



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 09-03399

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: Alan V. Edmunds, Esquire

August 20, 2010

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF-86) on December 16, 2008. On December 23, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline B (Foreign Influence). The action was taken under 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 adjudicative guidelines (AG).

Applicant acknowledged receipt of the SOR on January 14, 2010, and requested a hearing before an administrative judge. DOHA assigned the case to me on April 22, 2010. DOHA issued a notice of hearing on May 13, 2010. I convened the hearing as scheduled on June 22, 2010. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. Applicant testified and submitted 13 documents (AE A-M), which were admitted without objection. DOHA received the transcript (Tr.) on June 29, 2010. At Applicant's request, I kept the record open for a post-hearing brief and an

additional document. Applicant timely submitted the brief and an exhibit marked AE N and admitted into the record. I did not receive any objection from Department Counsel concerning the post-hearing submissions. Eligibility for access to classified information is granted.

Procedural and Evidentiary Rulings

Department Counsel requested that I take administrative notice of certain facts relating to the Russian Federation (Russia). The request and the attached documents are included in the record as Hearing Exhibit 1. The facts administratively noticed are set out in the Findings of Facts, below.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a through 1.d. His admissions are incorporated in my findings of fact. I make the following findings:

Applicant is a 28-year-old employee of a defense contractor. He graduated from high school in June 2001. Applicant obtained a Bachelor of Science degree in 2008. He has been employed with his current employer since November 2008. (GE 1) He held an interim security clearance from January 2009 until December 2009. (Tr. 33)

Applicant married in June 2009. He met his wife, who was born in Russia, on a Christian dating service several years ago. (Tr. 22) His wife, who is a permanent resident of the United States, resides with him. (AE M) She came to the United States in 2007 for religious asylum. (AE) Applicant and his wife are members of the Seventh Day Adventist Church. (Tr. 23) Applicant and his wife have an infant son who was born on May 2, 2010. (AE L)

Applicant's wife was detained by the police in Russia for distributing religious pamphlets. (Tr. 41) She has no desire to return to Russia. She has no contact with anyone in Russia. Her Russian passport has expired. (AE N) She will become a United States citizen as soon as a required three year-residency period ends. (Tr. 38)

Applicant's mother-in-law and father-in-law arrived in the United States in January 2010. Although they are still citizens of Russia, they have been granted religious asylum in the United States because they are Christian (Seventh Day Adventist). They are in the process of becoming permanent residents. (AE G) As part of the process, they need their Russian passports. (AE H) They are not allowed to travel abroad without written permission as part of the "refugee status."¹ Applicant's in-laws are not connected to the Russian government. His mother-in-law was a nanny and his father-in-law was a driver. (Tr.) They have no property in Russia, nor do they receive any pensions. (Tr.)

¹The passports are stamped "admitted as a refugee pursuant to Section 207 of the INA for an indefinite period of time. If you depart the U.S. you will need prior permission from INS to return. Employment authorized.

Applicant's brother-in-law is a citizen of Russia who resides in Germany. He fled Russia for religious freedom about six years ago. (Tr. 26) Applicant's brother-in-law is seeking German citizenship. Applicant has seen his brother-in-law approximately five times in the past five years by video-cam. His brother-in-law visited the United States once. (Tr. 53)

Applicant's other brother-in-law is a citizen of Russia, but lives in the United States. He does not intend to return to Russia. He arrived in the United States in 2007 with Applicant's wife. (Tr. 28) He is in the process of becoming a United States citizen. (AE I)

Applicant's manager, who holds a security clearance, recommends Applicant for retention of his clearance. (AE A) Applicant is frank and honest. Applicant received an award due to his professionalism and work ethic. Applicant is a highly regarded engineer who is trustworthy. (AE A)

A senior software engineer describes Applicant as a key contributor in the design of a unique database. Applicant is enthusiastic and works hard on all projects. He is a trusted member of the team. (AE B)

An assistant program manager describes Applicant as a quick learner and contributor to the team. He informed management about his plan to wed a foreign national. Applicant delivers his work in a timely fashion with high quality. He has shown a strong work ethic and professionalism in all his assignments. (AE C)

Applicant is described by colleagues as honest in all matters. His integrity, attention to detail, strong work ethic and technical knowledge are notable. (AE D and E) Family friends also describe Applicant and his family as loyal and solid citizens. (AE F)

Applicant does not speak Russian. He has never visited Russia. Applicant has little or no contact with his in-laws or his wife's brothers. Applicant testified credibly that as a U. S. citizen, he would not jeopardize the United States. (Tr. 29)

I have taken administrative notice that the Russian Federation (Russia) has a centralized political system, with power concentrated in the president and prime minister, a weak multiparty political system, and a ruling-party dominated by a bicameral legislature. Russia's large population of more than 142 million people is both multinational and multi-ethnic. Russia is a nuclear superpower that since the dissolution of the Soviet Union, continues to develop politically, socially, and economically.

Russia has an active, recent, and ongoing collection program targeting the United States. Russia and China have been the most aggressive collectors of sensitive and protected United States technology and accounted for the majority of such targeting. Russia's lead in the targeting of United States technologies, through its industrial espionage efforts, goes back to 1997. Russian espionage specializes in military technology and gas and oil industry technical expertise. Russia continues to strengthen

its intelligence capabilities directed against the United States. However, Russia is not known to target U.S. citizens to obtain protected information.

Russia's human rights record remains uneven and poor in some areas. Additional specific instances of these human rights abuses, as reported by the United States Department of State, include: reports that the government or its agents committed politically motivated killings and other arbitrary killings, credible reports that law enforcement engaged in torture, abuse and violence, extremely harsh and life threatening prison conditions, and arbitrary arrest and detention.

The United States and Russia share common interests on a broad range of issues, including counter terrorism and the reduction of our strategic arsenals. Russia shares the basic goal of stemming the proliferation of weapons of mass destruction and the means to deliver them. The Cooperative Threat Reduction (CTR) program, launched in 1992 to facilitate dismantlement of weapons of mass destruction in the former Soviet Union, was renewed in 2006 until 2013. During the past several years, Russia has intensified its efforts to combat trafficking in persons. We are cooperating in the fight against HIV/AIDS. Despite the cooperation, there remain areas in which the United States and Russia disagree. The Obama administration is seeking ways to improve our bilateral relations and enhance cooperation by focusing on areas of mutual interest, while managing areas of disagreement.

The role Moscow plays regarding issues of interest to the United States is likely to turn on many factors, including developments on Russia's periphery and the degree to which Russia perceives U.S. policies as threatening to what its leadership sees as vital Russian interests.

In the conventional forces realm, Moscow remains capable of militarily dominating the former Soviet space; although Russia's experience in the August 2008 Georgia conflict revealed major shortcomings in the Russian military, it also validated previous reform efforts that sought to develop rapidly-deployable forces for use on its periphery. Russia continues to use its military in an effort to assert its great power status and to project power abroad.

There have been encouraging signs in the past year that Russia is prepared to be more cooperative with the United States, as illustrated by President Medvedev's agreement last summer to support air transit through Russia of military cargo in support of operations in Afghanistan and Moscow's willingness to engage with the United States to reduce the nuclear threat from Iran.

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 an applicant meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole-person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of an applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination of the loyalty of an applicant. It is merely an indication an 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 an applicant that may disqualify an applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. 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 AG ¶ 2(b).

Analysis

Guideline B (Foreign Influence)

The SOR alleges Applicant's wife, mother-in-law, father-in-law and two brothers-in-law are citizens of Russia. (SOR ¶¶ 1.a-1.d). The security concern relating to Guideline B is set out in AG ¶ 6 as follows:

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 U.S. 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.

A disqualifying condition may be raised by "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." AG ¶ 7(a). A disqualifying condition also may be raised by "connections to a foreign person, group, government, or country that creates 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." AG ¶ 7(d) is raised by "sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure or coercion. Based on this evidence, AG ¶¶ 7(a), (b), and (d) are raised.

Applicant has foreign family ties through his 2009 marriage to his spouse who was born in Russia. Applicant's wife is a permanent resident of the United States. She is not yet a United States citizen due to the three-year residency requirement. She was born in Russia and has been living in the United States since 2007. Applicant's in-laws are still Russian citizens. Applicant's brothers-in-law are still Russian citizens. However, none of them live in Russia. None of them have any government connections or other position in which they could otherwise benefit from Applicant's access to sensitive information or technology. Such ties do not automatically disqualify an Applicant from obtaining a security clearance. Family ties with Russian citizens raise security concerns because of the potential for foreign influence.

Since the government produced evidence to raise the disqualifying condition in AG ¶¶ 7(a), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of

proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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).

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, 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 United States 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 United States.

Security concerns under this guideline can be mitigated by showing that “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 U.S.” AG ¶ 8(a). 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). Similarly, AG 8(b) “there is no conflict of interest, whether 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 U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.

Applicant is a United States citizen. He was born and educated in the United States. He and his family, not including his spouse and in-laws, have lived in the United States their entire life. He married a woman who was born in Russia who has resided in the United States since 2007. They have a son who is a United States citizen. Applicant and his wife and son are Seventh Day Adventist Christians. They will raise their family in the United States.

Applicant has never traveled to Russia. He does not speak Russian. He has no contacts in Russia. His wife’s family is now living in the United States and is seeking to become United States citizens. They are in the United States for religious asylum. They do not plan to return to Russia. They have ended their ties to Russia. His wife’s passport

has expired. His in-laws will have their passports destroyed once they become United State's citizens.

Applicant's ties to the United States as a native-born citizen persuade me that given the circumstances in this case, he would choose the interests of the United States over any foreign connection, in the event that a conflict of interest arose. AG ¶ 8(b) applies.

Whole-Person Concept

Under the whole-person concept, an 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. An 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. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a loyal U.S. citizen who has held a security clearance without any security violations. In 2009, he married a woman who was born in Russia and is a Russian citizen. She now resides with him and their infant son. She is a permanent resident of the United States. She is in the United States for religious asylum. She has no plans to return to Russia.

Applicant's wife's parents and siblings no longer reside in Russia. Her parents are in the process of becoming permanent residents in the United States for the same religious reasons. They want to become U.S. citizens. They have no other ties to Russia. They are not connected in any way to Russia or its government. Applicant's brothers-in-law do not live in Russia. One brother-in-law lives in the United States and the other one lives in Germany. They have no plans to return to Russia.

While Russia is actively engaged in the collection of U.S. information, there is still no evidence suggesting that it targets its expatriate citizens such that would make Applicant or his family members likely targets. Applicant's wife and her family are all in

the United States. Her brother is in Germany. There is no one with a tie to Applicant or his wife living in Russia.

After weighing the disqualifying and mitigating conditions under Guideline B and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Foreign Influence: FOR APPLICANT

Subparagraph 1.a-d: For Applicant

Conclusion

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

Noreen A. Lynch
Administrative Judge