

KEYWORD: Foreign Influence

DIGEST: Applicant, a naturalized United States citizen, married a Ukrainian citizen in February 2001, and adopted her daughter in 2002. His wife and daughter are now U.S. citizens. However, Applicant has failed to mitigate the security concerns that arise from his travel to Ukraine, and from his father-in-law and brother-in-law being citizens and residents of Ukraine. Clearance is denied.

CASE NO: 04-05077.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. 04-05077

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

## **FOR APPLICANT**

Paul T. Amundson, Esq.

### **SYNOPSIS**

Applicant, a naturalized United States citizen, married a Ukrainian citizen in February 2001, and adopted her daughter in 2002. His wife and daughter are now U.S. citizens. However, Applicant has failed to mitigate the security concerns that arise from his travel to Ukraine, and from his father-in-law and brother-in-law being citizens and residents of Ukraine. Clearance is denied.

### **STATEMENT OF THE CASE**

On April 27, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline B (foreign influence). Applicant submitted a response to the SOR that was received by DOHA on May 16, 2005, and admitted all SOR allegations except SOR subparagraph 1.b. By separate letter, dated June 15, 2005, Applicant indicated he did not want a hearing. However, on August 10, 2005, Applicant sent a note to Department Counsel and stated he had changed his mind and was now requesting a hearing. (Appellate Exhibit I)

The case was assigned to me on August 15, 2005. A notice of hearing was issued on September 9, 2005, scheduling the hearing for September 29, 2005. The hearing was conducted as scheduled. The government submitted four documentary exhibits that were marked as Government Exhibits (GE) 1-4. GE 1 was admitted into the record, and administrative notice was taken of the information contained in GE 2-4 without objection. Applicant testified and submitted three documentary exhibits that were marked as Applicant's Exhibits (AE) 1-3, and admitted into the record without objection. The transcript was received on October 17, 2005.

## **PROCEDURAL MATTERS**

Department Counsel moved to withdraw SOR subparagraphs 1.a. and 1.b. based on documentary evidence presented to her before the hearing and subsequently admitted in evidence as AE 1-3. Applicant voiced no objection to the motion, and the motion was allowed.

## **FINDINGS OF FACT**

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, testimony, and exhibits, I make the following findings of fact:

Applicant is a 65-year-old man who has been employed by a defense contractor as a senior tool and die maker since July 2002. He was previously employed outside the defense industry as a senior machinist from January 1995 to July 2002, and as a tool and die maker from August 1987 to December 1995.

Applicant immigrated to the U.S. from Germany in 1959, and became a U.S. citizen in November 1962. He was first married in October 1959, and divorced in July 1968. He has three adult children from that marriage. Applicant married again in December 1974, and that marriage ended in divorce in May 1998. Applicant has two children from his second marriage who alternate residing with him and his ex-wife.

Following his second divorce, Applicant began searching an internet website in an effort to find a woman outside the United States to marry. He made contact with a Ukrainian woman through the internet site sometime in 1999 or 2000, and visited with her in Ukraine for about two weeks. After visiting with her, Applicant decided she was not right for him, and so he once again searched the internet site for a prospective bride. He made contact with his present wife sometime in 2000, and corresponded with her by e-mail and telephone for about one-year.

Although she was a Ukrainian citizen, Applicant's wife was living with her aunt and uncle in Moscow when she began corresponding with Applicant. Applicant visited with her in Moscow on three occasions between 2000 and 2001, staying at her aunt's residence on each occasion, and eventually arranged for her to come to the United States with her young daughter in 2001. They married in February 2001. Applicant adopted his wife's daughter, who is now ten years old, in 2002, and she was issued a certificate of citizenship on May 18, 2004. Applicant's wife became a naturalized U.S. citizen on September 14, 2005.

Applicant's father-in-law is a 73-year-old widower who is a citizen and resident of a small town in Ukraine. He is a retired maintenance worker and lifeguard supervisor. Applicant's brother-in-law is a 31-year-old citizen and resident of Ukraine. He is single, employed as a construction worker, and resides with his father. Neither is employed by the Ukrainian government nor any subunit thereof.

Applicant's father-in-law visited with Applicant and his wife in the U.S. for about three months between December 2002 and March 2003. Applicant, his wife, and his adopted daughter visited with his in-laws in Ukraine in April or May 2005. Applicant's wife speaks with her father by telephone approximately twice a month, and with her brother when he chances to answer the phone when she calls her father. Applicant sends his father-in-law between \$50.00 and \$100.00 about every six months. He recently sent him \$3,000.00 so he could purchase a pacemaker.

Applicant's wife is a college graduate whose sole employment for the two to three years she was residing in Moscow was babysitting her aunt's children. She does not own any property outside the U.S., and transferred her interest in an apartment she owned in Ukraine to her father when she came to the U.S.

On December 25, 1991, the United States officially recognized the independence of Ukraine; and upgraded its consulate in the capital, Kiev, to embassy status on January 21, 1992.<sup>(2)</sup> Ukraine is undergoing profound political and economic change as it moves from its Soviet past toward a market economy and multiparty democracy, and integration into Euro-Atlantic and other international institutions.<sup>(3)</sup> The political, economic, and social transformations taking place in Ukraine have caused perceived wealthier visitors, including Americans, to be targeted for criminal activity.<sup>(4)</sup> The U.S. Embassy in Ukraine has received reports of harassment and intimidation being directed against foreign businessmen and interests, ranging from physical threats, to local government entities engaging in such practices as arbitrary termination or amendment of business licenses and "inspections" by officials that appear designed to harm the business rather than a genuine attempt at good governance.<sup>(5)</sup>

The United States attaches great importance to the success of Ukraine's transition to a democratic state with a flourishing market economy. . . .The Ukrainian government's stated determination to implement comprehensive economic reform is a welcome development, and the U.S. is committed to strengthening its support for Ukraine as it continues on this difficult path. Bilateral relations suffered a setback in September 2002 when the U.S. Government announced it had authenticated a recording of President Kuchma's July 2000 decision to transfer a Kolchuga early warning system to Iraq. The Government of Ukraine denied that the transfer had occurred. U.S. policy remains centered on realizing and strengthening a democratic, prosperous, and secure Ukraine more closely integrated into European and Euro-Atlantic structures.<sup>(6)</sup>

## **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon 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. Considering

the evidence as a whole, Guideline B, pertaining to foreign influence, with its DC and MC, is most relevant in this case.

### **BURDEN OF PROOF**

The sole 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.<sup>(7)</sup> The government has the burden of proving controverted facts.<sup>(8)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence,<sup>(9)</sup> although the government is required to present substantial evidence to meet its burden of proof.<sup>(10)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(11)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(12)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(13)</sup>

No one has a right to a security clearance<sup>(14)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(15)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(16)</sup>

### **CONCLUSIONS**

**Foreign Influence.** 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.

Based upon the allegations in the SOR, Disqualifying Condition (DC) 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* and DC 2: *Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse influence or duress exists* must be evaluated in determining whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant under Guideline B:

Although Applicant's wife and daughter are now U.S. citizens, DC 1 and 2 still both apply because his father-in-law and brother-in-law remain citizens and residents of Ukraine. Applicant's wife's regular and frequent telephone contact with her father, her father's extended visit with them in the U.S., and their recent travel to Ukraine to visit with her father and brother demonstrate the close ties of affection she has with her father and, to some extent, with her brother, and Applicant's vicarious obligation to them. Applicant's recurring, although nominal, monetary assistance to his father-in-law, along with the recent substantial financial contribution he made to provide his father-in-law with medical care, further demonstrate

his sense of obligation to his wife's father. Applicant's ties of love and affection for his wife and daughter expose him to the potential for adverse influence or duress through her Ukrainian relatives.

Once the government meets its burden of proving controverted facts<sup>(17)</sup> the burden shifts to an applicant to present evidence demonstrating extenuation, mitigation, or changed circumstances.<sup>(18)</sup> Further, the government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating conditions, and an Administrative Judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition.<sup>(19)</sup>

The following Mitigating Conditions (MC) must be evaluated in determining whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant under Guideline B: MC 1: *A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitants, 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; and MC 3: Contact and correspondence with foreign citizens are casual and infrequent.*

Applicant has not presented evidence sufficient to permit finding his in-laws are not in a position to be exploited by Ukraine. His wife's family members are citizens and residents of Ukraine. Applicant, his wife and daughter traveled to Ukraine in 2005, and her father came to the U.S. on an extended visit in 2002/03. Considering their recent past travel and her father's age and apparent medical condition, it is reasonable to expect that Applicant, his wife, and daughter will travel to Ukraine in the future. The presence of Applicant's in-laws, and, likely in the future, Applicant, his wife and daughter, in Ukraine places them in the position to be exploited by the Ukrainian government.<sup>(20)</sup>

In considering the possibility of exploitation by the Ukrainian government, I have also considered that Ukraine is a country in transition. While Ukraine is on its way to becoming a stable democracy with a market economy that will be more closely integrated into European and Euro-Atlantic structures; it is also a country that exhibits periodic internal instability, and that has acted as recently as 2000 contrary to the international interests of the United States. Accordingly, MC 1 does not apply.

As discussed above, Applicant's wife's contacts with her father are clearly indicative of the continuing close relationship she has with him. Her contact is neither casual nor infrequent, and, accordingly, MC 3 does not apply.

Security clearance eligibility decisions are determinations in terms of the national interest,

and are in no sense a determination of the loyalty of the applicant. There is no reason to question Applicant's or his wife's loyalty to the United States. However, in all adjudications the protection of our national security is the paramount concern, and the ultimate question to be answered is whether it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.

The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Having done so, I am unable to conclude that Applicant has presented sufficient evidence of refutation, extenuation, and mitigation to overcome the case against him. Accordingly, Guideline B is decided against Applicant.

## **FORMAL FINDINGS**

SOR ¶ 1-Guideline B: Against Applicant

Subparagraph a: Withdrawn

Subparagraph b: Withdrawn

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Subparagraph e: 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 or continue a security clearance for Applicant. Clearance is denied.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. GE 3, page 8
3. GE 2, page 1
4. GE 2, page 3
5. GE 2, page 4
6. GE 3, page 8
7. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
8. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
9. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
10. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

11. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
12. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
13. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
14. *Egan*, 484 U.S. at 528, 531.
15. *Id* at 531.
16. *Egan*, Executive Order 10865, and the Directive.
17. Directive, Additional Procedural Guidance, Item E3.1.14
18. Directive, Additional Procedural Guidance, Item E3.1.15
19. ISCR Case No. 99-0597 (December 13, 2000)
20. Applicant's travel to Russia in 2000 was situational, unlikely to recur, and does not create a continuing security concern at this time.