

DATE: April 7, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-03711

DECISION OF ADMINISTRATIVE JUDGE

BURT SMITH

APPEARANCES

FOR GOVERNMENT

Jonathan Byer, Department Counsel

Marc Curry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's business activities in a foreign country are arms-length transactions with minimal financial investment, and Applicant is not subject to coercion or duress by foreign interests. Applicant's family relationship to a foreign citizen is not the subject of potential exploitation by a foreign power. Clearance is granted.

STATEMENT OF THE CASE

On August 20, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR details reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. It recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

The Applicant responded to the SOR in a written answer dated September 12, 2002, in which he requested a hearing. The case was assigned to me on October 28, 2002. On November 5, 2002, a Notice of Hearing was issued scheduling the hearing on December 2, 2002. At the hearing the Government submitted 3 documentary exhibits (Gov. Exs.1-3). Applicant presented testimony from himself and two witnesses, and he submitted 7 documentary exhibits (App. Exs. A-G). The transcript was received by DOHA on December 6, 2002.

FINDINGS OF FACT

Rulings on Procedure. At the hearing Department Counsel moved to amend the SOR by entering a third allegation under Paragraph 2 (Guideline L), to wit: "2.c. That information set forth in subparagraph 1.h., above."⁽¹⁾ Applicant did not

object, and the motion to amend was granted.

Upon completion of the hearing, the factual issues in this case were pared by Department Counsel's acceptance of Applicant's mitigating evidence as to SOR Paragraph 1 (Guideline B), subparagraphs 1.c.: 1.d.; 1.e.; 1.f.; 1.g.; and 1.i. (2) These subparagraphs allege Applicant has business and financial ties to six organizations associated with the private economic sector in Ukraine, a state newly independent of the former Soviet Union (FSU). Department Counsel accepted Applicant's evidence showing that (1) two of these six organizations are US-funded non-profit groups providing volunteer executive assistance overseas (subparagraphs 1.f. and 1.g.); (2) Applicant's ownership interest in two for-profit companies is minimal (subparagraphs 1.c. and 1.d.); and (3) two other for-profit companies are no longer in existence (subparagraphs 1.e. and 1.i.). By extension, these circumstances also mitigate subparagraphs 2.a. and 2.b. because they rely solely upon factual allegations in mitigated subparagraphs 1.g. and 1.i.

In summary, as a result of procedural rulings, the Government's case under Guideline B is pared to subparagraphs 1.a.; 1.b.; 1.h.; and 1.j. Under Guideline L the Government's case is pared to subparagraph 2.c. The following findings of fact are entered as to the remaining allegations.

Paragraph 1 (Guideline B - Foreign Influence). The Applicant is 69 years old and married, and he is a native-born US citizen. He holds a master's degree in engineering, and he is employed by a defense contractor as an alternate proxy holder. Applicant has a lengthy career in American private enterprise, primarily in business development, management, and technology. At various times he has been employed by well-known corporations at the levels of division president and senior vice president. As an entrepreneur he founded, developed, and sold a business that generated \$4 million annually. (3) He has also performed public service as a senior appointee with the Department of Defense, and he has served as an assistant secretary of the Department of Treasury. He is a former military officer with active duty experience.

Concerning his reputation for good character, Applicant is described as honest and trustworthy by a former Secretary of the Army who also served previously as DoD General Counsel. (4) A second character witness, a businessman and former military pilot, testified Applicant has a sincere goal to extend "the rule of law and American democratic principles" to deserving underdeveloped countries. (5) I find evidence submitted by Applicant and his character witnesses to be forthright, credible, and worthy of belief.

In 1989, while employed by a national publisher as a division president, Applicant was asked by the firm's international advisory council to travel to Kiev, Ukraine to teach an introductory course in market economics at a western-style MBA school. Applicant agreed, and during the visit his expertise was widely solicited in business, government and academic circles. Applicant responded with a series of seminars, lectures and discussion groups related to the emergence of private enterprise in newly-independent nations of FSU. As a highly-experienced businessman, Applicant realized FSU nations would need western assistance to develop their market economies, and this circumstance would also present investment opportunities for foreign businesses.

Applicant's experience in eastern Europe gave rise to a desire for more participation in the evolving market economies of the FSU. Upon his return to the US in 1990, Applicant founded a non-profit organization chartered "to promote the exchange of business know-how" between capitalist countries and the FSU. (6) He sought and received sponsorship and funding from International Executive Services Corporation (IESC). This organization is a nationally-known foundation (funded in part by the US Government) which assists the growth of foreign businesses through grants, subsidies and hands-on advice from volunteer American businessmen. IESC agreed to provide financial subsidies and other assistance to Applicant's non-profit organization.

During the approximate period 1990-1995 Applicant's organization devoted itself to the assistance of developing economies and businesses in eastern Europe. This assistance was provided in the same manner as before, *i.e.*, through lectures, seminars, business conferences, personal contacts, and discussion groups. Applicant maintained a family residence in the US, and he traveled extensively throughout eastern Europe in conducting these commerce-related meetings.

By 1995, Applicant had established a large base of business contacts in eastern Europe, and he had a good understanding of the private sector economies emerging from the breakup of the Soviet Union. For five years, Applicant was on the assistance, counseling and teaching side of the business-to-business relations he encouraged. However, at this point Applicant could see the fruits of his labor in the growth of western capital investment in the FSU. In 1995, Applicant elected to join this developing growth by changing his participation from non-profit to direct involvement in for-profit enterprises.

Subpara. 1.a. - Applicant's real estate ownership in Ukraine. In 1995, Applicant selected Ukraine as the principal site for his proposed venture. In order to have a business presence in Ukraine, Applicant and his wife moved to the city of L'viv, in the western part of the republic. Applicant maintained his family residence in the US, and he rented a residential apartment and office space in L'viv. In September 1995 the rented office was burglarized and all office equipment stolen. Security from theft is a concern in Ukraine cities. (Also, Applicant believes Ukraine authorities practice the use of telephone surveillance, and he exercises "extreme vigilance" to avoid this possibility. [\(7\)](#))

Needing better protection from burglary, Applicant in 1996 purchased a small apartment for combined residential/business purposes, and he installed his own security devices. In 1999, Applicant purchased another apartment for a personal residence, although he continued to maintain his permanent residence in the US. In 2000, Applicant purchased a third apartment for business purposes. Applicant's ownership of these three properties in Ukraine is the subject of the Government's concern in SOR subparagraph 1.a.

Applicant's initial investment in the three apartments was about \$150,000, and the present-day total value of the apartments is about \$250,000, an increase of \$100,000 above purchase price. However, a part of this increased value is due to improvements made by Applicant at his expense. In April 2002, Applicant and his wife returned to the US as a permanent move, and they placed their L'viv residential apartment on the market for \$140,000 (now reduced to \$130,000), expecting it ultimately will be purchased by a western buyer. Additionally, they have placed on the market one of the two office apartments. Applicant has no plans to re-establish a residence in Ukraine, and it is realistic to find two of his three apartments will eventually be sold. When this occurs, Applicant's real estate investment in Ukraine will be reduced to one office apartment valued at \$60,000. (Tr. 62-64.)

Subparas. 1.b. and 1.h. - Applicant's business interests in Ukraine. In 1995, Applicant and his wife founded L'viv Consulting Group (LCG), a for-profit firm organized "as an intermediary between business opportunities in Ukraine and foreign investors and lenders." (Gov. Ex. 2, p.5, App. statement.) It was the business of LCG to match foreign buyers with sellers of business opportunities in Ukraine, prospectively leading to fees, commissions, and other forms of compensation for LCG.

Applicant owns approximately 35% of LCG, the remainder being held by four Ukrainian citizens and one American. [\(8\)](#) Each person invested about \$500 in the startup company. None of Applicant's business associates or clients are government officials, military officers, or military industrialists. [\(9\)](#)

LCG relied upon word-of-mouth advertising to circulate information about the firm's services, and LCG was presented with over 1,500 investment opportunities from Ukrainian businessmen. [\(10\)](#) However, only about 150 companies had realistic profit potential, and some of the enterprises assisted by LCG eventually failed. (See SOR subparas. 1.c. and 1.d, for example.) Nevertheless, Applicant's company secured foreign capital for several small firms, and he later attracted capital investment to Sensus, a profitable and well-managed chain of women's clothing stores in Ukraine. In order to secure the investor's confidence in Sensus, Applicant invested \$50,000 of his own funds into the project, making him an 8% owner of the company.

Applicant now resides permanently in the US, and he no longer oversees the business activities of LCG. However, he continues to own 35% of LCG and 8% of Sensus. The present value of these interests is found to be \$50,000 for Sensus (Tr. 67; Gov. Ex. 2, p.9.) and no more than \$2,500 to \$5,000 for LCG.

Applicant established LCG as a straightforward business enterprise based on western commercial practices. As such, Applicant's goal was to manage his business on the principles of "transparency, no mafia connections, and competent as well as honest management." (App. Ex. B, p. 2.) During his management of LCG, Applicant was only once approached

with an inappropriate proposal, and he immediately ended the project. (App. Ex. B, p. 4.) In April 2002, the American ambassador to Ukraine publicly praised the Applicant for his efforts in assisting Ukrainian citizens to develop "a nation that is more market oriented, a country where people have hope." (App. Ex. G.)

It is found that Applicant's business practices were based upon an application of capitalist principles to the Ukrainian private sector. Applicant conducted his affairs in an honest and ethical manner with proper regard for commercial authorities of the host countries as well as applicable US laws, rules and regulations.

Subpara. 1.j.- Applicant's family relation to a foreign citizen. Applicant's son is married to a citizen of Germany, and the couple lives in the US. Applicant's daughter-in-law is 33 years old, and she is studying to be a child psychologist. She and her husband have been married 12 years. Applicant's daughter-in-law is a resident alien of the US, and she visits her mother in Germany every two years. Applicant has no communication with his daughter-in-law's family. ⁽¹¹⁾ There is no evidence Applicant's daughter-in-law is in a position to be exploited by foreign authorities.

Paragraph 2 (Guideline L - Outside Activities). The Government alleges in subparagraph 2.c. (as added) that Applicant's financial interest in LCG is an outside activity that may pose a conflict with Applicant's security responsibilities, creating an increased risk of unauthorized disclosure of classified information. The factual allegations pertaining to subparagraph 1.h. above are referenced in support of this allegation, and factual findings related to that subparagraph are incorporated under subparagraph 2.c. for consideration.

POLICIES

Enclosure 2 of the Directive, as amended by DepSecDef Memorandum dated June 7, 2001, sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an Applicant's eligibility for access to classified information (Disqualifying Conditions, hereafter DC) and those that may be considered in deciding whether to grant access to classified information (Mitigating Conditions, hereafter MC).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in this case:

Guideline B - Foreign Influence. *The concern:* A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Disqualifying Conditions applicable:

1. An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.
6. Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government.
8. A substantial financial interest in a country, or in any foreign-owned or -operated business that could make the individual vulnerable to foreign influence.

Mitigating Conditions applicable:

1. A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the the person(s) involved and the United States.

5. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

Guideline L - Outside Activities. *The concern:* Involvement in certain types of outside employment of activities is of security concern if it poses a conflict with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information.

Disqualifying Conditions applicable: Any service, whether compensated, volunteer, or employment with:

3. A representative of any foreign interest.

Mitigating Conditions applicable:

1. Evaluation of the outside employment or activity indicates that it does not pose a conflict with an individual's security responsibilities.

The whole person concept. In addition to the above guidelines, the Directive provides in Para. E.2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

CONCLUSIONS

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted upon to safeguard it twenty-four hours a day. The Government is appropriately concerned where reliable information indicates an Applicant for clearance may be involved in outside activities that could lead to a security vulnerability on the applicant's part.

Concerning burden of proof, the Government must prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case, if he or she is to prevail, by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate and overall burden of proving it is clearly consistent with the national interest to grant him or her a security clearance. Furthermore, the Directive provides "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

Paragraph 1 (Foreign Influence) Applicant is an US-born businessman with several decades' experience in the American private sector. He has been involved in US commerce as a senior executive, entrepreneur, and as a business advisor to the federal government. He has a strong belief in the soundness of western-style economic principles, and in 1990 he decided to lend his expertise to newly-independent east European nations seeking to establish market economies modeled upon the American capitalist system. During approximately 1990-1995 Applicant presented his advice, ideas and counsel to foreign businessmen through a non-profit foundation founded by him for this purpose.

In 1995, Applicant elected to establish a for-profit business in Ukraine. He purchased, in stages, three apartments in L'viv, now valued at \$250,000. Two of the apartments are on the market and likely will be sold, reducing Applicant's Ukraine real estate holdings to \$60,000. Applicant also bought a one-third interest in LCG, a consulting business he no longer supervises, and this business interest is valued at less than \$5,000. Additionally, Applicant bought an 8% interest in a Ukrainian women's clothing firm, and this interest is valued at \$50,000. Thus, Applicant's total financial interest in Ukraine is presently \$305,000, although the ultimate sale of his two apartments will reduce this financial interest to \$115,000.

Considering the adjudication guidelines, DC 6 applies because Applicant's business activities in a foreign country might be tempting as a source of pressure for a foreign government interested in learning US defense secrets. Furthermore,

DC8 applies because Applicant has a substantial financial interest in a foreign-owned business that could make him vulnerable to foreign influence. These are negative considerations for purposes of determining security eligibility. However, Applicant presents mitigating evidence which offsets and outweighs this potential for coercion or duress.

First, Applicant's business involvement in Ukraine is diminished. Applicant continues to have investments in the Ukraine private sector, but he has returned to the US and he is divesting his largest holdings in Ukraine. Applicant no longer actively supervises his interest in LCG, and he no longer receives monthly compensation from a supporting foundation.

Second, Applicant's commercial efforts in Ukraine were marked by straightforward, arms-length transactions based solely upon market forces. Although Applicant is familiar with the Ukraine political and economic structure, he made a bona fide effort to distance himself from any form of inappropriate interference, to include possible telephone surveillance. Additionally, Applicant sought to associate only with reputable business acquaintances upon whom he could rely for good judgment and sound ethics. Thus, Applicant took steps to insulate his business interests from any potential vulnerability to pressure from outside sources.

Third, Applicant invested a substantial sum in the Ukraine economy, but this sum will be reduced to \$115,000 upon the sale of his two apartments. Judging from Applicant's successes in the US private sector (to include the sale of a business generating \$4 million per year), I conclude the loss of Applicant's Ukraine holdings would not be a realistic threat to his solvency. Applicant states credibly that when his two apartments are sold his investments in Ukraine will be reduced to less than 5% of his total assets.⁽¹²⁾ Applicant's financial interests in Ukraine are minimal, relative to his total assets, and MC 5 applies.

In written closing argument, Department Counsel argues that the DOHA Appeal Board decision in ISCR Case No. 01-06266 (September 23, 2002) supports a denial of this Applicant's request for clearance. The Appeal Board upheld an Administrative Judge who denied an Applicant's request for clearance because he had very close business and personal ties with a citizen of Israel who, in turn, had significant contacts with the Government of Israel and the Israeli defense establishment. The Appeal Board upheld a denial of clearance due to DoD concerns under Guideline B (Foreign Influence) and L (Outside Activities).

However, Case No. 01-06266 is factually distinguishable from the instant case. In the cited case the Applicant had long-standing ties with a specific foreign citizen ("Mr. X") who was found to be associated with Israeli national defense interests. In the instant case, the Applicant's foreign associates and contacts are broad in number and he has no close relationship with any foreign citizen whose position or connections cause concern as to a foreign government's interests, motives, or agenda. The Appeal Board decision in Case No. 01-06266 is based upon a factual situation unique to that Applicant and his association with "Mr. X". A similar association is not present in this case.

In subparagraph 1.j., the Government alleges Applicant's family relationship to a non-US citizen is a concern for clearance purposes. Applicant concedes his daughter-in-law is a citizen of Germany, and DC1 has application. However, Applicant's daughter-in-law has been married to a US citizen and resided in the US during her marriage. She has no strong contacts with Germany and only visits her mother infrequently. She has little or no potential for exploitation, and C1 applies.

Paragraph 2 (Outside Activities). The Government alleges the information set forth under subparagraph 1.h., i.e. 35% ownership of LCG, might pose a conflict with Applicant's security responsibilities. In resolving this issue, the factual findings pertaining to subparagraph 1. h. are incorporated by reference.

With respect to the "whole person concept" I have considered all the evidence, to include Applicant's years of dedication to American commercial interests in the international community. I have further considered his desire to promote western-style market principles as one leg of a strong national defense. Judging by the entirety of the evidence, Applicant brings himself favorably within the factors of the whole person concept.

On balance, it is concluded the Government has met its burden of proving facts necessary to support its allegations under Paragraphs 1 and 2 of the SOR. For his part, the Applicant has met his burden of overcoming the Government's

case with persuasive evidence in mitigation.

FORMAL FINDINGS

Formal findings For or Against the 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. Foreign Influence: For the Applicant.

Subparas. 1.a.-1.b.: For the Applicant.

Subpara. 1.h.: For the Applicant.

Subpara. 1.j.: For the Applicant.

Paragraph 2. Outside Activities: For the Applicant.

Subpara. 2.c.: For the Applicant.

DECISION

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

Burt Smith

Administrative Judge

1. Tr. 103-105.
2. See Memorandum of Department Counsel's Closing Argument, December 9, 2002, post-hearing submission.
3. App. Ex. C, p.2.
4. Tr. 25-28.
5. Tr. 18.
6. Certificate of Registration, Charitable Organization, App. Ex. D.
7. Gov. Ex 2, p.7.
8. Tr. 92.
9. Tr. 87, 93-94; 97.
10. Tr. 90.
11. Tr. 100-101.
12. A Memorandum of Applicant's Closing Testimony, p. 2, December 13, 2002.