

DATE: October 27, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-14948

ECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Jason R. Perry, Esq., Department Counsel

Erin C. Hogan, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Charles A. Meade, Esq.

SYNOPSIS

Applicant married a woman whose mother and brother are citizen residents of Russia. He is unable to successfully mitigate the resulting foreign influence security concern. Clearance is denied.

STATEMENT OF THE CASE

On January 27, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline B for foreign influence based primarily on Applicant's marriage to a woman who is a native of Russia. Applicant's Answer to the SOR, dated February 18, 2004, was mixed, admitting and denying with explanation the various allegations; he also requested a hearing.

Department Counsel indicated they were ready to proceed on June 1, 2004, and the case was assigned to me June 3, 2004. A notice of hearing was issued on June 16, 2004, scheduling the hearing for July 23, 2004. Applicant appeared with counsel and the hearing took place as scheduled. I received the transcript August 10, 2004. The record was left open until August 16, 2004, for Applicant to submit translations of Exhibits C, D, and E, which are documents in the Russian language. Department Counsel received the documents on August 6, 2004, and forwarded same to me on August 24, 2004, noting no objections. These additional documents are admitted into the administrative record as Exhibits G, H, I, and J. ⁽²⁾

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the

record, I make the following essential findings of fact:

Applicant is a 49-year-old married man and a native-born U.S. citizen. He holds a B.S. degree in information systems technology. He is employed as a systems engineer doing database development and management for a large defense contractor. Two of Applicant's current supervisors since November 2002 testified during the hearing and they describe Applicant as an honest, trustworthy person with good judgment.

Applicant is married to Y, a 41-year-old woman who is a native of Moscow, Russia. Applicant met Y when he elected to retain the services of a business, located in the U.S., specializing in assisting American men in meeting Russian women for dating and marriage purposes. After corresponding with Y, Applicant traveled to Moscow to meet Y during June and July 1994. Applicant spent three weeks there, and during that time he met Y's mother and father on one occasion. As Y was 31 years old, and she and her parents spoke no English, the meeting with the parents was for relatively brief 45 minutes. This is the only time Applicant has met Y's parents.

Applicant returned to the U.S. and obtained a fiancée visa for Y. She traveled to the U.S. and married Applicant in October 1994. Applicant and Y have since lived continuously in the U.S. They have one child, a daughter, born in February 1996. After the marriage, Y obtained permanent resident alien status. In August 2003, she became a naturalized U.S. citizen. In June 2004, she surrendered her Russian passport to the Russian Embassy in Washington, D.C., and informed embassy officials she was renouncing her Russian citizenship. Given these circumstances, I find for Applicant on SOR subparagraphs 1.a and 1.b.

Y is a college graduate trained in clothing design. In Russia, she worked as a clothing designer for a movie studio. Y's employment in the U.S. includes working for a bridal shop where she worked as a seamstress. The shop was owned and operated by a Russian native. Y ended her employment at the bridal shop in September 2003, and she is now employed by a public school system. As Y no longer works for the bridal shop, I find for Applicant on SOR subparagraph 1.f.

Y has immediate family members who are citizens of and residents in Russia. Her father passed away in July 2003. He was employed as a metal worker for many years until his retirement. During 1951 - 1954, he served in the Soviet Army as a conscript soldier. Y's mother is approximately 73 years old and lives in Moscow. She is retired after many years of employment as an ordinary worker in various capacities, including a concrete worker. Y's mother is in poor health, as she suffers from high blood pressure, hypertension, and diabetes. Y's brother is 39 years old and is employed as a warehouse manager for a private company in Moscow. Applicant has never met Y's brother.

Due to the language barrier, Applicant has virtually no contact with his mother-in-law and brother-in-law, but Y does have contact with her mother and brother. Y has weekly telephonic contact with her mother. Since her marriage in 1994, Y has made about a half-dozen trips to Russia to visit her mother; Y also sees her brother during these trips. On one trip, Y brought along her daughter to introduce her to her grandmother. Y has telephonic contact with her brother about one to two times per year.

On two to three occasions during 1997 and 1999, Applicant accompanied his wife to a Russian Consulate for her to obtain travel documents for herself, their daughter, or both. Applicant denies any Russian officials expressing interest in his life or work, and he denies having contact with consulate officials since 1999. Since Y is now a U.S. citizen, Applicant believes it will be unnecessary to visit a Russian Embassy or Consulate in the future. Given these circumstances, there is little security significance to this matter, and I find for Applicant on SOR subparagraph 1.e.

SOR subparagraph 1.g alleges Applicant maintains contact and socializes "with many other persons of Russian decent" he has met through his wife. An SOR is required to be as comprehensive and detailed as permitted by national security. Here, subparagraph 1.g fails to specify any named individuals, and it fails to specify the citizenship status of these unnamed individuals. It is so vague and lacking in detail that it prevents me from making findings of fact with any sort of precision and certainty. Given these circumstances, I find for Applicant on subparagraph 1.g.

As requested by Department Counsel, I took administrative notice of the following facts concerning Russia: (1) the Russian government has a poor record of human rights; and (2) Russia is one of several countries that have significant intelligence operations targeting the U.S., and in doing so, it places a significant emphasis on developing human intelligence through various means, including Russian emigres to the U.S. As requested by Applicant's Counsel, I took

administrative notice of the following facts: (1) the SVR, the successor of the First Chief Directorate of the KGB, is responsible for collecting foreign intelligence and has allegedly been reduced by 30 percent; and (2) the majority of SVR case officers operate under diplomatic cover.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁶⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽⁹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline B for foreign influence,⁽¹²⁾ a security concern 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 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. In addition, common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service.

In foreign influence cases, it is also appropriate to consider the significance of an applicant's spouse's ties to a foreign country.⁽¹³⁾ It is presumed an applicant has ties of affection for, or obligation to, his spouse's immediate family members.⁽¹⁴⁾

Here, based on the record evidence as a whole, the government has established its case under Guideline B. Applicant's wife clearly has close ties of affection or obligation to her mother, and less so for her brother. The closeness of the ties is evidenced by the family relationship, Y's trips to Russia for family visits, and her weekly telephonic contact with her mother. Applicant has close ties of affection, obligation, or both to his wife. Although this is all perfectly normal, it places Applicant in the position of having ties of affection or obligation to his Russian in-laws based on his ties of affection and obligation to his wife. These circumstances raise a security concern under DC 1.⁽¹⁵⁾

I have reviewed the mitigating conditions under Guideline B and conclude none apply. The only MC deserving serious consideration is MC 1,⁽¹⁶⁾ but it does not apply. Neither Y's mother nor her brother is an agent of the Russian

government or any other foreign power. (17) But that does not end the analysis, as Applicant must show his family members are not in position to be exploited by a foreign power. In foreign influence cases, it is proper to consider the foreign country at issue. The focus is not the country or its people, but its rulers and the nature of the government they impose. This approach recognizes it is nonsensical to treat North Korea as if it were Norway. Here, we know Russia is ruled by a government with a poor record of human rights. We also know Russia is known to target the U.S. in its intelligence operations. Unfortunately, these circumstances place Y's mother and brother at risk of being brought under control or used as a hostage by a Russian intelligence or security service. Given these circumstances, Applicant's in-laws are in a position where there is a potential for them to be exploited in a way that could force Applicant to choose between loyalty to his wife's mother and brother and the interests of the U.S. Accordingly, Applicant is unable to mitigate this security concern, and Guideline B is decided against him.

To conclude, Applicant has failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I have considered the record evidence as a whole, the whole-person concept, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline B: Against the Applicant

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: Against the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: For the Applicant

Subparagraph 1.f: For the Applicant

Subparagraph 1.g: For the Applicant

DECISION

In light of all 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.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Exhibit 2, Applicant's sworn statement obtained during the background investigation, was admitted into the record evidence. It contains information about Applicant's lengthy employment history as evidenced by numerous jobs he has held in the past. I have not considered these matters in deciding the merits of this case.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

6. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

11. *Egan*, 484 U.S. at 528, 531.

12. Directive, Enclosure 2, Attachment 2.

13. ISCR Case No. 01-02452 (November 21, 2002) at p. 8.

14. ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (February 20, 2002).

15. 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.

16. E2.A2.1.3.1. 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 person(s) involved and the United States.

17. *See* 50 U.S.C. § 1801(b).