

DATE: December 13, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-02893

ECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Jr., Esq., Department Counsel

FOR APPLICANT

James S. Delsordo, Esq.

SYNOPSIS

Applicant is 62 years old, married with two children. He is an engineer and inventor who has contributed significantly during the past 25 years to the development and refinement of night vision goggles used by the American military. Applicant had a security clearance when he did prior work for the military on night vision goggles, and no violations occurred. He fully disclosed the existence of his siblings and parents in Serbia (formerly Yugoslavia) and his brother in Canada on both security clearance applications. Applicant mitigated the foreign influence security concern. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On April 10, 2004, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing on May 3, 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on June 24, 2004. On June 30, 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. The Government and the Applicant submitted exhibits that were admitted into evidence. Applicant waived the 15 day notice period (Tr. 6). DOHA received the hearing transcript (Tr.) on July 12, 2004.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated here as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is a 62-year-old engineer who his president of his own company that develops night vision goggle

technology. He is married and has two children. Applicant immigrated from Yugoslavia in 1963 to France and Germany for short periods of time that year until he was allowed to enter Canada later that year. In 1969 Applicant came to the United States on a visa, and has remained here since then except for several years when he had to return to Canada to become a citizen there until he could return to the U.S. and eventually become a U.S. citizen in March 1991. Applicant departed Yugoslavia in 1963 because he wanted to live in a free country and have more opportunities for growth. (Tr. 46 to 48; Exhibits 1, 2 and 4)

Applicant's mother lives in Serbia, formerly Yugoslavia, and owns a farm on which she has lived and worked all her adult life. She was born in 1923 and is 81 years old. She lived through World War II and the subsequent Communist government. Applicant's father is deceased. (Exhibits 1 and 5)

Applicant calls his mother weekly on the telephone. His mother is terminally ill. He sends his brother money to be used for the family members. Some money was used to fix up the farm house in which his parents lived, and other money was used for health care costs for all family members. Over the past three years Applicant sent a total of \$15,000 to his family in Serbia, averaging \$5,000 annually in gifts. (Tr. 54, 60, 61)

Applicant has five brothers, and four sisters. All his siblings are in Serbia except for one brother who is a Canadian citizen and a professional engineer who designs and works on nuclear reactors for a Canadian government crown corporation, where he has been employed for many years. This brother communicates with Applicant regularly and with his mother in Serbia. Applicant's oldest stepbrother is 72 years old and has a heart condition making it difficult for him to walk. He is a retired farmer. The next brother worked for IBM as an executive. Another brother served as a communications officer in the Yugoslavian Air Force until his retirement several years ago. Applicant's oldest sister is 64 years old. She is married to a farmer. His next oldest sister is married to an electronics technician in Belgrade, Serbia. His next oldest sister is a mechanical engineer for Yugoslavian Airlines, and was formerly married to an officer in the Yugoslavian Navy. His youngest sister is a seamstress married to a machinist in Serbia. Applicant does not have contact with most of his siblings, except the Canadian on a regular basis. His contact with his family was through his parents, and now his mother upon the death of his father. Applicant visited Yugoslavia every other year in the 1970s and 1980s until his parents advancing age made him go every year in the 1990s. He visits his mother annually (Tr. 16 to 21, 54, 62 to 67; Exhibits 1 and 5)

Applicant invented and licenses night vision goggles used by the U.S. military. Applicant invented many features of these goggles over the past 30 years while working for one or more companies. Now he owns the company of four or five technical and professional engineering employees who invent and develop the product to be manufactured by larger companies. While there are other companies making night vision goggles, Applicant has a product that can be used by fixed wing pilots who might have to eject from their aircraft in emergencies. His product also has a greater field of vision than the goggles of his competitors. Applicant, through his company of which he is president, licenses the manufacture of his inventions to companies that have those production facilities. Applicant coordinates all overseas licenses with the appropriate departments of the U.S. Government. Applicant had a security clearance previously when working on night vision goggle projects for the military and that clearance went inactive when those projects were completed. There were no security violations during those time periods. Applicant's family connections were disclosed at those times. (Tr. 26 to 44, 49 to 53, 58, 59, 75 to 77, 84, 88; Exhibits 2, A and B)

Applicant is very credible when he avers he will not disclose, and has not disclosed or discussed his work and inventions with his siblings or other family members. Applicant's family contacts are mainly with his parents, the brother in Canada, and any other contact with his siblings seems to be through his parents, and now his mother. Applicant's loyalty is to the U.S., not to Serbia. (Tr. 55, 57, 58, 65, 69; Exhibit 5)

Serbia and Montenegro, the current name of Applicant's native land, is one component of the former Socialist Federal Republic of Yugoslavia. The government is democratically elected now, has a new constitution adopted in 2003, and no longer has a communist government. The population is slightly over 8 million people. The country is slightly smaller than the Commonwealth of Kentucky. Serbia and Montenegro is located in the Balkans in southeastern Europe. (Exhibit 9)

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.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required.

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. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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 ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of 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. Directive, ¶ E2.A2.1.1.

Conditions that could raise a security concern and may be disqualifying include:

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. Directive, ¶ E2.A2.1.2.1.

Conditions that could mitigate security concerns include:

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 person(s) involved and the United States. Directive, ¶ E2.A2.1.3.1.

CONCLUSIONS

The foreign influence guideline is the issue here because of Applicant's family members who continue to reside in Serbia, the country of their births. Disqualifying Condition (DC) 1 is clearly applicable.

The Mitigating Condition (MC) applicable is MC 1. Applicant's family members are in private business in Serbia, and one brother is a retired Yugoslavian Air Force officer. All siblings seem to be older than 50 years of age, according to Exhibits 1 and 2. Applicant's mother is 81 years old. It is clear to me from the facts that none of them, including the brother in Canada, are agents of a foreign government assigned to extract classified information from Applicant. An important fact to remember about the "whole person" of Applicant is that he is the inventor of the products the U.S. government needs, has purchased, and will purchase for our fighting men and women, particularly the pilots of our fighters. As such, Applicant has a proprietary and intellectual property interest in preserving and protecting the classified information he develops and encounters as he designs, develops, and sells his product. He testified no one has ever inquired of him about the work he does on night vision goggles, including his family members. Therefore, it is logical and clearly evident that none of his family members could exploit or be exploited to have Applicant divulge classified information or force him to choose between loyalty to the U.S. where he has been for about 35 years or Serbia, a small Balkan country whose air force is probably small and whose use of night vision goggles and need for that technology is non-existent.

Ordinarily an elderly parent is not a reason alone to mitigate the security concerns. However, Applicant's mother survived a harsh rural farm life, bore many children, persevered through the Nazi invasion and occupation from 1941 to 1945 that saw bitter partisan battles, and at war's end the establishment of a communist government under Marshal Tito (see Exhibit 9). To think Applicant's mother now could be coerced or exploited for night vision goggles is not realistic, coupled with the information from Applicant that she is terminally ill. Applicant's male siblings in Serbia are retired, and not in any position to exploit or be exploited. Applicant's brother who retired from the Yugoslavian Air Force, a military organization that no longer exists. Applicant's Canadian brother, who testified at the hearing, denied ever asking Applicant about his work or being asked by his brother about his work in Canada. These men are professionals and have integrity. They also have pride in their work and accomplishments. Common sense clearly shows in this case that the MC outweighs the DC, particularly because it is clearly in the national interest that the U.S. have the technology and product Applicant has developed in the past and will invent in the future to be used by our military forces.

Lastly, Applicant has spent nearly 35 years in the U.S. His family is here, along with his home and the business that is very important to him. Everything he has built in those years would be destroyed if he succumbed to exploitation. His business and scientific reputation would be devastated. At the age of 62 he stated very credibly that his loyalty is to the U.S. and not Serbia, a small and poor Balkan country. Applicant had a prior security clearance and all this same information was disclosed, evaluated, and the clearance granted. The most significant changes in that information are the death of his father in the interim, the current terminal illness of his mother, the divorce of one sister from her

Yugoslavian Navy officer husband, and the retirements from business of all but one brother. For all these reasons, I conclude this guideline for Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline B: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

DECISION

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

Philip S. Howe

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 (Directive).