

KEYWORD: Guideline B; Guideline C

DIGEST: Given the extent of Applicant's family and other personal contacts in Estonia, the Judge's decision does not explain, and the record does not support his conclusion that Applicant is not likely to have to choose between the interests of those persons and the interests of the United States. Favorable decision reversed.

CASENO: 09-07511.a1

DATE: 04/22/2011

DATE: April 22, 2011

In Re:)

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Applicant for Security Clearance)

) ISCR Case No. 09-07511
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William T. O'Neil, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 7, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 19, 2011, after the hearing, Administrative Judge Thomas M. Crean granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in his application of the mitigating conditions and whether the Judge’s whole-person analysis was erroneous. Consistent with the following, we reverse the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant is a freelance translator of Estonian for U.S. Government agencies and contractors. She holds both bachelor’s and master’s degrees.

Applicant was born to Estonian parents in the United States. She is considered to be a dual citizen of those two countries. Her parents had been refugees from the Soviet occupation of Estonia. Applicant and her parents spoke Estonian at home, enabling her to develop a proficiency in the language. She has provided translation services for a number of high-ranking U.S. officials.

Applicant’s husband is a dual citizen of the U.S. and Estonia. The couple’s three grown children were born in the U.S. One of them provides translation services for an agency of the Estonian government and resides in Estonia. Applicant and her husband speak with her frequently and see her whenever they visit Estonia. The other two children reside in the U.S.

Another Government agency granted Applicant a security clearance. A different Government agency requested for her to provide translation services, but she did not pass a required polygraph examination. This had nothing to do with her ties to Estonia.

On one occasion Applicant performed translation services at the request of the Estonian Embassy in the U.S. On another she translated a book into English and sought a grant from the Estonian Government, which she has not received. She maintains an Estonian bank account for receipt of payment for translation services provided in that country. The Estonian government withholds taxes from these payments, but they are refunded after she has filed her U.S. tax return.

Applicant obtained an Estonian passport in mid-2004 for business and for convenience. She travels to Estonia about once a year, and an Estonian passport facilitates the process of obtaining work and of entering Estonia and other European Union countries. She has used the passport a number of times and is willing to surrender it.

In the early 2000s, Applicant registered for and received a certificate to vote in Estonian elections. She did so twice, once in the early 2000s and once in the late 2000s. She voted for pro-American candidates. She is not sure if she will vote in future elections.

Applicant's husband owns a condominium in Estonia for vacation purposes and for a place to stay while visiting that country. It is valued at about \$160,000. Applicant and her husband have a net worth in the U.S. of about \$1,000,000.

Applicant knows high level officials in the Estonian government. Applicant follows Estonian political events in an effort to maintain her language proficiency. Her connection to Estonia is cultural and hereditary. Her loyalty is to the U.S.

Estonia has been a parliamentary democracy since 1992. It is a member of NATO and of the European Union. It has a stable and constructive relationship with the U.S.

Discussion

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. In rendering a final decision, an "agency must examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The standard applicable in security clearance decisions "is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

Department Counsel argues that the Judge's favorable conclusions as to mitigation are not supported by the record. His appeal brief cites to numerous pieces of evidence that, he argues, are not consistent with the Judge's decision. For example, he notes Applicant's close ties to at least three persons who occupy positions of high-visibility in Estonia and her close ties to her daughter. We also note Applicant's admissions to the SOR to the effect that Applicant has traveled to Estonia yearly to bi-yearly since 1991; she has maintained contact with members of her family as well as her husband's, who are citizens and residents of Estonia; she maintains close association and/or contact with at least four other friends who are citizens and residents of Estonia; and her husband did *pro bono* consulting work for Estonia in the mid-1990s. Department Counsel argues that the record evidence, viewed as a whole, does not support a favorable decision in this case.

The Judge stated, in the Guideline B analysis, that "there is little chance that there will be a difference between the interest of Estonia and the interests of the United States. There is little

likelihood Applicant will be placed in a position to have to choose between the interests of her contacts in Estonia and the interests of the United States.”¹ Decision at 9. However, the Judge’s conclusion about the purportedly insignificant differences between U.S. and Estonian policy is speculative at best. More to the point, the “national security of the United States can be at risk whether a person with foreign family ties is vulnerable to coercion or blackmail, or is vulnerable to non-coercive influence,” as might be the case of an applicant with relatives living in a country that is a U.S. ally. ISCR Case No. 02-02892 at 10 (App. Bd. Jun. 28, 2004). Given Applicant’s extensive personal contacts in Estonia, especially her adult child, the Judge’s decision does not explain, and the record evidence does not support, his conclusion that Applicant is not likely to have to choose between the interests of those persons and the interests of the U.S.

The Judge favorably applied two other Guideline B mitigating conditions, 8(b)² and 8(c).³ He stated that Applicant can be expected to resolve any conflict of interest in favor of the United States. However, for similar reasons as those stated above, the record viewed as a whole does not support a conclusion that Applicant met her burden of persuasion that her ties to her daughter in Estonia and to her other friends and relatives there would not give rise to a conflict of interest or, if it did, that Applicant would resolve the conflict in favor of the U.S. Additionally, her frequent contact with her daughter alone is inconsistent with a favorable application of 8(c).

Regarding Guideline C, the Judge noted that Applicant had stated that she would surrender her passport.⁴ He also stated that Applicant voted in Estonian elections in order to elect candidates favorable to the U.S. and that she does not intend to vote in future elections. Decision at 10. Many of the Judge’s conclusions are without foundation in the record. For example, it is not clear why Applicant’s evidence that she exercised Estonian citizenship rights for business and economic reasons (Decision at 10), even if true, mitigates the security concerns arising therefrom. There is a paucity of record evidence to demonstrate that she will have no further economic interests in Estonia. The Judge accepted Applicant’s statement that she voted in Estonian elections simply to advance U.S. interests. He does not explain why he finds that credible, given the extent of Applicant’s ties to Estonia, or, even if credible, why it is mitigating. Moreover, the Judge’s statement that Applicant will not vote in future Estonian elections is not consistent with his earlier

¹See Directive, Enclosure 2 ¶ 8(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 U.S[.]”

²Directive, Enclosure 2 ¶ 8(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 U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest[.]”

³Directive, Enclosure 2 ¶ 8(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[.]”

⁴Directive, Enclosure 2 ¶ 11(e): “the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated[.]”

finding that she was not sure as to whether she would do so or not. Regarding the passport, Department Counsel persuasively argues that a stated willingness for future action may demonstrate good intentions but is not a substitute for evidence that an Applicant has destroyed the passport, surrendered it, or otherwise invalidated it.⁵

To sum up, the Judge's findings and the record demonstrate that, while an American citizen, Applicant has obtained and used an Estonian passport and voted in Estonian elections; that she maintains close association and/or contact with high-level officials in the Estonian government and with other persons in that country; and that her daughter lives in Estonia and works as a translator for an agency of the Estonian government. The Judge's decision fails to consider important aspects of the case and runs counter to the weight of the record evidence. ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). Viewed in light of the record as a whole, the Judge's decision is not sustainable, either under the mitigating conditions or the whole-person factors.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

⁵Appeal Brief at 18, citing to Directive, Enclosure 2 ¶ 11(c).