

KEYWORD: Foreign Influence

DIGEST: Applicant married a woman from the Ukraine whom he met on the Internet. She and her son, also a Ukrainian, emigrated to the U.S. and will apply for U.S. citizenship when eligible in October 2005. Her mother and sister are citizen residents of the Ukraine. Applicant mitigated foreign influence security concerns. Clearance is granted.

CASENO: 04-00500.h1

DATE: 09/29/2005

DATE: September 29, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-00500

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Chester H. Morgan II, Esq.

SYNOPSIS

Applicant married a woman from the Ukraine whom he met on the Internet. She and her son, also a Ukrainian, emigrated to the U.S. and will apply for U.S. citizenship when eligible in October 2005. Her mother and sister are citizen residents of the Ukraine. Applicant mitigated foreign influence security concerns. 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 22 February 2005, 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 18 March 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 20 May 2005. On 22 June 2005, 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 30 June 2005.

FINDINGS OF FACT

Applicant is a 53-year-old systems administrator for a defense contractor. He married for the first time in 1974. He and his wife had two children who are now adults. He received a secret security clearance in 1985, and another in 1996. He has had an active security clearance with his current employer since January 2001. His supervisor reports Applicant is dedicated, trustworthy, and professional. He is seen as a meticulous worker who is a stickler for security. Applicant currently needs a secret clearance, but soon will need a top secret clearance.

While training for a bicycle race, Applicant was hit by a car and suffered severe injuries. These injuries were exacerbated when he was struck by a motor vehicle while driving in his car. After three failed therapies, he eventually had surgery removing three discs from his spine.

While he was recovering from his injuries, he had a lot of time on his hands. His wife had announced that when he recovered he was free to move out of the house. He spent his convalescence exploring the Internet on the computer. Using a computer community chat program, he decided to try to contact someone in every state of the Union. He did so within a couple of days. He then decided to try to contact someone in every country in the world. He was able to contact men, women, young, and old. One of those he contacted in 1998 was Yelena, who lived in the Ukraine. In May 1999, Applicant moved out of the house he shared with his wife.

Yelena was born near Vladivostok, Russia, in 1967 of a Russian father and a Ukrainian mother. Her father was a major in the Soviet military who retired in 1979 when she was 11 years old. She has a sister, eight years older, who spent a considerable part of her childhood living with Yelena's mother's parents in Odessa, in the Ukraine.

When Applicant's father retired, the family moved back to Odessa. For three years, before they moved into their own home, Yelena and her parents lived with her grandmother and Yelena's older sister. Yelena attended school in Odessa and eventually graduated from college with a degree in environmental engineering. In 1988, while at school, she married another student who had been a musician in the Soviet Army. They have a son who was born in 1990. After graduation, Yelena's husband became an engineering mechanic on merchant marine ships. The long separations while he was at sea took their toll on the marriage.

Applicant visited Yelena in the Ukraine in August 2000. After three days, Applicant became ill and Yelena cared for him for the several days before he returned to the U.S. Yelena and her husband divorced in November 2000. Tr. 45-46. On about 15 March 2001, Applicant advised his facility security officer that he was engaged to Yelena. Ex. B. Applicant and Yelena traveled to Poland for ten days in May 2001 to vacation together. Ex. 1 at 7. Yelena came to the U.S., with her son, on a fiancée visa, on 9 September 2001. Tr. 33. The couple married in the U.S. on 11 November 2001. Ex. 1 at 7.

After arriving in the U.S., Yelena worked as an X-ray transporter, but has been accepted into a training program to be a radiology technologist. Her son is 15 years old. She would not let him go back to the Ukraine alone as she is concerned about that country's high crime rate. On occasion, her ex-husband sends her money to help raise their son, although he is not required by law to do so. Her ex-husband rarely telephones to speak to their son. Tr. 44-45. Yelena intends to apply for citizenship as soon as she is eligible-in October 2005.

Yelena is close to her mother, but not to her sister. Tr. 41. She sends small gifts of money to her mother at Christmas and on her birthday. She calls her mother every month or two. Yelena has little contact with her sister. She calls her once a year at Christmas. Tr. 41-42.

The only time Applicant traveled to the Ukraine was in 2000 to meet Yelena. He does not plan to go back. Since her arrival in the U.S., Yelena has traveled to the Ukraine twice: once in 2002 to get the rest of her clothes and belongings and once in 2004 to renew her son's Ukrainian passport until he could apply for U.S. citizenship. Tr. 38.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personnel 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 the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

In the SOR, DOHA alleged Applicant' wife (¶ 1.a) and stepson (¶ 1.b) are citizens of the Ukraine residing in the U.S.; his mother-in-law is a citizen resident of the Ukraine (¶ 1.c); and he has traveled to the Ukraine (¶ 1.d). Applicant admits each of the allegations. A security risk may exist when an applicant's immediate family, or other persons 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.

The Government's evidence and Applicant's admissions constitute evidence of potentially disqualifying conditions under Guideline B. Members of Applicant's family-his wife and stepson- are citizens of a foreign country. DC E2.A2.1.2.1. It is also potentially disqualifying for an applicant to have foreign associates to whom he is bound by affection or obligation. DC E2.A2.1.2.1. There is a rebuttable presumption that a person has ties of affection for, or at least obligation to, the immediate family members of his wife. ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002). Applicant's wife's mother and sister are citizen residents of a foreign country. Sharing living quarters with persons if the potential for adverse foreign influence or duress exists is also potentially disqualifying. DC E2.A2.1.2.2. Applicant lives with citizens of the Ukraine whose family members are citizen residents of the Ukraine.

Once the Government establishes a disqualifying condition by substantial evidence, as they have done in this case, 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." *Id.*

An applicant may mitigate foreign influence security concerns in several ways. Potentially mitigating conditions in Applicant's case include the following: His immediate family members and foreign associates are neither "agents of a foreign power" nor in a position to be exploited by a foreign power in a way that could force the applicant to choose between loyalty to the family member or associate and loyalty to the U.S. (MC E2.A2.1.3.1); Applicant has promptly reported to proper authorities all of his contacts with a foreign country (MC E2.A2.1.3.4); and he has no foreign financial interests (MC E2.A2.1.3.5).

In weighing the evidence, an administrative judge must evaluate an applicant's security eligibility in terms of the totality of his conduct and circumstances under the whole person concept. A piecemeal analysis is inconsistent with the whole person analysis. ISCR Case No. 02-09907, 2004 DOHA LEXIS 642 (App. Bd. Mar. 17, 2004); *but see* ISCR Case No. 02-31154 (App. Bd. Sep. 22, 2005) (evaluating each fact individually and concluding the administrative judge erred because the individual fact alone was not determinative).

After considering all of the evidence, under the totality of circumstances, I conclude MC E2.A2.1.2.1 applies. The evidence of record supports a conclusion that Applicant's wife, stepson, mother-in-law, and sister-in-law are not agents of a foreign power. *See* 50 U.S.C. § 1801(b).⁽²⁾ Whether Applicant is in a vulnerable position concerning his foreign associates "hinges not on what choice Applicant might make if he is forced to choose between his loyalty to his family and the United States, but rather hinges on the concept that applicant should not be placed in a position where he is forced to make such a choice." ISCR Case no. 03-15205 at 3-4 (App. Bd. Jan. 21, 2005).

In assessing whether an associate is in a position to be exploited by a foreign power, it is helpful to consider several factors. Even friendly nations can have profound disagreements with the U.S. over matters they view as important to their vital interests or national security. We know friendly nations have engaged in espionage against the U.S., especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to

government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S. *See* ISCR Case No. 02-24254, 2004 DOHA LEXIS 703 at *17 (App. Bd. Jun. 29, 2004) (distinguishing ISCR Case No. 98-0419 (App. Bd. Apr. 30, 1999) and suggesting it was appropriate for the administrative judge to consider that the foreign country involved had a friendly relationship with the United States, is not an authoritarian regime, and is not on the U.S. list of countries sponsoring terrorism); *but see* ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005) (claiming "nothing in Guideline B indicates or suggests that it is limited to countries that are hostile to the U.S.").

The Ukraine has a presidential-parliamentary system of government with executive, legislative, and judicial branches. Ex. 6 at 3. Freedom of religion is guaranteed by law and the rights of minorities are respected. Although freedom of speech and press are guaranteed by the constitution, authorities have interfered with the news media through intimidation. *Id.* at 3-4. The Ukraine is seeking integration into NATO. *Id.* at 5. The U.S. has attached great importance to the Ukraine's transition to a democratic state with a flourishing market economy and has provided that country considerable financial assistance toward reaching that goal. *Id.* at 8. It is not on the list of state sponsors of terrorism.

Applicant established that his foreign associates are neither agents of a foreign power nor place Applicant in a position to be exploited by a foreign power in a way that could force him to choose between loyalty to his wife and stepson and loyalty to the U.S. Applicant's wife and stepson's ties with the Ukraine are limited. They will apply for U.S. citizenship as soon as possible, later this year. The only significant contact Applicant has in the Ukraine is his wife's mother. She does not speak English and he does not speak either Ukrainian or Russian. The country has a friendly relationship with the U.S., is not an authoritarian regime, and is not on the U.S. list of countries sponsoring terrorism. Under all the circumstances, Applicant's foreign associates do not represent a threat to national security.

I also conclude Applicant reported his foreign travels and contacts with foreign citizens, as required. MC E2.A2.1.3.4 applies. Applicant and his wife have no financial interests overseas. MC E2.A2.1.3.5 applies.

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

DECISION

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

James A. Young

Administrative Judge

1. As required by 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).
2. The phrase "agent of a foreign power" is a statutory term of art defined in 50 U.S.C. § 1801(b). It does not include a person who is simply employed by a foreign government, unless they are so employed in the U.S., or they are engaged in intelligence gathering or terrorism. The Appeal Board has not discussed the applicability of 50 U.S.C. § 1801(b) to DOHA cases. In fact, its interpretation of "agent of a foreign power" seems to be inconsistent with the statutory definition. *See* ISCR Case No. 02-24254, 2004 WL 2152747 (App. Bd. Jun. 29, 2004) (holding an employee of a foreign government need not be employed at a high level or in a position involving intelligence, military, or other national security duties to be an agent of a foreign power for purposes of MC 1). Although I am convinced 50 U.S.C. § 1801(b) defines "agent of a foreign power" for national security matters, including security clearance decisions, I am required to follow the Appeal Board's opinion. ISCR Case No. 03-16516 at 4 (App. Bd. Nov. 26, 2004).