



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



In the matter of:

)
)
)
)
)

ADP Case No. 13-01305

Applicant for Public Trust Position

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

07/25/2014

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the record evidence, I conclude that Applicant mitigated the trustworthiness concerns under foreign preference, but failed to mitigate concerns raised under the guideline for foreign influence. His request for access to sensitive information is denied.

Statement of the Case

On April 4, 2014, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) citing concerns under Guidelines B (foreign influence) and C (foreign preference) of the Adjudicative Guidelines (AG).¹ In his Answer to the SOR, signed May 5, 2014, Applicant admitted four of the six SOR allegations listed under foreign influence, as well as the single allegation regarding foreign preference. He also requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on June 25, 2014. At the hearing on

¹ Adjudication of the case is controlled by Executive Order 10865, as amended; DOD Directive 5220.6 (Directive), as amended; and the Adjudicative Guidelines, which supersede the guidelines listed in Enclosure 2 to the Directive. They apply to all adjudications or public trust position determinations in which an SOR was issued on or after September 1, 2006.

July 9, 2014, I admitted one Government exhibit (GE 1), and seven Applicant exhibits (AE A-G). DOHA received the transcript (Tr.) on July 17, 2014.

Procedural Matters

Applicant attached six documents to his Answer to the SOR. For administrative convenience, I severed the attachments and admitted them as AE A through F.

I take administrative notice of facts related to Russia and Ukraine, included in 14 U.S. Government documents provided by Department Counsel, and marked as HE II. The facts are limited to matters of general knowledge, not subject to reasonable dispute, and are set out in the Findings of Fact.

Findings of Fact

Applicant's admissions to the SOR allegations are incorporated as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact.

Applicant is 53 years old, and was born in the area that is currently Ukraine. When Applicant was born in 1961, the area was part of the Union of Soviet Socialist Republics (U.S.S.R; Soviet Union). Applicant attended college and graduate school in the Soviet Union. He received a master's degree in 1983, and a doctorate in 1987, both in the field of biochemistry. While in college, Applicant received mandatory military training, consisting of a half-day of classes per week, for "two or three" years. He held the rank of sub-lieutenant, but did not perform military service in the Soviet army.² He does not maintain contact with the classmates with whom he received military training. (GE 1; Tr. 17-20, 27-33, 44)

Applicant and his wife married in 1986. In 1989, at the age of 28, Applicant moved to the United States for post-doctoral study. He received a master's degree from a U.S. university in 2005. He believed the opportunities for a scientist were better in the United States than Russia, and he decided to remain in the United States. He became a naturalized U.S. citizen in 2009. He also holds Russian citizenship. Since 1995, Applicant has been a researcher at a university, a lab director, a production manager at a research company, and a research and development scientist. This is Applicant's first application for access to sensitive information. (GE 1; Tr. 20-22, 27)

Applicant's wife is 51 years old, and was born in the Soviet Union. She is a naturalized U.S. citizen, and currently works as a laboratory technician at a university. She is aware that Applicant is applying for access to sensitive information. She maintains her Russian citizenship. Applicant's son, 25 years old, was born in Russia. He works in the United States for a consulting company. He holds both U.S. and

² Applicant provided documentation that appears to be part of his Russian passport. It is dated June 10, 2009, and shows that he has been "released from liability for military service." (AE F)

Russian citizenship. Applicant's wife and son hold Russian passports. Applicant testified that his son's passport is expired, but he was unsure if his wife's Russian passport remains valid. It has been several years since his wife traveled to Russia. (GE 1; Tr. 27-33, 43, 47, 54)

Applicant's parents were born in the Soviet Union. Before they passed away, they lived in what is now Ukraine. (GE 1; Tr. 33) Applicant's father-in-law, a physicist, is also deceased. His mother-in-law is a citizen and resident of Russia. She is 75, and has been retired for several years. She was formerly a scientist. She and Applicant worked at the same scientific institute in the Soviet Union, and Applicant met his wife through her. Applicant's mother-in-law travels to the United States to see her daughter and Applicant "once in a couple of years." In his e-QIP, Applicant stated he is in contact with his mother-in-law weekly by telephone or through electronic methods. However, at the hearing, he testified he has contact with her "a couple of times a year perhaps." His wife keeps in touch with her mother about once per week by telephone or over the internet via Skype. (GE 1; Tr. 28-33, 46-47)

In his 2013 e-QIP, Applicant listed travel to Russia and Ukraine in June 2009 to visit his mother-in-law, other family, and friends. He also traveled to Ukraine in September 2010, November 2010, and December 2012. On one trip, he and his son traveled together to visit Applicant's ill mother. Applicant also went to Ukraine in 2013 and 2014 because he was required to be present for the sale of two properties he inherited from his mother. (GE 1; Tr. 31, 37-43)

When Applicant's mother passed away in 2012, he inherited two apartments in Ukraine. When Applicant began the process of applying for a sensitive position, he learned that foreign financial interests constituted a concern, and initiated the process to sell the properties. He sold the first property in July 2013 for approximately \$44,000 in U.S. dollars. He sold the second property in January 2014 for approximately \$53,000. Applicant testified that he had the proceeds transferred to his account in the United States. Applicant had opened a bank account in Ukraine to facilitate the sales. He provided documentation showing he closed the account in January 2014. He no longer holds financial interests in Russia or Ukraine. (GE 1; AE A-E; Tr. 33-35)

Applicant owns a home in the United States with an estimated value of \$180,000. He and his wife have retirement savings. He has additional savings in the United States, including the proceeds of the sale of the properties in Ukraine, which total approximately \$130,000. (Tr. 43-44)

Applicant has maintained contact with a man and woman he met when he was studying at the university in Ukraine. They are married and are currently citizens and residents of Ukraine. He spoke with them infrequently over the years, and a few times when he visited his sick mother in Ukraine several years ago. They also assisted him with the sale of his properties in Ukraine in 2013 and 2014. (Tr. 36-37, 44-45)

As of April 2013, when Applicant completed his electronic questionnaire for investigations processing (e-QIP), he possessed a Russian passport.³ When he learned that his foreign passport presented a security concern, he contacted his facility security officer (FSO). His FSO provided signed documentation showing that, on June 26, 2014, Applicant surrendered his foreign passport. (AE G)

Applicant testified that he is willing to renounce his foreign citizenship. He has requested information from his FSO about how to proceed, but has not received further information. (Tr. 48)

Administrative Notice: Russia; Ukraine

The Russian Federation (Russia) comprises 21 republics, created at the dissolution of the Union of Soviet Socialist Republics (U.S.S.R.) on August 24, 1991. It has a centralized political system, with a bicameral legislature, a weak multi-party political system, and power concentrated in the president and prime minister.

The United States and Russia share certain common strategic interests in counterterrorism, the reduction of strategic arsenals, and control of the proliferation of weapons of mass destruction and the means to deliver them. The Cooperative Threat Reduction (CRT) program was launched in 1992 to provide for the dismantlement of weapons of mass destruction in the former U.S.S.R. The CRT program was renewed in 2006 for seven years, until 2013.

Tensions between the United States and Russia increased in August 2008, when Russia sent its army into the Republic of Georgia. By the end of 2008, relations were at a ten-year low. The resetting of U.S. relations in 2009 offered opportunities for the creation of a new START treaty, which was completed and entered into force in February 2011. The two countries work closely on initiatives designed to address threats of nuclear terrorism. However, Russia's 2014 decision to establish a military presence on the Crimean peninsula of Ukraine, and to declare it independent of Ukraine and part of the Russian Federation, has again increased tensions between the United States and Russia.

Russian intelligence services target U.S. personnel with access to sensitive computer network information. According to the Director of National Intelligence, as of 2014, Russia is one of the leading intelligence threats to U.S. interests. It pursues information on advanced weapon systems, as well as proprietary information from U.S. companies and research institutions involved with defense, energy, and dual-use technology. In addition, Russia supports countries of security concern to the United

³ The SOR alleges (¶1.a) that Applicant's passport expired in June 2014. However, Applicant testified at the hearing that this was a misinterpretation of the date. The Russian format places the month first, followed by the date (*i.e.*, March 6 is written as 06/03). The expiration date of March 6, 2014 was misinterpreted as June 3, 2014. (Tr. 23-24)

States, by providing military and missile technologies to China, Iran, Syria, and Venezuela.

Russia's internal problems include a poor human rights record. The U.S. State Department's 2013 human rights report indicated that Russian security forces throughout the country committed human rights abuses. The government continued its crackdown on dissent that began after Vladimir Putin's return to the presidency. Human rights abuses include: credible reports of torture and excessive force by law enforcement officials with inadequate prosecution, resulting in a climate of impunity; life-threatening prison conditions; interference in the judiciary and the right to a fair trial; restrictions on religious freedom of minorities; widespread corruption; violence against women and limits on their rights in certain regions; and trafficking in persons.

Although Russian law prohibits government officials from entering private homes except as allowed by law or judicial decision, the State Department reported allegations that officials engaged in electronic surveillance without authorization and entered homes without warrants. Russian law enforcement agencies have legal access to electronic communications, and the internet activity of private individuals. Police can legally monitor telephone calls in real time.

Ukraine

Following the breakup of the USSR in 1991, Ukraine became an independent state. In March 2014, Russian forces moved into the Crimean peninsula in western Ukraine, and annexed the region. Ukraine and the United States do not recognize the annexation. The U.S. General Assembly affirmed Ukraine's territorial integrity in March 2014 and deemed the March 16 referendum on Crimean annexation illegitimate. Russia has positioned military forces on the border of eastern Ukraine and requires non-Russian citizens to obtain a Russian visa to enter Crimea. Armed militants have threatened, detained, or kidnapped some journalists and international observers in eastern Ukraine for hours or days. In May 2014, the State Department issued a warning to U.S. citizens to defer all non-essential travel to Ukraine, and to avoid all travel—essential or non-essential—to the Crimean peninsula.

Policies

Each decision regarding a public trust position must be a fair, commonsense determination based on all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Adjudicative Guidelines (AG).⁴ Decisions must also reflect consideration of the "whole-person" factors listed in ¶ 2(a) of the guidelines. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed when a case can be measured

⁴ Directive. 6.3.

against them because they represent policy guidance governing the grant or denial of access to sensitive information. In this case, the pleadings and the information presented by the parties require consideration of the adjudicative factors addressed under Guidelines B and C.

A trustworthiness decision is intended only to resolve the questions of whether it is clearly consistent with the interests of national security⁵ for an applicant to either receive or continue to have access to sensitive information. The Government bears the initial burden of producing admissible information on which it based the decision to deny or revoke access to sensitive information for an applicant. Additionally, the Government must prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one has a "right" to a sensitive position, an applicant bears a heavy burden of persuasion.⁶ A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness to protect the national interest as her or his own. The "clearly consistent with the interests of national security" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁷

Analysis

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern under Guideline B:

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.

⁵ See DOD Regulation 5200.2-R, ¶¶C2.1.2; C6.1.1.

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

Under AG ¶ 7 of Guideline B, I have considered all the disqualifying conditions, especially the following:

- (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;
- (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; and
- (e) a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

Family ties to residents or citizens of a foreign country do not *per se* disqualify an applicant from obtaining access to sensitive information; such ties are only disqualifying if they create a heightened risk of foreign exploitation or a potential conflict of interest. The country in question also must be considered.⁸ Russia has been deemed one of the leading intelligence threats to U.S. interests based on its pursuit of information on advanced weapon systems, as well as proprietary information from U.S. companies and research institutions involved with defense, energy, and dual-use technology.

The nature of a nation's government and its human rights record are also relevant in assessing the likelihood that an applicant's family members are vulnerable to coercion based on threats or pressure.⁹ Russia has a poor human rights record including, *inter alia*, abuses committed by security forces, crackdowns on dissent, inadequate prosecution of law enforcement's use of excessive force, restrictions on religious freedom of minorities, violence against women, and trafficking in persons. Moreover, Russian law enforcement agencies can legally access the electronic communications, internet activity, and telephone calls of private individuals.

⁸ See ISCR Case No. 04-07766 at 3 (App. Bd., Sep 26, 2006) (the nature of the foreign government involved must be evaluated in foreign influence cases).

⁹ ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006).

Applicant shares a home with his wife. She has been a U.S. citizen since 2012, but she is also a citizen of Russia. She is aware that Applicant is applying for access to sensitive information. Applicant's son is also a dual Russian-U.S. citizen. In addition, Applicant's mother-in-law is a citizen and resident of Russia. His wife is in touch weekly with her mother, showing a close family relationship. Applicant is also periodically in touch with his mother-in-law. The Appeal Board has held, "As matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse."¹⁰ Applicant has not rebutted the presumption that he has ties of affection and/or obligation to his mother-in-law in Russia. Applicant's relationships with Russian citizens--his wife, son, and mother-in-law--constitute a heightened risk of foreign influence or exploitation, and a potential conflict of interest. AG ¶ 7(a), (b), and (d) apply. However, Applicant's infrequent contacts with two friends who are citizen-residents of Ukraine do not pose a heightened risk of exploitation, and are not disqualifying.

After his mother passed away, Applicant inherited two properties in Ukraine. He provided documentation showing that he sold the properties in July 2013 and January 2014. He no longer holds real estate, bank accounts, or any other financial interests in either Russia or Ukraine. AG ¶ 7(e) does not apply.

I have considered the mitigating conditions under 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.;

(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 U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and,

(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.

Applicant has contact with his mother-in-law, a citizen and resident of Russia. Applicant's wife is aware that he is seeking access to sensitive information, and is in

¹⁰ ISCR Case No. 05-00939 at 4 (App. Bd. Oct. 3, 2007).

touch with her mother weekly by telephone. Applicant has also been in touch with his mother-in-law intermittently on the telephone and over the internet via Skype during the years he has been married. Russian authorities monitor telephone and internet activity of private individuals. Given these facts, I cannot confidently conclude that Applicant could not be placed in a position of having to choose between the interests of a foreign individual or government and the interests of the United States. AG ¶ 8(a) does not apply.

Applicant's U.S. citizenship, graduate education, residence, and employment represent long-standing ties to the United States. Applicant receives partial mitigation under AG ¶ 8(b). However, on balance, these facts do not outweigh his relationship to a foreign family member with whom his wife has close ties, and with whom he and his wife have ongoing contact. Applicant's mother-in-law visits them in the United States every couple of years. Applicant's contacts with his mother-in-law are not so casual that they fail to raise a concern of foreign influence or coercion. AG ¶ 8(c) does not apply.

Guideline C, Foreign Preference

The security concern under Guideline C, AG ¶ 9, states:

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.

Under AG ¶ 10, the following disqualifying condition is relevant:

(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.

Applicant possessed a valid Russian passport, which expired in March 2014. He possessed the Russian passport until June 2014. AG ¶ 10(a)(1) applies.

AG ¶ 11 contains factors that can mitigate disqualifying conditions. I have considered all the mitigating conditions, especially the following:

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

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

Applicant used his Russian passport for foreign travel before he became a U.S. citizen in 2009. On June 26, 2013, following his security officer's instructions, Applicant surrendered his Russian passport to his FSO. He provided a statement signed by his FSO. Applicant also testified that he has sought information regarding the process to renounce his Russian citizenship. His actions indicate that he is willing to renounce his foreign citizenship. AG ¶¶ 11(b) and (e) apply.

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate the Applicant's eligibility for a public trust position by considering the totality of the Applicant's conduct and all the circumstances. An 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant access to sensitive information must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

In evaluating the facts in light of the whole-person concept, I considered Applicant's U.S. ties: his service to the government through a federal defense contractor, his 25-years of residence in the United States, his U.S. citizenship, and his economic ties through U.S. property ownership. Moreover, decisions regarding public trust positions are made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."¹¹ Here, Applicant's loyalty is not in question. However, such decisions sometimes involve circumstances unrelated to an applicant's conduct, such as the foreign residence of an applicant's relatives. Here, Applicant's family ties to a Russian citizen-resident raise security concerns. Through his wife, Applicant will continue to have ties to a foreign citizen-resident, who resides in a country that engages in human rights abuses, monitors private communications, and targets U.S. personnel and U.S. companies and research institutions for sensitive information.

¹¹ See Exec. Or. 10865 §7.

Overall, the evidence fails to satisfy the doubts raised about Applicant's suitability for a public trust position. For all these reasons, I conclude Applicant has not mitigated the security concerns raised under Guideline B.

Formal Findings

Paragraph 1, Guideline C:	FOR APPLICANT
Subparagraph 1.a	For Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraphs 2.a – 2.b	Against Applicant
Subparagraphs 2.c – 2.f	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to allow Applicant access to sensitive information. Applicant's request for a public trust position is denied.

RITA C. O'BRIEN
Administrative Judge