



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



In the matter of:)	
)	
-----)	ADP Case No. 06-13316
SSN: -----)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Paul M. DeLaney, Esquire, Department Counsel
For Applicant: *Pro Se*

April 1, 2008

Decision

MOGUL, Martin H., Administrative Judge:

Applicant submitted two Questionnaires for Public Trust Position (SF 85P) on January 27, 2003, and April 15, 2005. On October 30, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guidelines C and B for Applicant. 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 Jan. 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 responded to the SOR (RSOR) in writing on November 16, 2007, and requested a decision by an Administrative Judge on the written record in lieu of a hearing. The case was assigned to this Administrative Judge on March 20, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

On January 30, 2008, Department Counsel prepared the Department's written case. A complete copy of the file of relevant material (FORM) was provided to Applicant, and she was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. A response was due on March 20, 2008.

In the FORM, Department Counsel offered 11 documentary exhibits (Items 1-11). Applicant timely submitted an additional document that has been identified and entered into evidence without objection as Item A.

Request for Administrative Notice

In the FORM, Department Counsel submitted a request that I take administrative notice of certain facts relating to the country of Russia. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In the SOR, the Government alleges concern under Adjudicative Guideline C (Foreign Preference (FP)) and B (Foreign Influence (FI)) of the Directive. The SOR contains 1 allegation, 1.a., under Guideline C and four allegations, 2.a, through 2.d., under Guideline B. In her RSOR, Applicant admitted SOR allegations 2.a, through 2.d. She denied allegation 1.a. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the FORM, the admitted documents, and upon due consideration of that evidence, I make the following additional findings of fact:

Applicant is 38 years old, and was born in the Soviet Union (now Russia). She moved to the United States in 1998, and she became a naturalized United States citizen in 2004. She remains a dual citizen of Russia and the United States, but she indicated in an affidavit that she executed in January 2007 (Item 9) that she is willing to renounce her Russian citizenship, if it is required for her current position. Applicant is married, and her husband is also a dual citizen of Russia and the United States. Applicant and her husband have two children, one of whom was born in Russia, and is a Russian citizen, and the other in the United States.

Applicant attended medical school in Russia from 1988 to 1993, and she was a practicing physician before moving to the United States.

Applicant is currently a Software Developer for a defense contractor who seeks an ADP-I/II/III position on her behalf.

Current Status of Russia

I take administrative notice of the following facts regarding Russia. Currently, Russia consists of a strong president, a prime minister, a bicameral legislature, and a

weak judiciary. Russia in a nuclear superpower that, since the dissolution of the Soviet Union, continues to develop politically, socially, and economically.

Russia has an active, recent and ongoing collection program targeting the United States. As of 2005, Russia and China were the most aggressive collectors of sensitive and protected U.S. technology and accounted for the majority of such targeting. Russia's collection efforts targeting the United States likely will continue and will focus on obtaining commercial or dual-use technology.

Finally, Russia's internal problems include terrorism and a problematic human rights record. United States citizens, who are former Russian citizens, may be viewed in Russia as Russian citizens and not be allowed to leave Russia except on a Russian passport.

Paragraph 1 (Guideline C - Foreign Preference)

1.a. It is alleged in the SOR that Applicant possessed a Russian passport, that was issued on April 29, 2003, and is not scheduled to expire until April 29, 2008. In her RSOR (Item 3). Applicant stated that she had "surrendered (her) passport to the company's facility security officer." Additionally, she submitted a letter dated March 6, 2008, (Item A) in which her employer's Security Facility Officer (FSO) wrote that Applicant surrendered her Russian passport to her on November 6, 2007, and it is being kept "in the personnel file of [Applicant] under lock and key." She added that "if there should be any change to the Status of where this passport is being held, it will be reported immediately to the Department of Defense."

Paragraph 2 (Guideline B - Foreign Influence)

2.a. Applicant's mother is a citizen of Russia, and she resides with Applicant in the United States. Applicant has no brothers or sisters, and her father is deceased.

2.b. Applicant's grandmother is a citizen and resident of Russia. In an Affidavit made and signed by Applicant on July 8, 2003, (Item 10) she stated that she has contact with her grandmother one time every two weeks. That is the only evidence in the file about Applicant's relationship with her grandmother.

2.c. Applicant intends to visit her grandmother in Russia in the future.

2.d. Applicant traveled to Russia in 2003 to visit her relatives that lived there.

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 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

Under AG ¶ 9 the security concern involving foreign preference arises, “[W]hen 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.”

Applicant’s application and receipt of a Russian passport raises foreign preference concerns under Disqualifying Condition DC 10 (a), the exercise of the privilege of foreign citizenship.

However, Applicant did invalidate her foreign passport, by turning it over to her FSO, who maintains it in the company safe. Additionally, she has indicated a willingness to renounce her Russian citizenship to the proper authorities, Therefore, I find that Mitigating Conditions (MC) (b) and (e) under this guideline apply to this case. After considering all of the evidence of record on Guideline C, I conclude that the mitigating evidence substantially outweighs the disqualifying evidence.

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding foreign influence:

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.

Based on the evidence of record, the Government has established an initial reason to deny Applicant a security clearance because of Guideline B (Foreign Influence). Applicant’s mother and grandmother are citizens of Russia, and her grandmother resides in Russia, which could create the potential for foreign influence that could result in the compromise of classified information because it makes Applicant potentially vulnerable to coercion, exploitation, or pressure. The possession of such ties raises a security concern sufficient to require Applicant to present evidence in rebuttal, extenuation, or mitigation sufficient to meet her burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for her.

In reviewing the Disqualifying Conditions (DC) I find that DC 7 (a) applies, contact with foreign family members, who are citizens and residents in a foreign country, if that contact creates heightened risk of foreign exploitation, pressure or coercion. Since Applicant’s mother resides with her in the United States, I do not find it

security significant that she continues to be a Russian citizen. However, Applicants's grandmother continues to reside in Russia. The only information that can be ascertained about Applicant's relationship with her grandmother is that Applicant visited her in 2003, and she intends to visit her again in Russia in the future. Also, as of 2003, Applicant contacted her grandmother one time a week.

I can not find that any MC applies in this case under Guideline B, since there simply has been insufficient evidence introduced to make a determination of the nature of the relationship of Applicant with her grandmother, or to determine Applicant's relationships and loyalties with the United States compared to her sense of loyalty or obligation to her grandmother.

Accordingly, I find Guideline B against Applicant.

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 commonsense 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.

Overall, the record evidence is insufficient to make a favorable finding as to Applicant's eligibility and suitability for a public trust position under the whole person concept. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns arising from her 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
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Martin H. Mogul
Administrative Judge