

KEYWORD: Guideline B

DIGEST: Applicant held a Soviet/Russian security clearance for a number of years while working on matters related to Russian national defense. In the Analysis, the Judge cited to record evidence of Applicant's ties within the U.S. and within Russia. He also cited to evidence that Applicant would be willing to renounce his possible dual citizenship. However, because the SOR did not allege Foreign Preference concerns, this is entitled to limited weight. The Judge did not explain how it is that cited U.S. ties are such as to mitigate the heightened risk of coercion that he found to have been raised by Applicant's circumstances. The record contains evidence from which a reasonable person could conclude that Applicant's family and friends might well come to the attention of the Russian authorities and become a means through which Applicant could be subjected to coercion. The Judge's decision fails to consider an important aspect of the case. Favorable decision reversed.

CASE NO: 10-00824.a1

DATE: 08/06/2012

DATE: August 6, 2012

| | | |
|----------------------------------|---|------------------------|
| In Re: |) | |
| |) | |
| ----- |) | ISCR Case No. 10-00824 |
| |) | |
| Applicant for Security Clearance |) | |
| |) | |

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 29, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 25, 2012, after the hearing, Administrative Judge Martin H. Mogul 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 pertinent 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 found that Applicant was born and educated in the former Soviet Union. He immigrated to the U.S. in the 1990s and has resided in this country since then. He became a U.S. citizen in the mid-2000s. He has not traveled outside the U.S. since 2003. While in Russia, Applicant worked for the government on projects of military significance. He held a Russian security clearance from the early 1980s until the late 1990s.

Applicant’s spouse is a naturalized U.S. citizen who lives with Applicant in the U.S. Before coming to this country, she worked for the Russian government at a job of military significance. He has a son from a first marriage who is a citizen of Russia but who now lives in the U.S. He also has a son from his current marriage who was born in Russia but who lives in the U.S. One of Applicant’s sons has worked for the Russian government. Applicant’s father is a citizen and resident of Russia. Applicant’s father worked for the government, and held a Russian security clearance, before retiring. Applicant speaks to him by telephone about twice a month.

Applicant has a sibling who is a citizen and resident of Russia, as is the sibling’s spouse. Applicant’s sibling and sibling’s spouse have previously worked for the Russian government. Applicant has not spoken with his sibling for several years, due to a falling-out.

In addition, Applicant has three friends who are citizens and residents of Russia. One of the friends works for the Russian government. He speaks with one of these friends “a few times a year.” Decision at 3.

Applicant had a Russian passport, which expired in 2005. He did not use it after becoming a U.S. citizen. He lives in a house he purchased with his wife in the early 2000s. To the extent that Applicant can be considered a dual citizen, he is willing to renounce his Russian citizenship, although he had heard that it is difficult to do so.

Applicant enjoys an excellent reputation for his job performance and character. His son avers that Applicant does not have any contacts with a foreign government, nor any business relationships in Russia. Russia has provided military and missile technology to other countries of security concern. It’s human rights record is uneven.

Russia and the U.S. are experiencing discord in their relations with one another. Russia targets the U.S. for purposes of intelligence gathering, specializing in military technology and technical information pertaining to the oil and gas industry.

In the Analysis, the Judge concluded that Applicant's circumstances raised two disqualifying conditions, 7(a)¹ and 7(b).² He also concluded that Applicant's circumstances justified the favorable application of mitigating condition (MC) 8(b).³ In support of this conclusion, he cited to evidence of Applicant's U.S. citizenship and to evidence of the U.S. residence of Applicant's wife and sons. The Judge stated that Applicant's contact with most of his Russian relatives and friends has been casual and infrequent⁴ and that Applicant has no assets in Russia. The Judge also noted Applicant's stated willingness to renounce his dual citizenship, although dual citizenship was not alleged as a security concern.

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).

¹Directive, Enclosure 2 ¶ 7(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[.]"

²Directive, Enclosure 2 ¶ 7(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[.]"

³Directive, 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[.]"

⁴*See* Directive, Enclosure 2 ¶ 8(c): "contact with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation[.]" The Judge did not explicitly cite this mitigating condition in his analysis of Applicant's security concerns.

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel contends that the Judge's favorable application of MC 8(b) was not supported by the record evidence. We find Department Counsel's arguments to be persuasive. We note at the outset that, in Guideline B cases, the nature of the foreign government and its intelligence gathering history are important considerations that must be brought to bear on a Judge's ultimate conclusions. *See, e.g.*, ISCR Case No. 09-06831 at 4 (App. Bd. Mar. 8, 2011). The Judge found that Russia is an active collector of intelligence data pertaining to the U.S. In addition to this finding, we note official notice documents in the record, which assert that (1) Russia, along with China, is the most aggressive collector of U.S. information and technology,⁵ (2) Russian authorities are able to monitor telephone calls in real time,⁶ (3) Russian authorities are able to monitor e-mail activity,⁷ and (4) Russian immigrants with advanced technical skills and who work in U.S. companies may be increasingly targeted by Russian intelligence services.⁸

We also note evidence that Applicant held a Soviet/Russian security clearance for a number of years while working on matters related to Russian national defense. *See* ISCR Case No. 01-10349 at 5 (App. Bd. Feb. 15, 2005) (Prior involvement with a foreign country's defense industry or prior access to a foreign country's sensitive military projects raises significant questions that require scrutiny in evaluating an applicant's security eligibility); *see also* ISCR Case No. 02-05988 at 4 (App. Bd. Dec. 18, 2003) (The applicant held a Russian security clearance at a time during which the Soviet Union and the U.S. held an adversarial relationship. This "adds to the already significant burden of demonstrating that Applicant's immediate family members . . . are not in a position to be exploited . . .")

In the Analysis, the Judge cited to record evidence of Applicant's ties within the U.S. and within Russia. He also cited to evidence that Applicant would be willing to renounce his possible dual citizenship. However, because the SOR did not allege Foreign Preference concerns, this is entitled to limited weight. In light of the above, record evidence of the extent of Applicant's relationships with foreign family members and contacts, especially his father with whom he speaks twice a month, is not consistent with a favorable Application of MC 8(b). That is, the evidence upon which the Judge's analysis relied does not reasonably establish that, under the *Egan* standard,

⁵Report to Congress on Foreign Economic Collection and Industrial Espionage, 2009-2011, at 4.

⁶U.S. Department of State 2010 Human Rights Report: Russia, April 8, 2011, at 10.

⁷*Id.*

⁸Report to Congress on Foreign Economic Collection and Industrial Espionage, 2009-2011, at 8.

Applicant's ties in the U.S. clearly outweigh his ties to his family and friends in Russia so that he would resolve any conflict of interest in favor of the U.S. interests.

Moreover, the Judge did not explain how it is that the cited U.S. ties are such as to mitigate the heightened risk of coercion that he found to have been raised by Applicant's circumstances. The record contains evidence from which a reasonable person could conclude that Applicant's family and friends might well come to the attention of the Russian authorities and become a means through which Applicant could be subjected to coercion. *See, e.g.*, ISCR Case No. 11-01470 at 2 (App. Bd. Mar. 5, 2012). Indeed, the record contains evidence that, in the past, one of Applicant's contacts had been subjected to pressure by the Russian government. Tr. at 68-69; Government Exhibit 3 at 13. To the extent that the Judge relied upon MC 8(c), the evidence does not support a conclusion that Applicant's contacts with his foreign family and associates are so casual and infrequent that there is little likelihood of a risk of foreign influence resulting from it. This is especially true of concerns arising from Applicant's contact with his father.

We conclude that the Judge's decision fails to consider an important aspect of the case and runs contrary to the weight of the record evidence, both as to the mitigating conditions and the whole-person factors. ISCR Case No. 03-22861 at 2-3, *supra*. The Judge's favorable decision, both under the mitigating conditions and the whole-person factors, is not sustainable on this record.

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