foreign citizenship by an American citizen.

Applicant traveled to Russia in 2003 to obtain dental work. This occurred before he became a U.S. citizen. That action does not raise a disqualifying condition. He possessed and used a Russian passport while a U.S. citizen. The passport expired in 2007. This raises AG ¶ 10(a) as a concern. The use of the Russian passport while a U.S. citizen could also raise a concern under AG ¶ 10(b), as an action to obtain recognition of his Russian citizenship.

Conditions that could mitigate Foreign Preference security concerns are provided under AG ¶ 11, including:

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

(d) use of a foreign passport is approved by the cognizant security authority; and

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

Russia may continue to consider Applicant a Russian citizen until he formally renounces his Russian citizenship. AG ¶ 11(a) does not totally apply because he actively exercised his Russian citizenship after becoming a U.S. citizen. AG ¶ 11(b) is applicable because he expressed a willingness to renounce his Russian citizenship. The passport is expired and Applicant does not intend to renew it or obtain another one. AG ¶ 11(e) is applicable.

Guideline B, Foreign Influence

The security concern relating to the guideline for Foreign Influence is set out in AG ¶ 7:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. Three are potentially applicable in this case:

- (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;
- (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's parents, siblings, and six of his wife's seven siblings are U.S. citizens and residents. They may also be considered citizens of Russia or Ukraine because they have not formally renounced their former citizenships. His wife's parents and one of her siblings are not U.S. citizens, but live here as permanent residents.⁷ I find the connection that Applicant's family has with their former countries is minimally sufficient to create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion, or raise a potential conflict of interest. AG ¶¶ 7(a) and (b) have been raised by the evidence.

Conditions that could mitigate Foreign Influence security concerns are provided under AG ¶ 8. The following is potentially applicable:

⁷ The citizenship of Applicant's parents-in-law was not raised in the SOR, and is therefore not considered for disqualifying purposes, but will be considered when analyzing the whole person.

(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.

Almost all of Applicant and his wife's family are now U.S. citizens and residents. The few remaining who are not yet citizens are permanent residents. I find that it is extremely unlikely Applicant 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(a) is applicable.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a public trust position by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) 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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case and I considered the totality of Applicant's ties to Russia and Ukraine. Applicant was born in Russia. His entire family came to the U.S. in 1997 as refugees because of religious persecution. His parents and three brothers all became U.S. citizens and reside in the United States, but they have not formally applied to renounce their Russian citizenship. His wife came to the U.S. in 1995. She became a U.S. citizen in 2004. Her parents live in the U.S. as permanent residents. Her seven brothers and sisters live in the United States and all are U.S. citizens, except for one sibling who is a permanent resident. Applicant used a Russian passport to enter Russia after becoming a U.S. citizen. The passport has expired and he does not intend to renew it or obtain another one. He is willing to renounce his Russian citizenship.

I considered the nature of the governments of Russia and Ukraine. Both countries have human rights issues and Russia has been victimized by terrorism and is known to conduct intelligence operations against the United States. Ukraine is moving

closer to obtaining NATO status. However, 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."⁸ The distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly. Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly 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 U.S. Also very important is whether the foreign country is associated with a risk of terrorism.

Most of Applicant and his wife's family are now U.S. citizens; the remaining are permanent residents. His future clearly lies in the U.S. He and his wife have three children born in the U.S. and another on the way. He is a valued and trusted employee. The potential for pressure, coercion, exploitation, or duress based upon Applicant's remaining ties to Russia and Ukraine are insufficient to raise a trustworthiness concern.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has mitigated the trustworthiness concerns arising from his Foreign Preference and Foreign Influence.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline C:	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 2.a-2.e:	For Applicant

⁸ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

Edward W. Loughran
Administrative Judge