

DATE: January 13, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24209

DECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

SYNOPSIS

Applicant is a senior systems analyst for a defense contractor. He was born and educated in Russia and worked for various Russian companies and was a member of the Russian Academy of Science until he and his wife immigrated to the United States in 1995. He has two doctoral degrees and has written many scientific books and papers. Applicant and his wife are naturalized United States citizens. He surrendered his Russian passport and denounced his Russian citizenship to Russian authorities. He has close ties of affection to and frequent contact with a stepdaughter and stepson and their families in Russia and is sponsoring their immigration to the United States. His contact with two friends is casual and not frequent. Clearance is denied.

STATEMENT OF THE CASE

On May 20, 2004, the Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb 20, 1990), 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 (Directive). Applicant acknowledged receipt of the SOR on May 26, 2004. The SOR alleges security concerns under Guideline C (Foreign Preference), and Guideline B (Foreign Influence) of the Directive.

Applicant answered the SOR in writing on May 27, 2004. He admitted all except one of the allegations under Guideline B and the allegation under Guideline C. He requested a hearing before an administrative judge. The request for a hearing was received by DOHA on June 3, 2004. Department Counsel was prepared to proceed with the case on October 12, 2004 and the case was assigned to me on October 20, 2004. A notice of hearing was issued on November 4, 2004. The hearing was held on December 8, 2004. Ten government exhibits and 48 Applicant exhibits and the testimony of the Applicant and three witnesses were received during the hearing. The transcript was received on December 16, 2004.

FINDINGS OF FACT

Applicant is a 60-year-old senior systems analyst for a defense contractor. He was born and educated in Russia and has a master's degree and two doctoral degrees from different Russian universities. He worked for a number of Russian corporations and for 15 years was a scientist with the Russian Academy of Science. He and his wife received a permanent resident alien (green card) lottery entry into the United States in 1995. Applicant applied for the visa lottery because he wanted to come to the United States for a better life for him and his family. Applicant became a naturalized United States citizen on February 15, 2001. He received a United States passport on March 2, 2001. His wife became a naturalized United States citizen on January 17, 2002. Applicant returned to Russia twice since emigrating, a pleasure trip in 1998 and to see his injured stepdaughter in 2002.

Upon coming to the United States, Applicant worked for a business repairing computers. He then worked as a data administrator before being hired by the defense contractor. He has been steadily promoted and is well thought of by his defense contractor employer. He receives excellent performance ratings and is considered by his supervisors and co-workers to be hard working, honest, and loyal. They do not believe he is a security risk to the United States. Applicant is also an accomplished academic. He has authored books or chapters in at least five books. He has also written numerous articles published in scientific journals and publications in Russia and the United States.

Applicant has been married twice and married to his second wife who accompanied him to the United States for 33 years. His son by his first wife is a United States naturalized citizen living in the United States. The son's wife is also a naturalized United States citizen and their three children are native born United States citizens. Applicant's first wife is now a permanent resident alien living with the son. Applicant has a daughter with his second wife who came to the United States shortly after her parents. The daughter was educated in the United States and is a permanent resident alien living in the United States with her native born United States citizen husband. Applicant's second wife had two children, a son and a daughter, by her first husband. These children are grown and reside in Russia. The daughter owns a hair salon and the son is a driver for a corporation. Neither the daughter nor the son work for the Russian government. The daughter is divorced but has a teen age son. The stepson is married and has two daughters. The stepson's wife works in the hair salon with her sister-in-law.

Applicant and his wife are sponsoring the stepdaughter and stepson and their families for entry into the United States. Applicant's wife could apply for a visa for her daughter and grandson as a permanent resident alien since the daughter was not married. The visa application for the stepdaughter is almost complete and it is anticipated she and her son will receive their visa to enter the United States in 2005. Applicant's wife could not sponsor her son for an entry visa until she became a citizen because he was married. She applied for a visa for the son and his family shortly after she became a citizen in 2002. It is anticipated the son will receive his visa in approximately two years. Applicant's wife talks to her daughter in Russia approximately once a month. She does not talk as often to her son. Her daughter conveys to her all the information about her son. Applicant does not talk to the stepson and stepdaughter often so as to not waste the short time they have to talk. The stepson was recently hospitalized for a heart problem so Applicant's wife has talked to the stepson or stepdaughter more frequently.

The stepdaughter was hospitalized in early 2002 for severe injuries suffered in a skiing accident. Applicant and his wife immediately went to Russia to be with the stepdaughter, staying approximately ten days. They gave her \$2,000 to help defray her medical expenses. On this trip, both Applicant and his wife used their Russian passports to enter Russia. At the time, Applicant was a U. S. citizen with a U.S. passport. The wife was not a U.S. citizen and did not have a U.S. passport. Applicant used his Russian passport because he did not want to stand in line to obtain a Russian Visa in his U.S. passport and pay the \$200 fee. Applicant also did not know if Russian officials would let him into Russia with a U.S. passport since they still considered him at the time a Russian citizen. Applicant and his wife also sent money to help defray medical expenses for the stepson's recent hospitalization.

Applicant surrendered his Russian passport to Russian officials on October 25, 2004 and informed them he was renouncing his Russian citizenship. The Russian officials returned the passport to Applicant cut in half to signify it is no longer valid. Applicant voted in Russian elections before he immigrated to the United States and at one time held a Russian security clearance. He has not voted in a Russian election since coming to the United States.

Applicant stays in contact with two colleagues and friends who reside in Russia. These friends worked with Applicant in the Russian Academy of Science. The Russian Academy of Science is an autonomous group of scientists who

coordinate and direct all scientific work in Russia. It originated in the 1800s. In the past, it received all of its funding from the Soviet government. It now receives funding partly from the government and partly from private and corporate grants. He first met one of his friends as a teenager. They went to school together but studied different disciplines. The friend left the Russian Academy of Science and now teaches in a private Russian university. Applicant visited this friend on his two trips to Russia and the friend has visited him once in the United States. They exchange letters and occasional telephone conversations discussing family, friends, and general subjects. Applicant has known the other friend since they were young and were next door neighbors. The friend is still a geophysicist with the Russian Academy of Science. Applicant visited the friend on his two trips to Russia but the friend has not visited him in the United States. They communicate mostly by e-mail to discuss family, friends, and other general subjects.

Russia is not as hostile to the United States as the old Soviet Union. However, it cannot be considered a "friendly" country, particularly in intelligence gathering. It is a known fact that Russia has an aggressive intelligence gathering service that actively seeks access to United States secrets.

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 judgement, 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.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should 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 applicant'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 of recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determination should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR:

Under Guideline C (Foreign Preference), a security concern exists when an individual acts in such a way as to indicate a preference for a foreign country over the United States so that he may be prone to provide information or make decisions that are harmful to the interests of the United States. Directive ¶ E2.A3.1.1. Under Guideline B (Foreign Influence), a security concern exists when an individual's immediate family and other persons to whom the Applicant may be bound by affection, influence, or obligation are not citizens of the United State 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. Directive ¶ E2.A2.1.1.

Applicant's use of a foreign passport after obtaining a United States passport brings the matter under Foreign Preference Disqualifying Condition Directive ¶ E2.A3.1.2.1. (*exercise of dual citizenship*); and Directive ¶ E2.A3.1.2.2. (*possess and/or use of a foreign passport*). Applicant's use of his Russian passport to travel to Russia in 2002 after obtaining United States citizenship and possessing a United States passport is an exercise of dual citizenship and establishes the disqualifying conditions. The Foreign Preference Mitigating Condition that may apply to Applicant is Directive ¶ E2.A3.1.3.4 (*individual has expressed a willingness to renounce dual citizenship*). Use of the foreign passport as a matter of convenience does not mitigate the disqualifying condition. ISCR Case No. 99-0424 at 4 (App. Bd. Feb. 8, 2001). A memorandum issued by Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, Arthur L. Money, dated August 16, 2000 (Money Memorandum) required that a security clearance be denied or revoked for an applicant with a foreign passport "unless the applicant surrenders the foreign passport...." Surrender of a passport contemplates returning it to the issuing authority. Applicant has surrendered his Russian passport to the issuing authority and informed them he was renouncing his Russian citizenship. I conclude Applicant has mitigated the security concern under Guideline C and has met the requirements of the Money Memorandum.

Applicant's stepson and stepdaughter and their families in Russia and Applicant's two friends in Russia bring the matter under Foreign Influence Disqualifying Conditions Directive ¶ E2.A2.1.2.1. (*an immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country*). An immediate family member include a *spouse, father, mother, sons, daughters, brothers, sisters*. Directive ¶ E2.A2.1.3.1. There is a reputable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse. ISCR Case No. 01-03120 at 8 (App. Bd. Feb 20, 2002). It is reasonable to consider the significance of Applicant's wife's ties to her children in Russia and the possible effects on Applicant's conduct under Guideline B. ISCR Case No. 01-02452 at 8 (App. Bd. Nov. 21, 2002). Applicant on his own has close ties of affection and obligation to his stepchildren and step grandchildren in Russia. Even though Applicant does not talk to the stepchildren on the telephone, his wife does and she conveys all of the news to Applicant. Applicant and his wife immediately went to Russia when his stepdaughter was injured which shows the depth of the relationship. He paid her medical expenses and now helps with the stepson's medical expenses. Applicant's wife has close ties of affection with her children and those ties are attributed to Applicant. I conclude the disqualifying conditions under Guideline B have been established as to the stepchildren and grand stepchildren.

Applicant's two friends and colleagues are citizens of and reside and are present in Russia. Applicant has known both since childhood and studied and worked with them. He stays in contact with them discussing family, friends, and life. They are close friends to whom he has ties of affection. I conclude the disqualifying condition under Guideline B has been established as to the two friends.

The Foreign Influence Mitigating Conditions that may apply to Applicant are: Directive ¶ E2.A2.1.3.1. (*a determination*

that the immediate family members or associates in question are not agents of a foreign government 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 person(s) involved or the United States); and Directive ¶ E2.A2.1.3.2. (contacts and correspondence with the foreign citizens are casual and infrequent). There is no evidence Applicant's stepchildren and grand stepchildren are agents of a foreign power. There is not a security concern merely because Applicant and his wife are sponsoring the step children and their families for emigration to the United States. However, there exists an unacceptable risk of undue foreign influence as long as the stepchildren and their families remain subject to Russian law and within physical reach of foreign authorities. Russian authorities still maintain an active intelligence gathering service and target the United States. The stepchildren and their families are in a position to be exploited by a foreign power in a way that could force Applicant to chose between loyalty to them or to the United States. Applicant has not met his heavy burden of establishing that there is not an undue foreign influence with the stepchildren and their families. I conclude Applicant has not mitigated the disqualifying conditions under Guideline B as to the stepchildren and their families.

One of Applicant's friends is no longer with the Russian Academy of Science but is a private teacher so he is not an agent of a foreign government. The other friend, even though still a member of the Russian Academy of Science, is not an agent of a foreign government. The Academy is independent from the government and receives funding not only from the government but from private sources. He is not an employee of the government and not an agent of the government. In addition, the contacts with the friends are infrequent and casual. The subjects of their conversations are the normal subjects of old friends, family, friends, and present personal events. The friendship with the colleagues in Russia is not of such a nature that it will force the Applicant to chose between them and loyalty to the United States. I conclude Applicant has mitigated any security concern with his two friends.

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For and Against 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, Guideline C: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Paragraph 2, Guideline B: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: 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.

Thomas M. Crean

Administrative Judge