



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



In the matter of:)
)
-----) ISCR Case No. 12-09088
)
Applicant for Security Clearance)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: Patricia H. Wittie, Esq., and Daniel Strouse, Esq.

06/12/2013

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to revoke his eligibility for a security clearance to work in the defense industry. The evidence shows he has mitigated the foreign influence security concern based on his strong and long-standing family and employment ties to the United States, which outweigh and overcome his recent marital ties to the Czech Republic. Accordingly, this case is decided for Applicant.

Statement of the Case

On January 23, 2013, the Department of Defense (DOD) sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly

consistent with the national interest to grant Applicant access to classified information.¹ The SOR is similar to a complaint, and it detailed the reasons for the action under the security guideline known as Guideline B for foreign influence based on ties to the Czech Republic.

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on March 27, 2013. The hearing was held as scheduled on April 18, 2013. The transcript (Tr.) was received on April 25, 2018.

Ruling on Procedure

Without objections, SOR ¶ 2.e was amended to allege that Applicant has two (not three) brothers-in-law and one sister-in-law who are citizens of and residents in the Czech Republic.²

Findings of Fact

In his seven-page answer, Applicant admitted the factual allegations set forth in SOR ¶¶ 1.a–1.e, as amended; he also provided detailed explanations. His admissions and explanations are accepted and adopted and incorporated as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 46-year-old president and facility security officer (FSO) of a small technology company he established in 2003. Before that, he worked as a senior network engineer for a federal contractor during 1998–2003. The available documentary information shows he has a good, if not excellent, record of employment.³ His employment history includes working as a subcontractor for a two-month period in 2003 in Iraq, where he provided technical support and training services.

As a cleared facility, Applicant's company is complying with the necessary security requirements to maintain a facility clearance. For example, his company was subject to a security inspection or assessment by the Defense Security Service as

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Tr. 10–11.

³ Exhibits 4, 7, and 8.

recently as August 2012, and the results were wholly satisfactory.⁴ His company has never been cited for a security infraction or violation.⁵

Applicant has held a security clearance, at the secret level or higher, since 1999. He is seeking to retain a top-secret clearance. To that end, he completed a security clearance application in March 2011, and he responded to written interrogatories in December 2012.⁶

Applicant was born in South Vietnam, where he lived with his mother and two older siblings, a brother and sister. They left South Vietnam in 1975 as part of the Vietnamese boat people who fled the country in large numbers following the Fall of Saigon, the event that marked the end of the Vietnam War. Applicant and his family were rescued at sea by the U.S. Navy, and they eventually came to the United States as refugees. They settled in a Mid-Atlantic state where they remain to this day. Applicant became a U.S. citizen in 1987; his mother, brother, and sister are U.S. citizens as well.

Applicant's first marriage ended in divorce in 1998. His marriage produced two children, a son and daughter. Applicant and his former spouse share custody of the children. Both children currently live with Applicant. In addition to the family home, Applicant owns a second residential property he uses as a vacation and fishing home; he considers it an investment property. He has no foreign business, financial, or property interests. His net worth consists of his two residential properties and his business.⁷

Applicant reported frequent overseas travel in his security clearance application.⁸ On one such trip to the Czech Republic, he made contact, via the Internet, with a Czech citizen who is now his wife. After the initial contact, they engaged in a long-distance courtship aided by modern technology. They married in 2011 when she was in the United States visiting Applicant. She returned to the Czech Republic at the end of the trip and she resides there today, although Applicant has traveled there since they married.

Applicant's spouse is self-employed in the real-estate business. She is pending immigration to the United States as a spouse of a U.S. citizen. Indeed, Applicant explained that a condition or requirement of the marriage is that his wife will live here in

⁴ Exhibit 5.

⁵ Tr. 130–131.

⁶ Exhibits A and B.

⁷ Exhibit B at 12 (personal financial statement).

⁸ Exhibit A.

the United States and become a U.S. citizen.⁹ The immigration petition was approved in April 2013, and that matter is pending.¹⁰ Applicant and his wife have not acted on the immigration matter because she was diagnosed with cervical cancer in mid-2012.¹¹ She has since been receiving medical treatment and care for her condition in the Czech Republic. Her condition, as explained by Applicant, is serious.¹²

Also divorced, Applicant's spouse is the mother of one child, a now 20-year-old daughter who is also a citizen-resident of the Czech Republic. His stepdaughter is a student and works in retail to support herself.

In addition to his U.S. family, with whom he is close, Applicant now has several in-laws who are citizens of and residents in the Czech Republic. Applicant has met his in-laws, but his interaction with them is limited due to a language barrier. He does not speak Czech and English is not his native language. His Czech in-laws speak little to no English. Applicant's spouse speaks English, but she is not fluent, and her efforts to translate conversations between Applicant and her family are modest. Despite the language barrier, Applicant explained that he endeavors to be respectful to his in-laws when he meets with them. He described a typical visit with his in-laws would consist of sitting at the family table and having coffee, or perhaps a meal and drinking Czech beer. The status of his Czech in-laws is summarized in the following table.

<i>Relationship</i>	<i>Citizenship & Residence</i>	<i>Employment</i>
Father-in-law	Czech Republic	Retired salesman
Mother-in-law	Czech Republic	Retired teacher
Brother-in-law	Czech Republic	Officer manager
Sister-in-law	Czech Republic	Restaurant/pub owner & waitress
Brother-in-law (via marriage)	Czech Republic	Restaurant/pub owner & cook

Although his second marriage is, at this point, unconventional, Applicant expressed a commitment to his marriage and displayed an emotional connection to his spouse during the hearing. Nevertheless, Applicant is also committed to his business and understands his obligations as both a clearance holder and FSO. He stated the

⁹ Tr. 69.

¹⁰ Exhibit 1.

¹¹ Exhibit 6.

¹² Tr. 101–102.

following when questioned about a potential conflict between his obligations and loyalty to the United States and his spouse:

Well, when I answer that freely to you, and I think that some people would find that, "Are you crazy?"

But I married my wife and absolutely, I love my wife, and that I would take care of her, you know, when it comes down to, you know, meeting her needs, like food or health or in sickness.

But when it comes down to my loyalty to the United States, I would do whatever it takes, okay, to meet my country's expectations.

Whether it is, if they were - - if they were to come to me today, and I would say this, if they were to come to me today and say, "[Applicant], you got to pick a side here. You know, we feel that you're a risk and I think that you need to decide whether you're going to continue to be married to your wife, or you continue on to support us and work for us and support the Government."

I would absolutely have to and want to, okay, support my country, because there is nothing more about my passion about this country, because there is a lot of history and lot of memorable moments for me and my family, being here as an immigrant boat person, working hard.

I have my daughter and my son here, who looks up after me, that you know, that they want to also follow my footsteps, in working for the Government.

So, I mean, I really don't have - - it's a very easy answer, and you know, I can't have all - - everything that I want in life, but I do know that when it comes down to priorities, I have to know what those priorities are, and those priorities are my children, my mother, my country, and my wife is really second. I hate to say that.¹³

The following information about the Czech Republic is derived from recent official reports from the U.S. Department of State:¹⁴ (1) the Czech Republic is a parliamentary republic and it was established in 1993 (the former Czechoslovak state was established in 1918); (2) the Czech Republic has one of the most developed and industrialized economies in Central and Eastern Europe; (3) the Czech Republic became a member of NATO in 1999, and it became a full member of the European Union (EU) in 2004; (4) the Czech Armed Forces have transformed from a Warsaw Pact-era force to that of an

¹³ Tr. 78-80.

¹⁴ Exhibits 2 and 3.

NATO Ally, and for over a decade it has made significant contributions to coalition and NATO operations in Afghanistan; and (5) relations between the United States and the Czech Republic are excellent and reflect the common approach both have to the many challenges facing the world at present, such as issues ranging from Afghanistan to the Balkans.¹⁵

Law and Policies

It is well-established law that no one has a right to a security clearance.¹⁶ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁷ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹⁸ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁹

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁰ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²¹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²² In addition, an applicant has the ultimate

¹⁵ To cite a recent example of the excellent relations, the Secretary of Defense hosted the Czech Minister of Defense at the Pentagon in November 2012. They discussed U.S.–Czech bilateral defense cooperation, the posture of U.S. forces in Europe, plans for increasing interoperability among NATO Allies, Afghanistan transition, and the situation in Syria. News Release, *Readout of Secretary Panetta’s Meeting with Czech Minister of Defense Alexandr Vondra*, No. 920-12, dated Nov. 20, 2012, which is available at www.defense.gov.

¹⁶ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

¹⁷ 484 U.S. at 531.

¹⁸ Directive, ¶ 3.2.

¹⁹ Directive, ¶ 3.2.

²⁰ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²¹ Directive, Enclosure 3, ¶ E3.1.14.

²² Directive, Enclosure 3, ¶ E3.1.15.

burden of persuasion to obtain a favorable clearance decision.²³ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁴ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²⁵

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.²⁶ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

The gravamen of the SOR is whether Applicant's recent marital ties to the Czech Republic disqualify him from eligibility for a security clearance. Under Guideline B for foreign influence,²⁷ the suitability of an applicant may be questioned or put into doubt due to foreign connections and interests. The overall concern is:

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.²⁸

²³ Directive, Enclosure 3, ¶ E3.1.15.

²⁴ *Egan*, 484 U.S. at 531.

²⁵ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²⁶ Executive Order 10865, § 7.

²⁷ AG ¶¶ 6, 7, and 8 (setting forth the security concern and the disqualifying and mitigating conditions).

²⁸ AG ¶ 6.

The guideline contains several disqualifying conditions. Given the evidence of Applicant's ties to the Czech Republic, I have especially considered the following disqualifying condition:

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 information or technology and the individual's desire to help a foreign person, group, or country by providing that information.²⁹

The guideline also contains several mitigating conditions. Given the evidence here, I have especially considered the following 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 United States; and

AG ¶ 8(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

Applicant is a small-business owner who is working hard and enjoying success as a federal contractor. A clearance holder since 1999, he also serves as his company's FSO. He has complied with all requirements placed upon him as the president and FSO of a company that is a cleared facility. In addition, for a two-month period in 2003, he worked as a subcontractor in Iraq, a place known as a high-risk environment for our soldiers and the contractors who support them. He has never lived in the Czech Republic, as he immigrated here after fleeing South Vietnam at the end of the war. He has lived here since 1975, went to school here, operates his business here, and has two children, who are both native-born U.S. citizens, here in the United States. He intends for his wife to live here and become a U.S. citizen as well, although her immigration is currently on hold pending her medical condition. His ties or connections to his spouse's family members in the Czech Republic are hindered by a language barrier and his infrequent interactions with them. His interactions with them are respectful, but *pro forma* or perfunctory or both. Taken together, his family and employment ties to the United States are much stronger than his ties to the Czech Republic, and these facts and circumstances weigh in his favor.

²⁹ I did not consider the disqualifying condition at AG ¶ 7(a), because the facts and circumstances surrounding Applicant's ties to the Czech Republic—a country ruled by a democratic form of government, a member of the EU, and an important NATO Ally—do not create a "heightened risk" within the meaning of the guideline.

The security clearance process is not a zero-risk program, because nearly every person presents some risk or concern. Many cases come down to balancing that risk or concern. Here, Applicant has ties to the Czech Republic via his recent marriage to a Czech citizen. This circumstance should not be dismissed or overlooked as fanciful or unrealistic because even friendly countries can pose security concerns. With that said, his ties to the Czech Republic are quite limited or distant, but for his spouse with whom he shares an emotional bond. Yet he also explained unequivocally that he puts his loyalty to his children and mother, and his loyalty to the United States, ahead of his loyalty to his spouse. On balance, I am satisfied that this is not a case of “divided loyalties” as contemplated by the guideline. Instead, I am satisfied that Applicant has both feet firmly planted in the United States and his ties to this country are strong and will become even stronger in the future. Any security risk or concern presented by his ties to the Czech Republic is outweighed and overcome by his much stronger family and employment ties to the United States.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating the evidence in light of the whole-person concept,³⁰ I conclude Applicant has mitigated the foreign influence security concern. Accordingly, I conclude he has met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline B:	For Applicant
Subparagraphs 1.a–1.e:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge

³⁰ AG ¶ 2(a)(1)–(9).