

DATE: April 22, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-16657

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is married to a woman from Kazakhstan who has relatives living in Russia. Two of Applicant's three brothers are married to Russian women, at least one of whom has relatives living in Russia. Applicant failed to mitigate foreign influence security concerns raised by his associations with these Russian citizens. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 15 October 2003, DOHA issued a Statement of Reasons (SOR)⁽¹⁾ detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing on 10 November 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 27 January 2004. On 2 March 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 17 March 2004.

FINDINGS OF FACT

Applicant is a 46-year-old compliance officer for a defense contractor who traces his ancestry in the U.S. back to 1636. He ensures the company is in compliance with all laws and regulations governing the transfer of technology and materials to foreign countries, including Japan and the countries that were formerly part of the Soviet Union. Ex. 1 at 1, 2; Ex. T; Tr. 27-28, 64-65. Applicant received his security clearance in 1987. Ex. 1 at 8. Applicant has the respect of his colleagues and friends as a hardworking patriot who has demonstrated sound judgment and strength of character. Exs. A-N.

When Applicant was in kindergarten, one of his classmates was from Japan. Although Applicant has only seen his classmate once since kindergarten, they still exchange holiday greetings each year. The Japanese friend is now a

permanent U.S. resident. Tr. 60.

In 1990 or 1991, Applicant's brother R married a Russian woman who was studying in the U.S. Ex. 2 at 2. She is now a U.S. citizen and her family members are permanent U.S. residents. She arranged meetings for Applicant with Russian woman in the local area. Nothing came of these meetings and Applicant decided to find a wife on his own. Applicant found his wife through a magazine advertisement for Russian women interested in marrying American men. Applicant's wife was born in the Soviet Union, in Kyrgyzstan, but she lived in Kazakhstan before coming to the U.S. Tr. 67. Applicant traveled to St. Petersburg, Russia, in 1994 to meet her. After 10-12 days, they traveled to Kazakhstan so he could meet her family. Tr. 89. She came to the U.S. in the Spring of 1995 on a fiancée visa and they were married in August 1995. Ex. 3 at 2. She became U.S. citizen in 2001. Tr. 60. The couple have two children. Tr. 77. Applicant has a "preference that the specific manner of [his] meeting [his] wife not be common knowledge amongst [his] colleagues at work, on a no need to know basis." Ex. P at 6.

Applicant's brother K is also married to a Russian woman. Ex. 3 at 2. His wife's father is a colonel (equivalent) in a Russian paratroop regiment. Ex. 4 at 2; Tr. 104. Applicant met K's wife's family in Russia during a business trip several years ago. None of the family spoke English.

Applicant's wife's parents are citizens of Kazakhstan, and now permanent U.S. residents. Tr. 60, 70. When they came to the U.S., they lived with Applicant and his wife, but have since found a place of their own. Applicant provides living/financial assistance to them. Ex. 4 at 4. Applicant's wife's brother was a citizen of Kazakhstan, was married, and had a son and step-son. He worked for Air Kazakhstan in a junior management position. In 2002, Applicant and his wife visited Moscow and St. Petersburg with her brother and her brother's son to celebrate her graduation for a doctoral program in music. Ex. 4 at 4; Tr. 60. Applicant, his wife, and in-laws also provided "modest" financial support to this family in Kazakhstan. Ex. 4 at 4; Answer; Tr. 99. Applicant's wife and in-laws kept in frequent touch with him by phone and e-mail. Tr. 99. After the record closed, Applicant reported that his brother-in-law had died suddenly.⁽²⁾ Ex. V.

Applicant's wife's first cousin is a Russian citizen living in Moscow. Tr. 60. Applicant has stayed with this cousin on "most trips to Moscow (business + last summer's family vacation)." He has direct occasional telephone and e-mail contact through the cousin's daughter who has a decent command of the English language. Ex. 4 at 5.

Applicant's father-in-law's second or third cousin, who resides in Moscow, is called "Auntie," and has a special relationship with Applicant's wife. Applicant provides her "modest" financial assistance. Applicant and his wife visit her whenever they are in Moscow. Ex. 4 at 5; Tr. 60.

Applicant has neighbors/friends who were born in the old Soviet Union. They are permanent U.S. residents and have applied for U.S. citizenship. Answer; Tr. 73. Applicant has frequent contact with these neighbors-once or twice a week. Ex. 4 at 5.

Applicant traveled to Kazakhstan at least once and Russia on at least six occasions since 1994. In 1994, he went to Russia to meet his wife; they later traveled to Kazakhstan. He traveled to Russia on business twice in 1997 and twice in 2001. Ex. 1 at 6. Applicant and his wife visited Russia in 2002 after she received her Ph.D.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

In the SOR, DOHA alleged Applicant's parents-in-law are citizens of Kazakhstan residing in Applicant's home (¶ 1.a.); Applicant's brother-in-law and his family are citizens and residents of Kazakhstan (¶ 1.b.); Applicant's wife's cousin (¶ 1.c.) and aunt (¶ 1.d.) are citizen residents of Russia; Applicant's neighbors are citizens of Russia (¶ 1.e.); his brother's wife is a citizen of Russia (¶ 1.f.); and Applicant's personal friend is a citizen of Japan, but resides in the U.S. (¶ 1.g.). A security risk may exist when an applicant's immediate family, and others to whom he may be bound by affection, influence, or obligation are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Directive ¶ E2.A2.1.1.

Applicant asserts he is "not susceptible to influence that would lead [him] to betray the U.S." Tr. 15. He believes that "ultimately the question comes down to [his] strength of character and loyalty to this nation." Tr. 74. The Government has not alleged, and the evidence does not show, that Applicant is anything but a loyal U.S. citizen. However, the issue is not his loyalty, but whether he is *vulnerable* to foreign influence that could result in the compromise of classified information because of his foreign associates.

In evaluating an applicant's foreign associates, it is also appropriate to consider the significance of the applicant's spouse's ties to foreign countries. ISCR Case No. 01-02452 at 8 (App. Bd. Nov. 21, 2002). There is a rebuttable presumption that an applicant has ties of affection for, or obligation to, his spouse's immediate family members. ISCR Case No. 01-26893, 2002 DOHA LEXIS 505 at *8 (App. Bd. Feb. 20, 2002).

Applicant admitted each of the factual allegations in the SOR. The question remains whether the facts are sufficient to establish any of the disqualifying conditions set forth in Guideline B. Applicant's in-laws are citizens of Kazakhstan—his wife's parents in the U.S. and his wife's brother's family in Kazakhstan. Applicant's cousin and "Auntie" are resident citizens of Russia. The evidence establishes Applicant's close ties of affection or obligation to these Kazakhs and Russians through his wife. Applicant's sister-in-laws are Russian citizens. Applicant has close ties of obligation to these women through his brothers. DC E2.A2.1.2.1. The evidence supports a conclusion that Applicant is not bound by affection, influence, or obligation nor is subject to duress because of his limited contacts with a Japanese friend he made in kindergarten.⁽³⁾ Although Applicant has more contact with his Russian neighbors, the evidence is insufficient to establish he has ties of affection or obligation to them.

It is a mitigating condition if the foreign associates are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force an applicant to choose between loyalty to the foreign associate and loyalty to the U.S. MC E2.A2.1.3.1. In analyzing whether a foreign associate is in a position of vulnerability, it is necessary to assess the nature of the foreign country. After the demise of the Soviet Union, ethnic Russians lost much of their political and economic sway in the various republics, including Kazakhstan. Ethnic Russians represent only 3.3 percent of the total

population of Kazakhstan. Ex. 5 at 1; Tr. 102. Kazakhstan is a constitutional republic with a strong presidency and has been given "a relatively high rating" for complying with international human-rights standards. Ex. 5 at 3; Ex. 6. Its relations with the U.S. are good and there is no evidence it is actively seeking U.S. secrets.

Neither the Government nor Applicant presented any evidence concerning the nature of the government in Russia. However, it is common knowledge that, although not as hostile to the U.S. as the Soviet Union was, Russia continues to operate an aggressive intelligence service that actively seeks access to U.S. secrets. ISCR Case No. 02-27444, 2003 DOHA LEXIS 448 at *6 (Testan, A.J. Jun. 6, 2003). Russia has assisted the U.S. in mediating international conflicts. While its human rights record has improved, it is still uneven.⁽⁴⁾

After carefully examining Applicant's foreign associates, I conclude Applicant has failed to mitigate the foreign influence security concerns attributable to his relationship with his wife's cousin and "Auntie" in Russia. His contacts with these Russians is more than casual. Applicant's ties to citizens of Russia are in large part a result of his family ties with his in-laws. Applicant has demonstrated that his in-laws, on their own, do not represent a credible security concern to the U.S. However, when considered in relation to the foreign associates in Russia, they do represent a security concern to the extent they could pressure Applicant, through their daughter, on behalf of those associates. As Applicant's brother-in-law is deceased, I find the relationship between the brother-in-law's family and member's of Applicant's wife's family in Russia is attenuated as to not represent a security concern.

The fact that Applicant's brother K is married to a Russian women who is not a citizen of the U.S. and still has relatives living in Russia raises a security concern. Applicant failed to demonstrate that he is not bound by affection, obligation, or influence to this women and her Russian family through his own brother.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.

2. Applicant provided this information to Department Counsel by e-mail on 1 April 2003. Although this evidence was provided after the record closed, as Department Counsel did not object, I have accepted the e-mail, with Department Counsel's response, as evidence. It is marked Ex. V.

3. Even if I had concluded Applicant was bound by affection or obligation, the evidence clearly demonstrates the relationship is casual and infrequent. MC E2.A2.1.3.3. I find for Applicant on ¶ 1.g.

4. Although I was not asked to take administrative or official notice, these facts are known to this agency through its cumulative expertise in deciding security-clearance cases involving foreign influence or foreign preference. *See* ISCR Case No. 99-0452 at 4 (App. Bd. Mar. 21, 2000); Gary J. Edles and Jerome Nelson, *Federal Regulatory Process: Agency Practices and Procedures* § 6.9 (1995).