



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



In the matter of:)	
)	
-----)	ISCR Case No. 12-05575
)	
Applicant for Security Clearance)	

Appearances

For Government: Christopher N. Morin, Esquire, Department Counsel
For Applicant: Brendan M. Lill, Esquire

06/10/2013

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On September 4, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under Guideline B (Foreign Influence) and Guideline C (Foreign Preference). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In a September 25, 2012, response to the SOR, Applicant admitted all allegations, provided narrative explanations regarding the allegations, and requested a hearing based on the administrative record. Government counsel converted the case to a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on February 7, 2013. The parties agreed to a hearing date of March 21, 2013. A notice to that effect was issued on February 15, 2013. The hearing was convened as scheduled.

At the beginning of the hearing, the Government moved to withdraw the allegation under Guideline C in light of evidence provided in response to the SOR

before the hearing.¹ Absent any objection, that motion was granted and Guideline C security concerns were struck from the SOR. Applicant gave testimony and offered seven documents, which were accepted into the record without objection as exhibits (Exs.) A-G. Department Counsel introduced two exhibits, which were accepted without objection as Exs. 1-2. The transcript of the proceeding (Tr.) was received on April 2, 2013, and the record was closed. Based upon a thorough review of the exhibits and testimony, security clearance is granted.

Request for Administrative Notice

During the hearing, both Applicant and the Government introduced hearing exhibits (HE) constituting requests for administrative notice regarding the country at issue (Ukraine). They were accepted into the record as Applicant's HE A and Government HE 1. The facts administratively noticed are set out below.

Findings of Fact

Applicant is a 51-year-old manager who has worked for her present employer, a defense contractor, for about seven years. At work, she is considered to be a highly reliable, trustworthy, and effective employee. She has been married for 28 years and raised two children.

Born in the Ukraine, Applicant moved to another eastern European country in the 1990s when her husband accepted a job there.² While abroad, Applicant was a housewife tending to the rearing of the couples' children. The family moved to another country for a brief period before returning to the Ukraine briefly in the late 1990s. In 2000, the family moved to the United States when Applicant's husband accepted a collegiate research position. Applicant devoted herself to learning English in order to become an effective parent and to help her look for work. She also completed certificate training and received multiple certifications in her current field. Meanwhile, her children attended the local public schools.

Applicant, her husband, and their children became U.S. citizens in the late 2000s. When they became U.S. citizens, they expressly renounced their foreign citizenship in favor of complete loyalty to the United States.³ The Ukrainian passports of Applicant and her family were physically returned to a representative of the Ukraine at that country's embassy, where the documents were destroyed.⁴ Since becoming a U.S.

¹ Tr. 10-11.

² Neither Applicant nor her husband performed military service in the Ukraine.

³ In addition, Applicant sought and received official renunciation of her Ukrainian citizenship from the Ukrainian government. She did so after the family decided to never return to the Ukraine, preferring to stay permanently in the United States. Her renunciation request was approved in 2012. Ex. D (Certificate, dated Oct. 10, 2012); Tr. 49-50.

⁴ Tr. 51; Ex. E (Letter).

citizen, Applicant has voted in U.S. elections. She intends to remain in the United States.

For eight years, Applicant and her family have lived in the same home. They own the house, which is their only residence. Their sole debt is the mortgage on the house. They live within their means and contribute the maximum sums permitted to their retirement accounts. Applicant and her family members are each financially secure, including Applicant's children, who are now college educated and gainfully employed. The children do not have contacts in the Ukraine.⁵ Like their parents, they consider the United States to be their home.

Applicant is not a member of any domestic or foreign organizations involving the Ukraine. She has never had any work related to the Ukrainian military or government. She was never politically active while living in the Ukraine. Neither Applicant nor her husband have any ownership interests, financial holdings, savings, or other economic ties in the Ukraine. Rather, they maintain retirement, savings, and checking accounts in the United States. Applicant has visited the Ukraine four times since coming to the United States in 2000. Two trips were as a tourist, while the other two trips were for her parents' funerals.⁶ Each trip lasted about two weeks. She is devoted to her work and is proud to be an American. Her allegiance lies solely with the United States.⁷

Remaining in the Ukraine are Applicant's sister, brother-in-law, and niece, all of whom are citizens and residents of the Ukraine. Applicant's sister is a physician. She does not work for the Ukrainian government. She and her husband, a private sector bus driver, have been married for nearly 30 years, are affluent, and well-traveled. They have no financial issues and are presently preparing to retire. None of these relatives have served in a foreign military. Their family and Applicant's family exchange gifts on various occasions. Sometimes, Applicant's gifts to her sister have been in the form of cash or a check, ranging in amounts from under a few hundred dollars to as much as a thousand dollars in a given year. The sisters converse about three times a month via Skype, often about family medical issues. Applicant's sister's daughter is 28 years old, single, and lives in another part of the Ukraine, where she manages a private clinic. Applicant speaks or emails with her about once every month or every other month.

Applicant also has two female friends in the Ukraine with whom she maintains contact. They are citizens and residents of the Ukraine. Applicant has been friends with one of the women, whom she met in college, for over 30 years. She works with public school students. At most, Applicant and this friend communicate about twice a month. They exchange gifts on special occasions. Applicant has known the other woman for 40

⁵ Tr. 46.

⁶ Neither parent ever worked for the Ukrainian government. Tr. 58-59.

⁷ Tr. 93.

years, having met her in middle school. That woman is a private sector engineer. They have telephonic contact on birthdays and some holidays. The gifts exchanged with these women are nominal.

Current Status of the Ukraine

I take administrative notice of the following facts regarding the Ukraine. The Ukraine has existed as an independent state for just over 20 years. During that time, it has moved to transition to a democratic society. It is ruled by a presidential-parliamentary form of government. In 2008, the United States signed the U.S.-Ukraine Charter on Strategic Partnership, which highlights the importance of the bilateral relationship and outlines enhanced cooperation in the areas of defense, security, economics and trade, energy, security, democracy, and cultural exchanges. In 2009, the U.S. Vice President spoke highly of the relationship between the United States and the Ukraine.

A cornerstone for the continuing partnership between the United States and the Ukraine has been the Freedom Support Act, under which the Ukraine has received from the United States more than \$4.1 billion since its independence. Ukraine has contributed troops and military personnel to the missions in Iraq and Afghanistan. Despite these facts, there has been some criticism of the Ukraine's 2010 electoral process. In addition, the Director of National Intelligence recently expressed concern that the Ukraine could drift toward authoritarianism. At present, however, there is no evidence the Ukraine's government is presently threatened, that it target U.S. citizens for classified or protected information, or is associated with any risk of terrorism.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are required in evaluating an applicant's eligibility for access to classified information. 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 overarching adjudicative goal is a fair, impartial and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." All available, reliable information about the person, past and present, favorable and unfavorable, must be and were considered 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 classified information will be resolved in favor of national security." In reaching my

decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence submitted.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”⁸ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.⁹

A person who seeks access to classified 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 classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 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 *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁰ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.¹¹ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.¹² It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

⁸ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

⁹ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

¹⁰ *Id.*

¹¹ *Id.*

¹² Executive Order 10865 § 7.

Analysis

Guideline B – Foreign Influence

The concern under Guideline B is that 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. Consideration should be given to 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 U.S. citizens to obtain protected information or is associated with a risk of terrorism. Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are discussed in the conclusions below.

Applicant was born, raised, educated, and married in the Ukraine. She and her family ultimately immigrated to the United States in 2000. Despite the fact she and her husband have built a new life for themselves and their children in this country, Applicant maintains close relationships with her sister, her sister's husband and daughter, and two school friends, all of whom are residents and citizens of the Ukraine. Consequently, Foreign Influence Disqualifying Conditions AG ¶ 7(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 exploitation, inducement, manipulation, pressure, or coercion*) and 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 sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information*) apply. With disqualifying conditions thus raised, the burden shifts to Applicant to mitigate security concerns

Applicant admits that she is close to the relatives and friends at issue. None of them, however, appear to have a direct nexus with either a foreign government or military, to be financially dependent on the Ukrainian government, or otherwise be under scrutiny by a foreign power. While it is suggested that the Ukraine may be drifting toward an authoritarian government, there is no evidence that the country has yet made that move. While other concerns may exist, none appear to have compromised, jeopardized, or impacted the United States' strategic relationship to the Ukraine as an ally and partner, or the friendly relations enjoyed by the two countries. Moreover, there is no evidence the Ukraine is involved in terrorism or targets United States citizens in the pursuit of gathering classified or protected information. Foreign Influence Mitigating Conditions 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 U.S.) applies.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance 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). 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is a mature and straight-forward woman who is well-educated and successful. Since coming to the United States 13 years ago, Applicant and her husband have become U.S. citizens, become active members of their community, raised their children, bought a home, saved toward retirement, and made plans to remain in the United States. Applicant is financially stable and there is no evidence suggesting that she is vulnerable to duress, coercion, or blackmail. All evidence indicates that Applicant's family, assets, work, and life are grounded in the United States.

Applicant maintains an understandably close relationship with her sister, her sister's family, and two school friends. They exchange gifts on certain occasions and either speak or correspond on a regular basis. However, none of these contacts maintains a relationship with the Ukrainian government or military, or is financially dependent on the Ukraine or any other foreign entity. Further, Applicant's relationships with these individuals are long-term. She has an intimate understanding of both the Ukraine and these individuals. Therefore, should a shift in the direction of the Ukraine's government and interests take place in the future, Applicant is in a unique position to assess her contacts' vulnerability. Based on the facts regarding the Ukraine and Applicant's depiction of these individuals, this scenario is highly unlikely, especially absent evidence that the Ukraine actively targets U.S. citizens or their contacts in order to cull confidential information. Here, neither Applicant's Ukrainian contacts nor the government of the Ukraine pose notable concerns in terms of either compromising Applicant's loyalties or her ability to protect classified and protected information. Based on these considerations, I find that Applicant mitigated foreign influence security concerns. Clearance is granted.

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 B:

FOR APPLICANT

Subparagraphs 1.a-1.b:

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Clearance granted.

ARTHUR E. MARSHALL, JR.
Administrative Judge