

KEYWORD: Foreign Influence

DIGEST: Applicant's ex-wife, a Russian citizen and a permanent U.S. resident, has custody of their six-year-old son, to whom Applicant is very devoted. Applicant's current wife is a Ukrainian citizen and a permanent U.S. resident. Her mother is a Ukrainian citizen residing in Russia. Her father and brother are Russian citizens and residents. The security concern based on foreign influence is not mitigated. Clearance is denied.

CASENO: 04-03354.h1

DATE: 11/30/2005

DATE: November 30, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-03354

**DECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's ex-wife, a Russian citizen and a permanent U.S. resident, has custody of their six-year-old son, to whom Applicant is very devoted. Applicant's current wife is a Ukrainian citizen and a permanent U.S. resident. Her mother is a Ukrainian citizen residing in Russia. Her father and brother are Russian citizens and residents. The security concern based on foreign influence is not mitigated. Clearance is denied.

**STATEMENT OF THE CASE**

On April 7, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. This action was taken under Executive Order 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). The SOR alleges security concerns under Guideline B (Foreign Influence).

Applicant answered the SOR in writing on April 14, 2005, admitted the allegations, offered explanations, and requested a hearing. The case was assigned to me on July 27, 2005, and heard as scheduled on September 12, 2005. I kept the record open to permit Applicant to submit additional evidence. I received his evidence on September 20, 2005, and it is incorporated in the record as Applicant's Exhibits (AX) I through M. DOHA received the transcript (Tr.) on September 21, 2005.

## FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant has been employed by a defense contractor since September 1997. He previously served thirteen years on active duty in the U.S. Air Force, transferred to the Air Force Reserve, and retired in November 1994 as a major. He received numerous awards and commendations while in the Air Force.<sup>(1)</sup> He has held a security clearance since 1997. His current employer regards him as talented, hard-working, dedicated, and trustworthy. He has been commended by supervisors, including the president of his company, on numerous occasions, received outstanding performance reports, and several monetary awards.<sup>(2)</sup> Applicant's security officer attested to his talent, responsibility, and trustworthiness.<sup>(3)</sup> Applicant is financially secure and has an excellent credit rating.<sup>(4)</sup>

Applicant was married to a U.S. citizen in April 1990 and divorced in June 1996. In September 1997, he traveled to Russia to meet a Russian woman he had met on the internet. Their relationship ended after this visit.<sup>(5)</sup>

In April 1998, Applicant traveled to Russia to meet another Russian woman he had met on the internet. Sponsored by Applicant, she came to the U.S. on a K-1 "fiancé" visa, and they were married in September 1998. According to State Department records, K-1 visas from Russia and Ukraine are common.<sup>(6)</sup>

Applicant and his second wife separated in September 2002, because she refused to have any more children. She is a citizen of Russia residing in the U.S. as a permanent resident. Applicant has no ties of affection to his ex-wife. To the contrary, Applicant is bitter about the divorce, but he is very devoted to his 6-year-old son from that marriage. His ex-wife has custody of their son, and Applicant has visitation rights for two of every three weekends.<sup>(7)</sup>

Applicant presented no evidence about his ex-wife's background, current employment, education, connections to foreign governments, or vulnerability to coercion or duress. He did not present any evidence regarding financial obligations he may have to his ex-wife as the custodial parent. Applicant considers his ex-wife's parents as "good, kind people," but he has no contact with his former in-laws, in part because of the language barrier.<sup>(8)</sup>

In September 2002, Applicant traveled to Russia to meet a Ukrainian woman he met on the internet. She came to the U.S. on a K-1 visa in January 2004, and they were married in March 2004. Applicant's mother-in-law is a citizen of Ukraine residing in Russia. His father-in-law and brother-in-law are citizens and residents of Russia. Applicant's

mother-in-law, father-in-law, and brother-in-law live in the southern portion of Russia, and they own and operate an agricultural tool business.<sup>(9)</sup> Neither Applicant's wife nor her immediate family has been connected with the Russian or Ukrainian Governments.

Applicant's current wife is now a permanent resident of the U.S., due to give birth to a child in March 2006, and states she intends to become a U.S. citizen. She obtained the U.S. equivalent of a master's degree in aviation engineering, but she has never worked in the aviation industry. Before coming to the U.S., she managed a photo processing center in Ukraine.<sup>(10)</sup> Since coming to the U.S., she has formed friendships among several women of Russian heritage. Applicant testified his wife "admires and respects the United States and its laws, as well as the natural beauty of the country."<sup>(11)</sup> Applicant's wife testified but did not express her views of the U.S. or Ukraine.

Applicant's wife has almost daily e-mail communication with her immediate family, but they do not talk about Applicant's work.<sup>(12)</sup> She has a grandmother, an aunt, and an uncle in Ukraine, but has contact with them only about twice a year.<sup>(13)</sup> Her parents cannot understand English.<sup>(14)</sup> Applicant has virtually no direct contact with his wife's immediate family because of the language barrier.

Ukraine has a presidential and parliamentary system of government with separate executive, legislative, and judicial branches. It is governed by a directly-elected president, a prime minister, and a unicameral parliament. After becoming an independent country, Ukraine established its own military forces, using troops and equipment inherited from the Soviet Union.<sup>(15)</sup> It is undergoing significant economic, political, and social change. Because of wide income disparities, crimes against institutions and individuals perceived to be wealthy are widespread.<sup>(16)</sup>

Ukraine has a poor human rights record. Continuing problems include arbitrary arrest and detention, abuse of detainees and prisoners, police corruption, political interference with the judiciary, illegal searches of mail and monitoring of electronic communications, and infringement of freedom of the press and the right of peaceful assembly.<sup>(17)</sup> Because Ukraine does not recognize dual nationality, American citizens entering Ukraine with a Ukrainian passport are treated as Ukrainian citizens.<sup>(18)</sup>

U.S. policy toward Ukraine is focused on fostering development of a democratic, prosperous, and secure Ukraine, and integrating it into European and Euro-Atlantic alliances.<sup>(19)</sup> Although Ukraine unilaterally gave up its nuclear weapons at the end of the Cold War, problems between the U.S. and Ukraine have arisen in the past because of Ukraine's transfers of dangerous weapons to countries in the Balkans.<sup>(20)</sup>

The Russian government consists of a strong president, a prime minister, and a bicameral legislature. The judiciary is

the least developed branch of government, with problems of internal corruption and executive branch influence on high profile cases. [\(21\)](#)

The Russian government has a restrictive and complicated system of visas for foreign travelers. U.S. citizens and dual-citizen minors with Russian passports face complicated problems. U.S. citizens who previously held Russian citizenship are often required to renounce Russian citizenship before they can apply for a Russian visa on a U.S. passport. Russian immigration and visa laws change regularly and unpredictably. Every foreign traveler is required to have a Russian-based sponsor such as a hotel, tour company, relative, or an employer. The Russian government does not recognize the standing of U.S. consular officers to act or intervene in visa problems. Foreigners frequently are harassed or mistreated by law enforcement and other officials. Extortion and corruption in business are common. Travel to Chechnya and all areas that border it is dangerous. [\(22\)](#)

Russia has generally respected the human rights of its citizens in some areas, but its record in areas such as Chechnya is poor. Although the Russian constitution permits entering a private residence only in cases authorized by federal law or a judicial decision and requires judicial permission to monitor correspondence, telephone conversations, and other means of communication, these requirements are not rigorously enforced. [\(23\)](#)

Numerous terrorist acts have occurred in Russia during the past several years. Although these acts were not directed at U.S. citizens, there is a general risk posed by indiscriminate terrorist attacks. [\(24\)](#)

## **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 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), as amended and modified. 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.

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 a fair, impartial, and 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.

In evaluating an applicant's conduct, 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 or 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 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 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 determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

## CONCLUSIONS

A security risk may exist when an applicant's immediate family, or 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. Directive ¶ E2.A2.1.1. A disqualifying condition (DC 1) may arise when "[a]n immediate family member [spouse, father, mother, sons, daughters, brothers, sisters], 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. "[T]here is a rebuttable 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, 2002 DOHA LEXIS 94 at \* 8 (App. Bd. Feb. 20, 2002). Applicant's testimony regarding his inability to speak Russian and his limited contacts with his in-laws are sufficient to rebut the presumption of affection for his wife's immediate family, but insufficient to rebut the presumption that he has ties of obligation to them. I conclude DC 1 is established.

Applicant's brief relationship with a Russian woman in 1997, alleged in SOR ¶ 1.a., apparently did not go beyond initial exploratory contacts. I conclude this relationship has no security significance.

The family circumstances of Applicant's ex-wife and son, referred to in SOR ¶¶ 1.b. and 1.d., have security significance, because they are relevant to "potential for pressure, coercion, exploitation, or duress." Directive ¶ E2.2.1.8. Applicant's ex-wife, who has custody of their son, is a Russian citizen, and her immediate family are Russian citizens and residents. Applicant introduced no evidence rebutting or mitigating his vulnerability to coercion or pressure from his ex-wife or her immediate family by exploiting his strong affection for his son.

A disqualifying condition (DC 2) also may arise if an applicant is "[s]haring living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." Because Applicant is married to and lives with a Ukrainian citizen with family ties in Russia and Ukraine, DC 2 is established.

Applicant rebutted the allegation in SOR ¶ 1.c. that his current marriage is not legally recognized in the U.S. The remainder of SOR ¶ 1.c. duplicates the allegation in SOR ¶ 1.e. When the same conduct is alleged twice in the SOR, one of the duplicative allegations should be resolved in Applicant's favor. *See* ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). Accordingly, I resolve SOR ¶ 1.c. in Applicant's favor.

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members . . . 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 ¶ E2A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1 ("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to choose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power"). Since the Government produced substantial evidence to establish DC 1 and DC 2, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). The distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, 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.

The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). Applicant's wife has very close ties to her immediate family, as evidenced by her almost-daily contact with them. She has lived in the U.S. for less than two years. Applicant's wife testified at the hearing, but revealed very little about her political views, familial relationships, attitudes toward the U.S. or Ukrainian governments, or her personal aspirations, due in part to her apparent shyness and limited ability to express herself in English.

Applicant established that his wife and her immediate family are not agents of a foreign power, connected to the Russian or Ukraine governments, and not involved in businesses vulnerable to government sponsored industrial espionage or private economic espionage. However, Applicant did not present any evidence about his ex-wife and her immediate family. Thus, he has not established he is not vulnerable to coercion or pressure from his Russian ex-wife and her family through exploitation of his strong affection for his son. After evaluating each family member's individual circumstances as well as the totality of Applicant's family ties to the Ukraine and Russia, I conclude MC 1 is established for his wife and immediate family members but not established for his ex-wife, her immediate family members, and his son.

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. Applicant continues to have contact with his ex-wife regarding visitation. Such contacts, although not necessarily friendly, are not casual because they pertain to their son, to whom Applicant is very attached. Thus, MC 3 is not established for Applicant's ex-wife. Because of the language barrier, Applicant's contacts with his wife's immediate family are virtually non-existent. Thus, I conclude MC 3 is established for his wife's immediate family.



None of the individual family circumstances discussed above are determinative. Likewise, the nature of the governments of Ukraine and Russia, their human rights records, and their relationships with the U.S. are clearly not determinative. Nevertheless, they are relevant factors in determining whether Russia or Ukraine are reasonably likely to exploit or threaten their private citizens in order to force a U.S. citizen to betray the U.S. In the final analysis, an applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the Government. <sup>(25)</sup> After weighing the disqualifying and mitigating conditions, evaluating each family member's individual circumstances as well as the totality of Applicant's ties to Ukraine and Russia by virtue of his two marriages, and making a commonsense evaluation of the evidence, I conclude the security concern based on foreign influence is not mitigated.

### **FORMAL FINDINGS**

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

Paragraph 1. Guideline B (Foreign Influence): AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. Applicant's Exhibits (AX) J through M.
2. AX B through G.
3. Tr. 122-131.
4. AX H.
5. Tr. 61.
6. Statistics regarding K-1 visas are available in the internet. *See* Applicant's Exhibit (AX) I.
7. Tr. 61, 96.
8. Tr. 96-97.
9. Tr. 64.
10. Tr. 92-93.
11. Tr. 65.
12. *Id.*
13. Tr. 116.
14. Tr. 104.
15. Hearing Exhibit (HX) II, pp. 1, 5.
16. HX I, p. 3.
17. HX III, pp. 1-26.
18. HX II, p. 6.
19. HX II, p. 8.
20. HX IV, p. 3; Tr. 74.
21. HX VI, p. 1; HX VIII at CRS-1.

22. HX V, p. 1, 2; 5-7.

23. HX VI, pp. 1-2, 9.

24. HX VII, p. 1.

25. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).