



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 14-02563 ¹
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

05/27/2015

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated concerns raised by her foreign familial ties to Ukraine and established her eligibility for access to classified information. Clearance is granted.

Statement of the Case

On July 28, 2014, the Department of Defense (DOD) sent Applicant a Statement of Reasons (SOR), alleging that her circumstances raised security concerns under the foreign influence and foreign preference guidelines.² Applicant timely answered the SOR and requested a hearing to establish her eligibility for access to classified information.

On October 20, 2014, Department Counsel notified the Hearing Office that the Government was ready to proceed. After coordinating with the parties, I scheduled the

¹ I have amended the SOR to correctly reflect the case number referenced in the caption.

² This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines implemented by DOD on September 1, 2006.

hearing for December 12, 2014. The hearing was held as scheduled. Department Counsel offered Applicant's security clearance application, which was marked and admitted into evidence without objection as Government exhibit (Gx.) 1. Department Counsel also offered a number of official, unclassified U.S. Government documents regarding the Ukraine for administrative notice.³ Applicant testified, called several character witnesses, and offered Applicant's exhibits (Ax.) 1 – 13, which were admitted into evidence without objection. The hearing transcript (Tr.) was received by our office on December 22, 2014.

Procedural Issues

The SOR alleges as a concern under the foreign preference guideline that Applicant possess a current, unexpired passport from the Ukraine. See AG ¶ 10(a)(1). Applicant submitted a document from her facility security officer noting that she voluntarily surrendered the Ukrainian passport to her employer in August 2013 (or, about a year before the SOR was issued).⁴ See AG ¶ 11(e). Department Counsel moved to withdraw the foreign preference guideline. Without objection, I granted the motion and said guideline will not be further discussed.

Applicant did not receive her copy of the transcript until February 7, 2015. Upon reviewing the transcript, Applicant noticed a number of discrepancies and inaccuracies. She requested that the record be reopened to allow her to submit corrections to the transcript. I granted her request. She timely submitted her corrections, which are reflected on Hearing Exhibit (Hx.) III and are hereby incorporated and made a part of the record, unless otherwise indicated.⁵ The record closed on February 26, 2015.

Findings of Fact

After a thorough review of the pleadings, exhibits, and transcript I make the following findings of fact:⁶

Applicant was born in the Ukraine. She was infatuated with American culture from an early age. She graduated from a teacher training college in Ukraine with a bachelor's and master's degrees in English Language and Literature. After earning her bachelor's degree in 1996, Applicant went to work at a power plant that her father had

³ The eight documents submitted for administrative notice are referenced in the Government's written proffer. The proffer was marked Gx. 2 and included with the record, but not admitted into evidence. Applicant's objection to my consideration of these matters for administrative notice was overruled. Tr. at 15-17. I have also considered the State Department's updated Travel Warning for Ukraine, updated Fact Sheet regarding U.S. Relations with Ukraine, and Assistant Secretary of State Nuland's March 10, 2015 testimony before the Senate Foreign Relations Committee. These documents were marked and included with the record as Hx. IV – VI, respectively; and are publically available at state.gov.

⁴ Ax. 3.

⁵ Hx. I is a list of Applicant's exhibits. Hx. II is e-mail communication with the parties.

⁶ In reaching the above findings of fact, I have made only those reasonable inferences supported by the evidence and, where necessary, resolved any potential conflict raised by the evidence.

worked at most of his adult life. She studied for her master's degree while working full time. She was employed as a translator at the power plant in direct support of a U.S. Government (USG) sponsored program. She came to realize that there existed a glass ceiling in her field in Ukraine and yearned to move to the United States.⁷

Between 1998 and 2002, Applicant primarily worked for Mr. X, a USG contractor, who is U.S. military veteran of the Vietnam War. He has held clearances with the USG for several decades and currently manages high-level projects for the USG. Mr. X was impressed with Applicant's work as a translator, as well as her overall work ethic, professionalism, and reliability. He volunteered Applicant as a translator for a technical conference with USG officials. Applicant was lauded for her work at the conference.⁸

In 2002, with the help of Mr. X, Applicant was selected for a prestigious U.S. fellowship and immigrated to the United States. In 2004, she graduated from a U.S. university with a 4.0 GPA and an advanced degree in management. She was offered and accepted a position with her current employer, a federal contractor. She was vetted by another U.S. Government agency (AGA), and provided access to a secure website for her work in support of the USG.⁹ She has been entrusted with sensitive employer and USG information. Applicant's manager, who has worked with her since 2005, finds her "extremely reliable" and trustworthy in the manner she handles proprietary and sensitive information. He testified about her hyper vigilance when it comes to safeguarding sensitive U.S. information, including recently reporting the potential spillage of confidential information.¹⁰ Her team lead writes:

Throughout [Applicant's] tenure working for me, she has always been reliable, trustworthy and, while she has not had access to classified information, she protects sensitive information extremely well.... [She] regularly advises her team and the [USG] on protecting sensitive information and ensures that program information is safeguarded in accordance with DOD regulations.... [She] is a top performer in my organization and a person of great character. She has proven herself on every occasion to be trustworthy, reliable and of great value to [the company] and the [USG]. I already rely on her to protect information sensitive to US government acquisition regulations and relationships with foreign governments.¹¹

Another manager, who has worked with Applicant for eight years, writes that Applicant has "demonstrated [her] reliability, trustworthiness, and ability to protect sensitive information." The manager goes on to state that Applicant "has consistently

⁷ Tr. at 52-54, 81; Ax. 1.

⁸ Tr. at 23-34, 52-53; Ax. 1; Ax. 6.

⁹ Tr. at 93-95; Ax. 1; Ax. 6; Ax. 13.

¹⁰ Tr. at 39-41.

¹¹ Ax. 8.

demonstrated integrity and an understanding of the heightened security requirements she is responsible for implementing when handling, reviewing, and storing procurement-sensitive proposals from competing bidders on behalf of her clients.”¹²

Applicant is married and has two children. Her children were born in the United States, and attend a U.S. public school for the academically gifted. Her husband, who was born in the Ukraine and worked at the same Ukrainian power plant, also immigrated to the United States in 2002. For the past four years, he has been employed at an electric power plant located at the headquarters of AGA. He went through a background check by the AGA and was granted an access badge. In 2013, Applicant and her husband became U.S. citizens. She was selected for a highly prestigious naturalization ceremony.¹³ During the naturalization ceremony, she pledged her allegiance to the United States and, in her Answer, renewed her “loyalty and commitment to this country.”¹⁴ Mr. X, who attended the naturalization ceremony as one of Applicant’s guests, writes that Applicant and her husband were “so proud to say that their two sons . . . were U.S. citizens several years before they themselves attained their citizenship.” He further states that “[a]ttaining her citizenship [in such a prestigious manner] was the pinnacle of her dreams.”¹⁵

Applicant had a job offer to return to Ukraine. When she told her husband of the offer, he was adamantly opposed the idea of returning to their country of birth. She was also not interested in returning to Ukraine and turned the job offer down. Applicant testified that her husband, who spoke just “four words in English” before immigrating to the United States, now has a “very good job” and considers himself an “American.”¹⁶ Applicant and her husband have lived continuously in the United States since they emigrated from Ukraine in 2002. She has not traveled to Ukraine in over five years.¹⁷

Applicant and her husband have no property or assets in Ukraine. Their combined annual income from their U.S. jobs is approximately \$150,000. She has a 401(k) retirement account with a balance of approximately \$70,000. Applicant and her husband owned a home in the United States for over six years, but recently sold it and are now renting a home in a school district that is generally well regarded for superior academic achievement and where their children go to school. Her closest friends are all U.S. citizens, including her children’s godparents – Mr. X and Mr. Y, another USG contractor who worked with her closely in Ukraine and has a high opinion of her professionalism, reliability, and trustworthiness. She use to travel quite extensively for her job and dutifully reported her foreign travel, as well as any suspicious overseas

¹² Ax. 9.

¹³ Tr. at 56-60; 96-97; Answer; Ax. 1.

¹⁴ Answer at 2.

¹⁵ Ax. 5; Tr. at 33.

¹⁶ Tr. at 70.

¹⁷ Tr. at 72-73, Gx. 1.

contacts. She no longer travels for her work as her priorities over the past few years have shifted from work to her children.¹⁸ Applicant credibly testified that she and her family identify themselves as “Americans.”¹⁹ She further stated that “[m]y priority is here with my family in the U.S. and my life is here in the United States of America.”²⁰

Applicant’s only connection to and contacts in Ukraine are her parents, sister, parents-in-law, and brother-in-law.²¹ Her parents and parents-in-law are retired. They receive relatively small retirement pensions or disability payments from the Ukrainian government. Her parent’s home is fully paid for and will pass to her sister. Applicant’s sister is a low-level clerk at the power plant that she, her father, and husband once worked at. Her brother-in-law is a welder. Applicant’s contact with her sister and brother-in-law is limited to those times that either is visiting their respective parents and Applicant is speaking to them. None of her foreign relatives have any connection to the Ukrainian government or the so-called separatist. Her foreign family members do not reside or work in or close to the Crimean Peninsula or other areas that remain flashpoints between Ukrainian government forces and Russian-backed forces.²²

The United States established diplomatic relations with Ukraine in 1991, following its independence from the Soviet Union. U.S. policy is centered on realizing and strengthening a democratic, prosperous, and secure Ukraine more closely integrated into Europe and Euro-Atlantic structures.²³

Ukraine’s transition to an independent, democratic state that is a full member of the global economy has faced significant internal and external challenges; none greater than that posed by Russia’s unlawful annexation of the Crimean Peninsula and support of so-called separatists in Eastern and Southern Ukraine. Russia’s actions followed peaceful protests by ordinary Ukrainians that brought down a “corrupt regime bent on cheating the people of their sovereign choice to associate with Europe.”²⁴ Despite the signing of a ceasefire agreement in September 2014, the situation in Ukraine remains precarious. Violent clashes between Russia-backed separatists and Ukrainian forces continue in parts of the country, resulting in thousands of injuries and deaths. In addition, Russian military forces continue to occupy the Crimean Peninsula and are

¹⁸ Tr. at 44-50, 54-55, 68-70, 91-101; Gx. 1; Ax. 5.

¹⁹ Tr. at 103.

²⁰ Tr. at 110.

²¹ Applicant’s parents, sister, and parents-in-law were alleged as a foreign influence concern at SOR 1.a – 1.c. Her brother-in-law, on the other hand, was not alleged in the SOR. However, I have considered Appellant’s entire connections to the Ukraine in assessing the security concerns at issue.

²² Tr. at 60-74, 83-90, 101-102; Answer.

²³ Hx. V.

²⁴ Hx. VI at 1.

present on the eastern border of Ukraine.²⁵ Numerous checkpoints have been established by the Russia-backed separatist forces and the State Department warns that “individuals, including U.S. citizens, have been threatened, detained or kidnapped for hours or days after being stopped at separatist checkpoints.”²⁶ The State Department also warns that “Russia-backed separatist groups have taken on an increasingly strident anti-American tone” and, in light of ongoing unrest, the U.S. Embassy’s ability to provide consular services may be limited.²⁷

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are only eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant’s eligibility, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b). Moreover, “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531. See also ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance.”). However, no circumstance or conduct results in automatic disqualification and, thus, a judge must examine and decide each case on its own merits.²⁸

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This

²⁵ Hx. IV; Hx. VI at 1.

²⁶ Hx. IV at 1.

²⁷ *Id.* at 1 – 2.

²⁸ ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

relationship transcends normal 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.²⁹

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.³⁰

Analysis

Guideline B, Foreign Influence

The security concern regarding an individual with foreign contacts and connections, to include contact with and connections to family members residing in a foreign country, is set forth at AG ¶ 6:

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.³¹

An individual is not automatically disqualified from holding a security clearance because they have familial ties to a foreign country. Instead, in assessing an individual's

²⁹ Security clearance determinations are “not an exact science, but rather predicative judgments about a person's security suitability.” ISCR Case No. 01-25941 at 5 (App. Bd. May 7, 2004). An administrative judge is required to examine an individual's past history and current circumstances to make a predictive judgment about an individual's ability and willingness to protect and safeguard classified information. ISCR Case No. 11-12202; ISCR Case No. 11-13626 (App. Bd. Nov. 7, 2013).

³⁰ ISCR Case No. 12-04554 at 4 (App. Bd. July 25, 2014) (“an adverse decision under the Directive is not a determination that the applicant is disloyal. Rather, such a decision signifies that the applicant has engaged in conduct or has otherwise experienced circumstances that raise questions about his or her judgment and reliability.”).

³¹ ISCR Case No. 09-07565 at 3 (App. Bd. July 12, 2012) (“As the Supreme Court stated in *Egan*, a clearance adjudication may be based not only upon conduct but also upon circumstances unrelated to conduct, *such as the foreign residence of an applicant's close relatives.*”) (emphasis added) (internal citation omitted).

vulnerability to adverse foreign influence, an administrative judge must take into account the foreign government or entity involved; the intelligence gathering history of that government or entity; the country's human rights record; and other pertinent factors.³²

In light of the current situation in Ukraine, Applicant's foreign familial ties raise the foreign influence concern and, specifically, the following 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 foreign exploitation, inducement, manipulation, pressure, or coercion;

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; and

AG ¶ 7(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.

A finding that Applicant's circumstances raise the above listed disqualifying conditions does not end the foreign influence analysis. However, Applicant's burden in mitigating concerns that she could be influenced or coerced through her foreign family members must be examined under the "very heavy burden" standard that the Appeal Board has usually reserved for cases involving hostile foreign countries.³³ Although U.S. relations with the current Ukrainian government are good, foreign-backed forces with interests inimical to the United States operate freely in parts of Ukraine and pose a significant threat not only to Ukraine's sovereignty, but also to U.S. national security interests. In light of these circumstances, the serious security concerns that are raised by an individual with family members in a hostile foreign country are also present in the current case. Accordingly, Applicant's mitigation case must be examined through the lense of this heightened scrutiny.

In meeting this higher standard of proof and persuasion, an individual is not required "to sever all ties with a foreign country before he or she can be granted access to classified information."³⁴ However, what factor or combination of factors will mitigate

³² ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (setting forth factors an administrative judge must consider in foreign influence cases).

³³ ISCR Case No. 10-09986 at 3 (App. Bd. Dec. 15, 2011) ("an applicant with family members in a country that is hostile to the U.S. bears a 'very heavy burden' to show that the family members are not a means of coercion or exploitation."). See *also* ISCR Case No. 11-12202, n. 10 (App. Bd. June 23, 2014) (after declining to extend heightened scrutiny to cases involving punitive discharges or dismissals from the military, Appeal Board reaffirmed use of heightened standard in cases involving hostile foreign countries).

³⁴ ISCR Case No. 07-13739 at 4 (App. Bd. Nov. 12, 2008).

security concerns raised by an applicant with family members in a foreign country is not easily identifiable or quantifiable.³⁵ An administrative judge's predictive judgment in these types of cases must be guided by a commonsense assessment of the evidence and consideration of the adjudicative guidelines, as well as the whole-person factors set forth in the Directive.³⁶ A judge's ultimate determination must also take into account the overarching standard in all security clearance cases, namely, that any doubt raised by an applicant's circumstances must be resolved in favor of national security.³⁷

The adjudicative guidelines also set forth a number of potential conditions that may mitigate the foreign influence security concerns. After a thorough review of all the mitigating conditions, the only one that warrants discussion is:

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

Applicant established that she will resolve any attempt to influence, manipulate, or coerce her through her foreign familial connections in favor of the United States. In 2013, she accomplished her life-long dream of becoming a U.S. citizen. Although, at first blush, Applicant's story may not appear much different than similarly situated applicants born in a foreign country, the circumstances under which her naturalization ceremony took place speaks volumes as to the deep connections she has established in the United States in a relatively short period of time. Furthermore, the decision she and her husband made shortly after arriving in the United States to forego a job opportunity in Ukraine also stands as proof that she and her husband have fully embraced the United States as their home.

Since immigrating to the United States over a decade ago, Applicant and her husband have both worked extremely hard to become productive members of society and their hard work has paid off in well-paying, full-time jobs. She has been employed as a federal contractor for over 10 years, while he works for AGA. She gave birth to their two children in the United States. Their children have been raised and educated in the United States, and fully identify themselves as Americans with, at best, a passing knowledge of their parent's country of birth, language, and culture – Applicant having last traveled to Ukraine when they were both very young. Her closest friends, to include her children's godparents, are all U.S. citizens and most of these individuals either worked for or are currently working for the USG in some capacity with access to classified information. Although predicting with exact certainty how an individual might react if they were placed in the unenviable predicament of having to choose between their foreign family members and their security obligations is never an exact science,

³⁵ ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

³⁶ Directive, ¶ 6.3.

³⁷ AG ¶ 2(b); ISCR Case No. at 5 (App. Bd. Aug. 4, 2014).

Applicant met her burden of mitigating the security concerns at issue. Her firmly established ties to the United States and credible testimony, which was corroborated by the record evidence, regarding her loyalty to the United States demonstrate that she will place her security obligations and responsibilities over all other concerns.

Additionally, this favorable conclusion is informed by Applicant's track record of properly handling and safeguarding sensitive employer and USG information. She was first granted access to sensitive USG information over a decade ago by AGA, which granted her access to a secure website. Since then, Applicant has been entrusted with ever increasing levels of sensitive information by her employer and the USG. She has inspired the confidence of her supervisors and others who have worked closely with her and have seen her exhibit the level of care required of those granted access to classified information. Applicant has also demonstrated that she understands her responsibility in voluntarily and promptly reporting matters that might raise a security concern, as evidenced by her recent report of a suspected spillage of confidential information. Consequently, through her words and actions, Applicant has demonstrated that she will properly handle and safeguard the secrets of this nation.

After carefully weighing the evidence, both favorable and unfavorable, and considering the heightened risk of potential foreign influence raised by Applicant's foreign contacts and connections in Ukraine, I find that she met the very heavy burden standard and mitigated the foreign influence concerns. AG ¶ 8(b) applies.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).³⁸

Applicant's personal character and integrity, which are vital matters to be considered in assessing an individual's suitability for a security clearance, are unassailable. She has been candid about her foreign connections throughout the security clearance process. Furthermore, I had an opportunity to observe her demeanor while she testified. I found her forthcoming and resolute in her ability to resolve any potential conflict of interest in favor of the United States. Accordingly, if any foreign entity were to attempt to influence her through her foreign familial connections and contacts, I am convinced she would report any such attempt to the appropriate authorities and not succumb to any adverse foreign pressure or influence. For all the foregoing reasons, I find that Applicant mitigated the foreign influence concerns. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility for access to classified information.

³⁸ The non-exhaustive list of adjudicative factors are: (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) the 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.

Formal Findings

Paragraph 1, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraphs 1.a – 1.c:	For Applicant
Paragraph 2, Guideline C (Foreign Preference):	WITHDRAWN
Subparagraph 2.a:	Withdrawn

Conclusion

In light of the record evidence and for the foregoing reasons, it is clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge