



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
)	ISCR Case No. 08-06915
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro Se*

March 18, 2010

Decision

HEINY, Claude R., Administrative Judge:

Applicant’s parents and brother are citizens and residents of the Ukraine. Applicant has rebutted or mitigated the government’s security concerns under foreign influence. Clearance is granted.

Statement of the Case

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on March 6, 2009, detailing security concerns under foreign influence. On March 24, 2009, Applicant answered the SOR, and requested a hearing. On July 30, 2009, I was assigned the case. On August 17, 2009, DOHA issued a notice of hearing scheduling the hearing which was held on September 9, 2009.

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

The government offered Exhibits (Ex.) 1 through 3, which were admitted into evidence. Applicant testified on his own behalf and submitted exhibits A through E, which were admitted into the record. On September 17, 2009, the transcript (Tr.) was received.

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the Ukraine. The request and the attached documents were not admitted into evidence, but were included in the record as Hearing Exhibit (H Ex.) I (United States Department of State, Background Note: Ukraine), II (United States Department of State, 2008 Human Rights Reports: Ukraine), III (Ukraine Country Specific Information) and IV (Congressional Research Service, Ukraine: Current Issues and United States Policy). The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In Applicant's Answer to the SOR, he admitted the factual allegations listed in the SOR. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 44-year-old senior electrical engineer who has worked for a defense contractor since October 2005, and is seeking to obtain a security clearance.

In 1965, Applicant was born in the Soviet Union in what is now the Ukraine. (Tr. 26) Applicant does not speak Ukrainian. (Tr. 63) He grew up speaking Russian and studied English since the age of three. (Tr. 64) In 1989, Applicant left the Soviet Union and came to the United States. (Tr. 27) In 1992, he obtained his green card after marrying a United States citizen. (Tr. 45) In January 1996, he became a United States citizen. (Ex. 1) Until he became a citizen, he had not returned to the Ukraine since 1991. (Tr. 41, 66) Applicant has a United States passport and maintains no foreign passports. He has no financial interests in the Ukraine.

In 1998, Applicant filed for his mother's immigration to the United States. (Ex. B and C, Tr. 30) He also filed for his brother, but it took longer to have his brother's paperwork finalized. (Tr. D, Tr. 30) From September 2003 to March 2005, Applicant attended university in the United States and obtained a Master of Science in Electrical Engineering.

In 1938, Applicant's great-grandfather, an accountant, was declared an enemy of the people and was killed during one of Stalin's purges. (Tr. 27) His great-grandfather was an officer in the czar's White Army and taught at a military college. (Tr. 32) His great-grandfather's status resulted in the termination of his great-grandmother's job and his grandfather being denied admission to several universities and being unable to have a career in a managerial position. (Tr. 28)

In 1982, Applicant enrolled at university taking civil construction engineering courses. In 1983, he was expelled and drafted into the military during the Afghanistan war. (Tr. 28) From 1983 through 1985, he was in tank repair before becoming a draftsman due to his education. (Tr. 35, 47) In 1989, the Soviet Union opened up and Applicant came to the United States as a student attending a U.S university. (Tr. 29) The American university paid for his initial education as part of the exchange program. (Tr. 46) Later, he paid for his education by working while attending school. (Tr. 46)

In 1990, he returned to the Ukraine and finished his education. (Tr. 36) In 1991, the Soviet Union broke up and Applicant left the country, but he went back in 1996, after he had become a United States citizen, to defend his thesis. (Tr. 44) He obtained a combined Master's degree and Bachelor's degree in Physics. (Tr. 36) While defending his thesis and obtaining his degrees in the Ukraine, he was still attending a university in the United States. (Tr. 44, 67) In 1997, he obtained a Bachelor's degree in Mechanical Engineering from a U.S university. (Tr. 36)

In 2002, Applicant was laid off from his job when the company shifted production overseas. (Tr. 49) Applicant was unemployed for nine months before returning to an American university in the United States to work on his second Master's degree. (Tr. 49) In 2005, he obtained his Master's degree in Electrical Engineering. (Tr. 36)

After completing his education, Applicant decided to stay in the United States and not return to the Ukraine, because he liked living in a free society, free of tyranny and oppression. (Tr. 37) Applicant states the Ukraine is not a satellite of Russia. (Tr. 37) It is a market democracy. (Tr. 39) In the 1990's, the Ukraine had the third largest nuclear arsenal in the world and chose to destroy it. (Tr. 38) The Ukraine was the most industrialized republic when part of the Soviet Union. (Tr. 40) In 2008, following Russia's invasion of Georgia, the Ukraine openly supported Georgia. (Tr. 67)

Applicant visited the Ukraine in June 2001, July 2004, December 2006, January 2007, August 2007, and Christmas time 2008. In 2001, he spent two to three weeks in the Ukraine. In 2004, he was there for two months. In late 2005 and early 2006, Applicant was in the Ukraine for two to three weeks. In late 2006 and early 2007, Applicant spent two to three weeks in the Ukraine. (Ex. 3) In August 2007, he was there three weeks. (Ex. 3) His last trip was for two weeks at Christmas time 2008. (Tr. 33) All of his trips were to visit his family. Applicant asserts that loyalty to his family does not translate into loyalty to the Ukrainian government. (Tr. 32)

Applicant's mother, age 67, is a citizen and resident of the Ukraine. (Tr. 52) In 1981 or 1982, his parents divorced. (Tr. 57) From 1981 until the summer of 2009, she was a college chemistry professor at a state-funded Ukrainian college. (Tr. 31, 52) Applicant's mother was ineligible for a career above her teaching level because of her grandfather. (Tr. 28) Applicant has telephone communication with his mother from two or three times a week to everyday. (Ex. 3, Tr. 33) Applicant sees his mother when he visits the Ukraine. In July 2006, Applicant's petition for his mother to obtain a United States visa was approved. (Ex. B)

In March 2009, his mother was issued an immigrant visa by the United States (Ex. 2, D, Tr. 51, 58) She did not use it because of her deteriorating health. (Tr. 51) In July 2009, his mother had an operation and his brother remained to take care of her. (Tr. 30, 54) As of the time of the hearing, his mother had successfully undergone the operation, but was yet unable to travel. (33) Following the operation, Applicant talked to his mother several times a day. (Tr. 34)

Applicant has no relationship with his father, a retired science researcher, and has not had any contact with him for more than ten years. (Ex. 2, 3) Applicant's brother, an insurance salesman, is a citizen and resident of the Ukraine. Applicant's contact with his brother was between every two weeks to monthly contact and he saw him whenever he traveled to the Ukraine. (Tr. 34) He last saw his brother in 2008, and last talked to him six weeks before the hearing. (Tr. 55) In October 1998, Applicant's petition for his brother to obtain a United States visa for was approved. (Ex. C)

Ukraine

The Ukraine has a parliamentary-presidential system of government with separate executive, judicial, and legislative branches. It has been an independent state since August 1991.² (H Ex. I, p.3) In December 1991, the United States officially recognized the independence of the Ukraine. The first post-Soviet constitution was adopted in June 1996. In March 2006, the Ukraine held parliamentary and local elections. (*id.*, p.4) Following World War I, the Ukrainians declared independent statehood. However, part was incorporated into Poland and part incorporated into the Soviet Union in 1922 as the Ukrainian Soviet Socialist Republic.

The Ukraine is undergoing a significant economic, political, and social transformation, and income disparities have grown sharply. (H. Ex. III, p.3) Freedom of religion is guaranteed by law. (*id.*, p.4, H Ex. II, p.13) Minority rights are respected. Freedom of speech and press are guaranteed and these rights are generally respected. (*id.*) The Ukraine does not recognize dual nationality. (H. Ex. III, p.5)

The Ukraine maintains peaceful and constructive relations with all its neighbors and has sought to maintain good relations with Russia. (H Ex. I, p.8) The United States attaches great importance to the success of the Ukraine's transition to a democratic state with a flourishing market economy. (*id.*, p.9) Ukraine's democratic "Orange Revolution" has led to closer cooperation and more open dialogue between the Ukraine and the United States. (*id.*) In March 2006, normal trade relation status was restored with the termination of the Jackson-Vanik amendments to the Trade Act of 1974. (*id.*)

United States policy remains centered on realizing and strengthening a democratic, prosperous, and secure Ukraine more closely integrated into Europe and Euro-Atlantic structures. In December 2008, the United States signed the United States—Ukraine Charter on Strategic Partnership, which highlights the importance of the bilateral relationship and outlines enhanced cooperation in the areas of defense, security, economics and trade, energy security, democracy, and cultural exchanges.

² The dissolution of the Soviet Union occurred In December 1991. (H Ex. I)

(*id.*) The Charter also emphasizes the continued commitment of the United States to support enhanced engagement between NATO and the Ukraine. (*id.*)

The total United States assistance since independence has been more than \$3.8 billion. United States assistance is targeted to promote political, security, and economic reform and to address urgent social and humanitarian needs. The United States has consistently encouraged Ukraine's transition to a democratic society with a prosperous market-based economy. (*id.*)

Fundamental civil and political rights are respected. (H Ex. II, p.1) The police and penal systems continue to be sources of some of the most serious human rights concerns. (H Ex. II, p.1) They include instances of torture by law enforcement personnel, harsh conditions in prisons, and arbitrary and lengthy pretrial detentions. (*id.*) The judiciary lacks independence and suffers from corruption. (*id.*) Police corruption remains a problem. (*id.* p.8) Serious corruption persists in all branches of the government. (*id.* p.1)

Lengthy pretrial detention remains a problem. Individuals often remain in detention for months or years before being brought to trial. (*id.* p.8) The constitution includes procedural provisions intended to ensure a fair trial, including the right of suspects or witnesses to refuse to testify against themselves or their relatives; however, these rights were limited by the absence of implementing legislation, which left a largely Soviet era criminal justice system in place. (H. Ex. II, p. 11) The constitution gives citizens the right to challenge in court any decisions, actions, or omissions of national and local government officials that violates human rights. (*id.*p.12)

The Ukraine seeks to join NATO. (Tr. 67) In April 2008, the Bush Administration strongly supported granting a Membership Action Plan to the Ukraine, a stepping-stone to NATO membership. (H. Ex. IV, summary, p.13) The effort was blocked. However, the Allies confirmed that the Ukraine will join NATO in the future. (*id.*) The Ukraine has also sought entry into the World Trade Organization and the European Union.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

AG ¶ 6 explains the Government’s security concern regarding foreign influence:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in United States interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying. The two conditions applicable to this case are:

(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion, and

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

Applicant's parents and brother are citizens and residents of the Ukraine. His parents are divorced and he has not had contact with his father in more than ten years. He has frequent contact with his mother and less frequent contacts with his brother. His connections to his family also create a potential conflict of interest because the relationships are sufficiently close in nature and could raise a security concern over his desire to help his mother and brother. Once Applicant became a United States citizen, he sought to obtain a United States visa so his mother and brother could come to the United States.

The government presented sufficient evidence to support the factual allegations in the SOR. AG ¶ 7(a) and 7(b) apply.

Four of the mitigating conditions under AG ¶ 8 are potentially applicable:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the United States interest;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

Applicant has professed his total loyalty to the United States. He has no financial interest located in the Ukraine or in any other foreign country. It was Applicant's

decision to stay in the United States and not return to the Ukraine, because he likes living in a free society, free of tyranny and oppression.

Based on his relationship and depth of loyalty to the United States, Applicant can be expected to resolve any conflict of interest in favor of United States interests. He has lived in the United States since 1989, when he arrived to attend university. After earning an undergraduate and advanced degrees, he began working in the United States. In 1996, he became a United States citizen. His ties to the Ukraine have become minimal over the years. He has no financial or property interests in the Ukraine. His communication with his brother is once every two to six weeks and with his father, non-existent. His communication with his mother is more frequent.

I have considered the information of which I have taken administrative notice concerning the Ukraine. That information discloses that the Ukraine is a country that has experienced a degree of political and economic instability since it gained independence following the breakup of the Soviet Union in 1991. The Ukraine is not a satellite of Russia, but has a continuing complex relationship with Russia. The Ukraine has sought entry into NATO, the World Trade Organization, and the European Union. There is nothing to indicate the Ukraine has engaged in any espionage efforts, economic or otherwise, since obtaining its independence.

As to the potential for coercion, available information shows that the Ukraine is an open, market society, governed through a democratically elected legislature and executive, checked by an independent judiciary. It is not a hostile, totalitarian state seeking to project its power worldwide through the brute intimidation or coercion of its citizens domestically and abroad. While there are notable problems regarding human rights abuses in the Ukraine, all of the available information shows Applicant's mother and brother are not likely to be subject to coercive methods to obtain information from Applicant. I conclude there is little likelihood the Ukraine, a nation friendly toward the United States, will try to leverage Applicant's relationship with his mother and brother to gain access to the information with which Applicant works.

Neither his mother, a retired university chemistry professor, nor his brother, an insurance salesman, are in positions connected with the Ukrainian government or engaged in activities that would likely cause Applicant to be exploited or placed in a position of having to choose between them and the United States. Considering all available information about the Ukraine, Applicant is entitled to substantial consideration under AG ¶ 8(a).

Applicant established the application of AG ¶ 8(b) based on his relationship and depth of loyalty to the United States. He can be expected to resolve any conflict of interest in favor of United States interests. He does not have any foreign financial or property interests. AG ¶ 8(f) applies. He has frequent communication with mother and less frequent communication with his brother. He last talked with his brother six weeks before the hearing. Since leaving the Ukraine in 1989—20 years ago—he has visited his mother and brother in the Ukraine seven times.

Applicant has not had contact with his father in more than ten years. AG ¶ 8(c) applies. Based on the foregoing, I conclude SOR ¶ 1.a for the Applicant, and further conclude available information is sufficient to mitigate the security concerns raised under Guideline B.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

The Appeal Board requires the whole person analysis address "evidence of an applicant's personal loyalties; the nature and extent of an applicant's family's ties to the United States relative to his [or her] ties to a foreign country; his or her social ties within the United States; and many other [factors] raised by the facts of a given case." ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007). Substantial mitigating evidence weighs toward granting Applicant a security clearance.

Applicant is fully entrenched in the United States, has no foreign financial interests, and is unlikely to compromise his life here. Applicant is a mature person. He has lived in the United States for 20 years, most of his adulthood, and has been a naturalized citizen for the past 13 years. He earned an undergraduate degree and an advanced degree from United States institutions. He is a successful member of his business community, providing services to the United States government and private industry. His ties to the United States are much stronger than his ties to the Ukraine. There is no evidence he has ever taken any action that could cause potential harm to the United States. He takes his loyalty to the United States seriously, and he renounced his Ukrainian citizenship after taking his United States oath of citizenship. The Ukraine does not recognize dual citizenship. There is no derogatory information about him in the record.

A fair and commonsense assessment of the entire record before me shows the government's doubts about Applicant's suitability to have access to classified information are based solely on his mother and brother being citizens and residences of

the Ukraine. They both have United States visas and would be living in the United States now were it not for his mother's surgery followed by a period of being unable to travel after the surgery. After weighing the disqualifying and mitigating conditions, and all facts and circumstances in the context of the whole person, I conclude Applicant mitigated the security concerns pertaining to foreign influence.³ Available information is also sufficient to resolve those doubts. Overall, the record evidence leaves me without questions as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from foreign influence.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Foreign Influence: FOR APPLICANT

Subparagraphs 1.a to 1.d: For Applicant

Conclusion

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

CLAUDE R. HEINY II
Administrative Judge

³ I conclude that the whole person analysis weighs heavily toward approval of Applicant's security clearance. Assuming a higher authority reviewing this decision determines the mitigating conditions articulated under AG ¶ 8 do not apply and severs any consideration of them, I conclude the whole person analysis standing alone is sufficient to support approval of a security clearance in this case.