



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



In the matter of:)
)
) ISCR Case No. 11-01383
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

05/23/2012

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. Applicant, a naturalized U.S. citizen from Ukraine, maintains close relationships to family members who are citizens and residents of Ukraine and Russia. Applicant’s wife, child, and assets are in the United States. He has no foreign property interests. Furthermore, his foreign family members are not dependent on or involved with the governments of their respective countries. Clearance is granted.

Statement of the Case

Acting under the relevant Executive Order (EO) and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this

December 2, 2011, notifying Applicant that it was unable to find that it is clearly consistent with the national interest to continue his access to classified information. DOHA recommended that his case be submitted to an administrative judge for a determination whether to revoke his clearance. The SOR detailed the reasons for the action under Guideline B (foreign influence).

Applicant answered the SOR on December 20, 2011, and requested a hearing. The case was assigned to me on February 7, 2012. The hearing proceeded as scheduled on March 28, 2012. Department Counsel offered Government's Exhibits (GE) 1 through 2, which were admitted. Applicant's Exhibits (AE) A through K were admitted without objection. I received the transcript (Tr.) on April 11, 2012.

Evidentiary Rulings

Request for Administrative Notice

At hearing, Department Counsel requested that I take administrative notice of certain facts about Russia and Ukraine. Applicant did not object to the request, and it was granted. The administrative summary regarding these countries is appended to the record as Hearing Exhibit (HE) 1. Applicant submitted nine decisions issued by other administrative judges granting access to applicants with similar foreign influence concerns. These documents are appended to the record as HE A, without objection from Department Counsel. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

Applicant, a 49-year-old employee of a federal contractor, was born in the Soviet Union, in present-day Uzbekistan. Applicant's moved with his family to Kiev where he completed high school and attended college. After graduation, he was conscripted into the Russian Army, completing his two-year compulsory service in 1988. Applicant did not maintain any contacts from his military service. After his discharge, he began working for a state-owned technology company. When the Soviet Union collapsed in 1991, Applicant and his family, as residents of Kiev, automatically became citizens of Ukraine.¹

In 1991, Applicant married his first wife. As a member of a persecuted religious minority, she obtained asylum in the United States. Though not a member of the religious group, his wife's status as an asylum seeker was extended to him and he was able to immigrate with her in 1992. They divorced in 1994. Initially, Applicant worked as a busboy while he matriculated at a U.S. university, receiving a bachelor's degree in 1996. He became a naturalized citizen in 2000. Applicant married his current wife, a

case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines contained in Enclosure 2 to the Directive.

¹ Tr. 20-24, 59-60; GE 1 - 2.

distant cousin, in 2009. The couple, who have known each other since they were children, reconnected in 2007 when she visited the United States for a professional conference. While in Russia, Applicant's wife worked in advertising. Since immigrating to the United States, she has attended school to improve her English-language skills. She does not work outside the home. Although she is still a citizen of Russia, she currently holds permanent resident status in the United States and is eligible to apply for citizenship in the summer of 2012. The couple's one-and-a-half-year-old daughter is a U.S. citizen by birth.²

Applicant's mother and brother remain in the Ukraine. She is a retired secretary, who receives a small pension from her former employer. His brother, a software engineer, works for a private company. Applicant maintains contact with his mother at least twice a month by telephone. Occasionally, he sends her money to help with her medical expenses. She visited Applicant and his wife in the United States after their daughter was born. Applicant does not maintain regular contact with his brother. His mother-in-law is a citizen and resident of Russia. A retired nurse, she receives income from a pension from her former employer and rent from a property she owns. Applicant's wife and mother maintain frequent contact by telephone, at least three times each week. She visits Applicant and his wife frequently in New York to spend time with her granddaughter. Since the couple married in 2009, Applicant's mother-in-law has visited them six times, most recently from January to March 2012. She is scheduled to return in June 2012 for a four-month visit. After his wife becomes a naturalized citizen, they plan to sponsor her mother's permanent entry into the United States.

Since 2008, Applicant has traveled to Russia three times. In 2008, he traveled to Russia twice to visit his wife while they were dating. Applicant, his wife, and daughter traveled to Russia for the 2011 holiday season to visit his mother-in-law and escort her to the United States for an extended visit. Applicant's brother and mother, who is unable to travel to the United States because of her advanced age and health concerns, came to Russia to visit with them. Applicant traveled to Ukraine once in 2004.³

Applicant owns his home and holds other sizeable assets in the United States. He has accumulated \$35,000 in equity in his home and almost \$90,000 in retirement savings. He does not hold assets in the Ukraine or Russia.⁴

Russia⁵

The Russian Federation is composed of 21 republics. It achieved independence with the dissolution of the Soviet Union on August 24, 1991.

² Tr. 20, 24-26, 57-58; AE A- D.

³ Tr. 17-18, 24, 29-31, 37-48; GE 1-2; AE K.

⁴ Tr. 51-53; AE E-J.

⁵ HE 1.

The United States and Russia share certain common strategic interests. Of mutual interest to the United States and Russia are counterterrorism and the reduction of strategic arsenals. U.S.-Russian relations have often been strained. The Russian Federation's intelligence capability is significant and focuses on collection of information from the United States. Russia has targeted U.S. technologies and has sought to obtain protected information from them through industrial espionage. Russian espionage specializes in military technology and gas and oil industry expertise. In 2010, the United States Department of Justice announced arrests of ten alleged secret agents for carrying out long-term, deep-covered assignments on behalf of Russia. Russia is a leading arms exporter, with major sales of advanced weapons and military-related technology to China, Iran, Syria, and Venezuela.

Russia has recognized the legitimacy of international human rights standards, but human rights abuses continue. The U.S. Department of State reports allegations that Russian government officials and others conduct warrantless searches of residences and other premises and electronic surveillance without judicial permission.

Ukraine⁶

Ukraine has a parliamentary presidential system of government. It has been an independent state since 1991. The country is undergoing a profound political and economic change as it moves from its Soviet past toward a market economy and multi-party democracy.

Ukraine inherited a military force of 780,000 from the Soviet Union. It is seeking to modernize the military and is looking to meet NATO standards. Security forces in the Ukraine are controlled by the president, subject to parliamentary investigation. Ukraine's foreign policy goals have been Euro-Atlantic integration and entry into the World Trade Organization. It also seeks to maintain good relations with Russia, referring to the country as their "permanent strategic partner." The relationship is strained due to energy dependence, the stationing of the Russian Black Sea Fleet in Sevastopol, and by Russia almost completely cutting off natural gas supplies in January 2009.

Overall, the Ukrainian human rights record has many problems, including police abuse and an unsatisfactory penal system. The law prohibits the use of torture, but law enforcement personnel use force and mistreatment routinely to extract confessions and information from detainees. Police arbitrarily detain persons, although it is prohibited by law. There are also instances of government intimidation of the opposition and independent media and reports of government personnel engaged in unlawful surveillance and telephone tapping.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief

⁶ HE 1.

introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines 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.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

The security concern for Foreign Influence is set out in AG ¶ 7 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. Two are potentially applicable in this case:

(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

(d) 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.

Both disqualifying conditions apply. Applicant's two-year compulsory military service, which ended in 1988, is not indicative of a foreign preference. However, he and his wife, a non-U.S. citizen, maintain close relationships with family members in Russia and Ukraine. The mere possession of close ties with family members living in Ukraine and Russia is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one relative living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.

The countries in question also must be considered. In particular, the nature of their government, their relationships with the United States, and their human rights record is relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. Although Russia and the United States are strategic partners in some areas, it is also true that Russia has focused its significant intelligence capability in an aggressive program of targeting sensitive U.S. information. It also has a poor human rights record, and violates civil rights by monitoring email traffic and telephone service. Ukraine and Russia maintain a close and complex strategic partnership. In addition, Ukraine has a poor human rights record and the government uses its resources to intimidate opposition and independent media. Accordingly, I find a heightened risk exists.

The guideline notes several conditions that could mitigate the foreign influence concerns under AG ¶ 8. Three are potentially applicable in this case:

(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.,

(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, and

(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.

Mitigating conditions AG ¶¶ 8(a) and (b) apply. Family contacts and ties with persons in a foreign country are not automatically disqualifying, but require an applicant to present evidence in mitigation and extenuation that he qualifies for access to classified information. Applicant's relationships with his mother and brother in Ukraine cannot be considered casual or infrequent; however, there is no evidence in the record to suggest that Ukraine is an active collector of sensitive or classified U.S. information. Applicant's relationship with his mother-in-law in Russia also a close one, however, none of Applicant's foreign family members are associated with or dependent on the governments of their respective countries. As such, it is unlikely that Applicant will be put in a position of having to choose between the interests of his foreign relatives and the United States. Applicant entered the United States 20 years ago as a refugee. He is firmly rooted to the United States by the presence of his wife and daughter, as well as his substantial assets in this country. Viewed in totality, these factors lead me to the conclusion that Applicant can be expected to resolve any conflict of interest in favor of the United States.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. In doing so, I have also considered the whole-person concept as described in AG ¶ 2(a). The evidence supports a finding that Applicant does not have divided loyalties between the United States, Russia, or Ukraine. Based on the evidence, I conclude that Applicant has mitigated the Guideline B concerns raised in this case.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:	For Applicant
Subparagraphs 1.a.-1.d.:	For Applicant

Conclusion

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

Nichole L. Noel
Administrative Judge