



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



In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 11-11916
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: David F. Hayes, Esq., Department Counsel  
For Applicant: *Pro se*

02/09/2016

**Decision**

MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate security concerns raised by his exercise of foreign citizenship, including the possession of a current foreign passport. He also did not mitigate security concerns raised by his substantial ties to Russia through which he could be subjected to adverse foreign influence. Clearance is denied.

**History of the Case**

On August 15, 2009, Applicant submitted a security clearance application (SCA). He voluntarily disclosed his dual U.S.-Russian citizenship, as well as his connections and property interest in Russia.

On April 17, 2014, the Department of Defense Consolidated Adjudications Facility sent Applicant a Statement of Reasons (SOR) alleging that his circumstances raised security concerns under the foreign preference and foreign influence guidelines.<sup>1</sup>

<sup>1</sup> This action was taken under Executive Order (E.O.) 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 implemented by the Department of Defense on September 1, 2006.

On July 26, 2014, Applicant answered the SOR, admitted all the SOR allegations, waived his right to a hearing, and elected to have his case decided on the written record.<sup>2</sup>

On July 22, 2015, Department Counsel prepared a file of relevant material (FORM) and sent it to Applicant. The FORM contains the SOR, Applicant's answer, and responses to two interrogatories, which were admitted into the record as Exhibits 1 – 4. Department Counsel also submitted with the FORM a request for administrative notice, Exhibit (Ex.) 5, which is discussed below.

On August 31, 2015, Applicant acknowledged receipt of the FORM.<sup>3</sup> He was provided 30 days from its receipt to file a response, but did not submit one.

On December 1, 2015, I was assigned Applicant's case and provided a copy of the FORM. On my own motion, I opened the record to provide him a last chance opportunity to submit a response to the FORM. He was also advised of the serious security concerns raised by his possession of a current foreign passport and that such concerns may be mitigated by surrendering or relinquishing the passport as set forth in the Directive.<sup>4</sup> Applicant did not submit a response or provide additional documentation. The record closed on December 15, 2015.

#### **Administrative Notice: The Russian Federation (Russia)**

DOHA administrative judges may accept for administrative notice uncontroverted, easily verifiable facts regarding a foreign country from official U.S. Government reports. Additionally, the official position of relevant federal agencies or the pertinent statements of key U.S. Government officials regarding a foreign country may be appropriate for administrative notice. The party requesting administrative notice of a particular matter must provide the source document, either the pertinent parts or the full document, to allow the judge and, if necessary, the Appeal Board to assess the reliability, accuracy, and relevancy of any administratively noticed fact. *See generally*, ISCR Case No. 08-09480 (App. Bd. Mar. 17, 2010); ISCR Case No. 05-11292 (App. Bd. Apr. 12, 2007).

Department Counsel did not submit the source documents (or, relevant portions thereof) with the FORM. Instead, Department Counsel's request for administrative notice, Ex. 5, cites to the web addresses where the source documents can be located. Recently, the Appeal Board held that, irrespective of whether an applicant raises an objection to a matter requested for administrative notice, citation to a web address alone is insufficient. The Board went on to reiterate its long-held position that the actual source document the judge relies upon for an administratively noticed fact must be

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<sup>2</sup> Hearing Exhibit I.

<sup>3</sup> Hearing Exhibit II.

<sup>4</sup> Hearing Exhibit III.

made a part of the record. See ISCR Case No. 14-01655 (App. Bd. Nov. 3, 2015), case remanded because the source documents not included in the record.<sup>5</sup>

Accordingly, I have marked and included in the record as Hearing Exhibit IV the source documents (or, the pertinent portions thereof), which provide a basis for the following relevant facts regarding Russia.<sup>6</sup>

Russia “has a highly centralized, weak multi-party political system dominated by President Vladimir Putin.”<sup>7</sup> A recent human rights report from the U.S. State Department reflects that the Russian government committed significant human rights violations and “the [Russian] government failed to take adequate steps to prosecute or punish most officials who committed abuses, resulting in a climate of impunity.”<sup>8</sup>

In 2015, the Director of National Intelligence reported to Congress that the leading state intelligence threats to the United States will continue to come from two main countries, one of which is Russia.<sup>9</sup>

### **Findings of Fact**

Applicant was born, raised, and educated in Russia. He received a commission as an officer in Russia’s reserve military forces and worked for a time for the Russian Defense Ministry. He immigrated to the United States in 1997 and married his wife, who is also originally from Russia, in 2002. They have one child, who was born in the United States.

Applicant became a U.S. citizen in 2005. Applicant, his wife, and his child all have dual U.S.-Russian citizenships. Since becoming a U.S. citizen, Applicant has

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<sup>5</sup> Department Counsel’s “failure” to submit the source documents is understandable as the FORM predates the cited Appeal Board decision. Arguably, Ex. 5 could be admitted as a summary of the pertinent facts contained in the source documents. See *generally*, Directive, Enclosure 3, ¶ E3.1.19 (Federal Rules of Evidence (F.R.E.) shall serve as a guide in DOHA proceedings and technical rules of evidence may be relaxed to permit the development of a full and complete record); F.R.E. 201; F.R.E. 1006. However, based on the present record, I cannot find that Applicant’s failure to raise an objection to Ex. 5 amounts to an agreement as to the exhibits accuracy, reliability, and relevancy. *Contrast with*, ISCR Case No. 14-03112 (App. Bd. Nov. 3, 2015), after applicant concurred with its content, the only evidence regarding the foreign country was the administrative notice request that was admitted as a summary.

<sup>6</sup> Applicant was provided notice regarding these source documents with the FORM. He was also provided ample opportunity to challenge or provide additional information regarding the matters requested by the Government for administrative notice. Although the Government’s citation to 26 source documents raises potential notice and fairness concerns, the additional time Applicant was provided to respond and provide additional information ameliorated any such concerns.

<sup>7</sup> Director of National Intelligence, Statement for the Record, Senate Armed Services Committee, *Worldwide Threat Assessment of the U.S. Intelligence Community* at 4, February 26, 2015.

<sup>8</sup> U.S. State Department, *Russia 2013 Human Rights Report* at 1.

<sup>9</sup> *Id.* at 1-2.

voted in Russian elections and twice renewed his Russian passport. His current Russian passport is due to expire in 2022. He is unwilling to surrender or relinquish his Russian passport because he may need it to travel to Russia on short notice to visit his elderly parents.

Applicant has a number connections and contacts in Russia. Notably, Applicant's parents and his wife's mother and her siblings are citizens and residents of Russia. Applicant's father used to work for the Russian government. His parents are now retired. Applicant has traveled to Russia to visit his family, with his most recent trip occurring in 2012. He has used his Russian passport to travel to Russia. He owns an apartment in Russia, which he has left to his parents to dispose of as they see fit. He and his wife maintain contact with their relatives and at least one friend in Russia.

### **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

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

Administrative Judges are responsible for ensuring that due process proceedings are conducted "in a fair, timely and orderly manner." Directive ¶ E3.1.10. Judges make certain that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the paramount importance of protecting national security, the Supreme Court has held that

“security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” E.O. 10865 § 7. Thus, a decision to deny a security clearance amounts to a finding that an applicant, at the time the decision was rendered, did not meet the strict guidelines established for determining eligibility for access to classified information.

## **Analysis**

### **Guideline C, Foreign Preference**

Under AG ¶ 9, the foreign preference security concern arises “[w]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States.” Applicant actively exercised his foreign citizenship after becoming a U.S. citizen, including voting in Russian elections and renewing, using, and maintaining a Russian passport. This record evidence raises the foreign preference security concern and establishes the disqualifying condition at AG ¶ 10(a).<sup>10</sup> The foreign preference guideline also sets forth a number of potential mitigation conditions. I have considered all the mitigating conditions and none apply. Notably, Applicant currently has a foreign passport and is unwilling to relinquish or surrender it. A current or prospective clearance holder is ineligible for a security clearance unless s/he surrenders it to the cognizant security authority (CSA), invalidates the foreign passport, or receives approval from the CSA for his/her continued possession and use of the foreign passport. See AG ¶¶ 11(d) and 11(e). Applicant did not supply any information that any of the preceding circumstances apply. Accordingly, foreign preference security concerns remain.

### **Guideline B, Foreign Influence**

The foreign influence security concern is explained at AG ¶ 6:

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

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<sup>10</sup> Exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen . . . This includes . . . (1) possession of a current foreign passport; . . . (7) voting in a foreign election.

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.<sup>11</sup>

An individual is not automatically disqualified from holding a security clearance because they have connections and interests in a foreign country. Instead, in assessing an individual's vulnerability to foreign influence, an administrative judge must take into account the foreign government involved; the intelligence gathering history of that government; the country's human rights record; and other pertinent factors.<sup>12</sup>

Applicant and his wife's connections and property interest in Russia raise the foreign influence security concern. The record evidence, to include the matters accepted for administrative notice, establish the following disqualifying conditions:

AG ¶ 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;

AG ¶ 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;

AG ¶ 7(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; and

AG ¶ 7(e): a substantial business, financial, or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation.

An applicant with close family members and interests in a foreign country faces a high, but not insurmountable hurdle in mitigating security concerns raised by such

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<sup>11</sup> ISCR Case No. 09-07565 at 3 (App. Bd. July 12, 2012) ("As the Supreme Court stated in *Egan*, a clearance adjudication may be based not only upon conduct but also upon circumstances unrelated to conduct, *such as the foreign residence of an applicant's close relatives.*") (emphasis added) (internal citation omitted).

<sup>12</sup> ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (setting forth factors an administrative judge must consider in foreign influence cases).

foreign ties. Furthermore, an applicant is not required “to sever all ties with a foreign country before he or she can be granted access to classified information.”<sup>13</sup> However, what factor or combination of factors will mitigate security concerns raised by an applicant with family members in a foreign country is not easily identifiable or quantifiable.<sup>14</sup> An administrative judge’s predictive judgment in these types of cases must be guided by a commonsense assessment of the evidence and consideration of the adjudicative guidelines, as well as the whole-person factors set forth in the Directive. A judge’s ultimate determination must also take into account the overarching standard in all security clearance cases, namely, that any doubt raised by an applicant’s circumstances must be resolved in favor of national security. AG ¶ 2(b).

I have considered all the foreign influence mitigating conditions and, based on the record evidence, none apply. Even if I assume for the sake of argument that Applicant’s property and non-familial connections in Russia are not significant enough to cause a conflict of interest with his security obligations, his and his wife’s close relationship to their family members in Russia raise a concern about his vulnerability or susceptibility to adverse foreign influence. Applicant’s relatives in Russia are subject to the dictates of a government whose respect for human rights and the rule of law is, at best, questionable. Moreover, Russia has been identified by the U.S. Government as continuing to pose an intelligence threat. Applicant’s familial connections in Russia, coupled with the threat posed by the current Russian government to its own people and the security threat it poses to the United States, raises a heightened risk that Applicant could be subjected to adverse foreign influence. Applicant did not present sufficient information to mitigate this security concern. However, this adverse finding is “not a comment on Applicant’s patriotism but merely an acknowledgment that people may act in unpredictable ways when faced with choices that could be important to a loved-one, such as a family member.” ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009).

### **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 an applicant’s conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).<sup>15</sup> I hereby incorporate my comments under Guidelines B and C. I gave due consideration to all the favorable and extenuating factors in this case, including Applicant’s honesty about his foreign connections from the start of the security clearance process. Furthermore, I recognize that Applicant left Russia nearly

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<sup>13</sup> ISCR Case No. 07-13739 at 4 (App. Bd. Nov. 12, 2008).

<sup>14</sup> ISCR Case No. 11-12202 at 5 (App. Bd. June 23, 2014).

<sup>15</sup> The non-exhaustive list of factors are: (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.

20 years ago and has made the United States his home. However, his possession of a current Russian passport and close familial connections in Russia through whom he could be adversely influenced raise serious security concerns. Accordingly, after weighing the favorable and unfavorable evidence, I find that he failed to mitigate the security concerns at issue. Overall, the record evidence leaves me with doubts about his eligibility for access to classified information.

### **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 C (Foreign Preference)	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	Against Applicant
Paragraph 2, Guideline B (Foreign Influence)	AGAINST APPLICANT
Subparagraphs 2.a – 2.h:	Against Applicant

### **Conclusion**

In light of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

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Francisco Mendez  
Administrative Judge