



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



In the matter of:)
)
 REDACTED) ISCR Case No. 12-02802
)
 Applicant for Security Clearance)

Appearances

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

11/05/2013

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated the foreign preference concern. He has a long track record of preferring the United States over the interest of his parent’s birth country, Serbia. He also mitigated the personal conduct security concern, because his failure to register for selective service was unintentional. Notwithstanding Applicant’s history of fidelity to the United States, concerns persist about the potential that foreign influence could be exerted on him through his only child, who lives in Serbia. Clearance is denied.

Statement of the Case

On May 21, 2013, the Department of Defense (DoD), in accordance with DoD Directive 5220.6, as amended (Directive), issued Applicant a Statement of Reasons (SOR), alleging the security concerns under Guideline B (Foreign Influence), Guideline C (Foreign Preference), and Guideline E (Personal Conduct). On June 10, 2013, Applicant answered the SOR and requested a hearing.

On July 15, 2013, I was assigned Applicant's case and, after coordinating with the parties, scheduled the hearing for July 30, 2013.¹ At hearing, Government Exhibits (Gx.) 1 through 3 and Applicant's Exhibits (Ax.) A and B were admitted into evidence without objection. Department Counsel also submitted a proposed summary of facts regarding Serbia and U.S.-Serbian relations taken from official, unclassified U.S. Government documents. The proposed summary of facts was marked Gx. 4 for identification, but was not admitted. The source documents were marked as hearing exhibits (Hx.) I – IV and, without objection, were considered for administrative notice. Applicant testified in support of his request for a security clearance. The hearing transcript (Tr.) was received on August 7, 2013.

Findings of Fact

Applicant is in his mid-50s and is a dual citizen of the United States and Serbia. He was born in the United States, but at a young age moved overseas with his family. At around age 10, Applicant and his family moved back to Serbia (then Yugoslavia). Applicant was educated, started a family, and worked the majority of his adult life in Serbia. He received certain benefits as a citizen of Serbia, to include free education. He exercised his Serbian citizenship by applying for and receiving a Serbian passport and voting in at least one Serbian election. He did not register with the U.S. selective service because he has been living overseas until relatively recently. However, he has not served in a foreign military service or paramilitary group. (Tr. at 28, 33-36, 42, 50-51, 59; Gx. 1, Gx. 3; Answer)

Applicant worked for the U.S. Government and U.S.-backed international organizations from approximately 1995 to about 2010. He underwent a counterintelligence background investigation by another government agency before being granted access to NATO bases. (Tr. at 28-29, 36-38; Gx. 3) His efforts contributed greatly to the U.S.-supported NATO mission in Serbia and surrounding countries. He was entrusted with millions of dollars in U.S. aid and received high praise for his work on behalf of the United States. (Ax. B; Tr. at 54-58) A U.S. military officer writes that:

[Applicant] has displayed a positive attitude throughout extensive periods of physical stress . . . He has dealt with hostility from various groups in situations involving hostage taking and frustration with dealings with foreign organizations in a consistent, professionally detached manner displaying poise, and diplomacy.

(Ax. B at 11)

The section head for a U.S.-backed international organization writes about Applicant's dedication and professionalism during an especially dangerous situation as follows:

¹ Applicant requested an expedited hearing and waived the Directive's requirement of 15 days prior notice of a hearing. (Tr. at 8-9)

[Applicant], as an interpreter on an observer team, was given a number of difficult and dangerous tasks due to his high level of competence and his ability to think clearly under extremely stressful circumstances. His ability to immediately analyze a situation and give clear accurate reports to his team leader and team members was instrumental in this Sector receiving no injuries or serious incidents during some particularly tense periods. [Applicant] personally put his life on the line standing between the observer team and an (sic) deranged refugee who was threatening them with an automatic weapon. [Applicant] talked calmly to the individual who was subsequently disarmed by the local militia thus preventing a possible tragedy for all concerned. He deliberately placed himself in danger to save the lives of others.

(Ax. B at 10)

Applicant recently returned to the United States with his wife. Applicant's wife is a permanent U.S. resident and works full time in the United States. Applicant has applied for a contract position as a translator for the U.S. Government in Kosovo, which requires, as a prerequisite, a security clearance. In order to facilitate his application for a security clearance, Applicant surrendered his Serbian passport to his facility security officer. Although he does not have any property or assets in Serbia and plans on remaining in the United States, he is unwilling to renounce his Serbian citizenship. (Tr. at 29-30, 38-39, 43-44, 47-48, 52-53, 58-59)

Applicant has some close friends in the United States, but most of his close family members, except for his wife, live in Serbia. Applicant's son, brother, and in-laws are citizen-residents of Serbia. Applicant's son is currently going to school in Serbia and plays on a Serbian national sports team. Applicant's brother works in the private sector in Serbia, while his in-laws are retired. Applicant has frequent contact with his family in Serbia. None of Applicant's foreign family members work for the Serbian government or other foreign entity. (Tr. at 39-43, 52; Gx. 1 – 2; Answer)

The Republic of Serbia²

In 1999, the United States broke off relations with the Federal Republic of Yugoslavia (FRY), a predecessor state that included Serbia, when it launched an ethnic cleansing and deportation campaign. A 78-day U.S.-backed NATO bombing campaign led to the establishment of U.N. missions and NATO-led forces in Kosovo, which permitted displaced persons and refugees to return to their homes.

In October 2000, a coalition of democratic parties defeated Serbian strongman Slobodan Milosevic in presidential elections, overturning a regime that had plunged the country into bloody conflicts in the region, economic decline, and international isolation. Since then, Serbia has embarked on a transition toward Western democratic and free market standards.

² The facts regarding Serbia and its relations with the United States were taken from Hx. I – IV.

In 2001, the United States reopened its embassy in Belgrade (Serbian capital). In 2006, the state union of Serbia and Montenegro, which had succeeded the FRY dissolved and the Republic of Serbia was formed. It is a constitutional, multiparty, parliamentary democracy that recently held national and local elections, which international observers said respected fundamental rights and freedoms. Notwithstanding the significant progress Serbia has made in the past ten years, the U.S. State Department reports significant human rights problems in the following areas: discrimination and societal violence against minorities; corruption in healthcare, education, and multiple branches of government; and harassment of journalists.

In 2006, Serbia joined NATO'S Partnership for Peace program and signed a Status of Forces Agreement with the United States, which has permitted greater bilateral military cooperation between the two countries. Currently, U.S.-Serbian relations are positive and continue to improve. However, Serbia's refusal to accept Kosovo's independence remains a major source of tension. Notably, following Kosovo's declaration of independence in 2008, Serbian demonstrators sacked a portion of the U.S. Embassy in Belgrade. The U.S. State Department continues to warn U.S. citizens traveling to Serbia of strong anti-U.S. sentiment on the anniversary dates of certain events and national holidays, including the beginning of the 1999 NATO bombing campaign and Kosovo's declaration of independence.

In March 2012, after having judged that Belgrade had made sufficient progress in reaching and implementing agreements with Kosovo, the European Union (EU) accepted Serbia as a candidate for membership. EU-led talks have led to agreements regarding the normalization of relations between Serbia and Kosovo. The United States looks favorably upon the progress in Serbia-Kosovo negotiations, and Serbia's EU integration.

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 only eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry*, § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant's eligibility, 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 common sense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an 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.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to establish their eligibility.

In resolving the ultimate question regarding an applicant’s eligibility for a security clearance, 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). Furthermore, “[s]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.³

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.⁴

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 B, Foreign Influence

The SOR alleges that Applicant’s wife (¶ 1.a), son (¶ 1.b), in-laws (¶ 1.c), and brother (¶ 1.d) raise the foreign influence concern. The foreign influence concern is addressed 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 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

³ See also ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (“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.”) (citing *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991)).

⁴ See generally *Kaplan v. Conyers, et al.*, 2013 U.S. App. LEXIS 17278 at ** 23-24, 40-51 (Fed. Cir. Aug. 20, 2013) (federal courts will generally defer to the predictive judgments made by executive branch officials responsible for determining the eligibility of an applicant for a security clearance).

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.

An individual's familial ties to a foreign country can raise the foreign influence concern. However, there is no *per se* rule against applicants who have such ties. Instead, in assessing the likelihood that an applicant's family members are vulnerable to coercion, an administrative judge must consider the foreign government involved; the intelligence gathering history of that government; the country's human rights record; and the presence of terrorist activity in that country.⁵

Applicant's family members in Serbia, coupled with the still lingering tensions between the United States and Serbia over Kosovo, raise the foreign influence concern.⁶ This record evidence also establishes the following disqualifying conditions under 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;

(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; 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.

Applicant's foreign connections to Serbia do not end the foreign influence analysis. AG ¶ 8 sets forth a number of conditions that could mitigate the security concern and the following were potentially raised by the evidence:

(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.; and

⁵ ISCR Case No. 11-06619 at 2 (App. Bd. May 2, 2013).

⁶ In light of his wife's permanent U.S. residency status, her (now passive) dual citizenship no longer serves as a basis of foreign influence. Accordingly, SOR ¶ 1.a is decided in Applicant's favor.

(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.

AG ¶ 8(a) does not apply. Although Applicant's foreign family members do not work for the Serbian government, they reside in a country whose government and a strong segment of the population strongly oppose and resent past and current U.S. policy in the region. Moreover, Applicant is seeking to work as a U.S. Government (USG) contractor in Kosovo – the key source of tension between the United States and Serbia. Under such circumstances, the possibility that a conflict of interest might arise between Applicant's security responsibilities and the interest of his foreign family members is not a remote, hypothetical concern.

AG ¶ 8(b) applies in part. Applicant has proven his loyalty to this country under extreme situations and demonstrated his trustworthiness through his past work on behalf of the United States in dangerous situations. Applicant's past conduct *suggests* that he would resolve any conflict of interest in favor of the United States. However, Applicant's connections to the United States are tenuous, at best. He has only resided in the United States for a short period of time. Other than his wife, who is also a dual citizen of Serbia and the United States, he has no longstanding relationships in the United States. Furthermore, his sense of loyalty and obligation to his foreign family members, not the least of which is his only child, cannot be disputed. His son is in a particularly vulnerable position to even subtle foreign pressure, as his athletic future is in the hands of unknown Serbian government officials. Although Applicant may have been willing in the past to place the interest of the United States ahead of his own and would likely repel any attempts to influence him through his in-laws or his brother, it is a wholly different situation when a parent is asked to place the government's interest above that of their children – in this case, an only child who is pursuing a life-long dream to play for his country's national team on the international stage.⁷ The record evidence does not indicate that Applicant has faced this potential situation in the past and, thus, his response to such potential foreign influence is unknown.

Application of one or more mitigating conditions does not compel a favorable determination. An administrative judge is required to carefully weigh the disqualifying and mitigating conditions, as well as whole-person factors, before making a suitability determination. Consequently, resolution of the security concerns raised by Applicant's foreign family members and the other matters addressed herein are set forth below under the whole-person section.

⁷ ISCR Case No. 08-10025 at 4 (App. Bd. Nov. 3, 2009) (individuals may act in unpredictable ways when faced with choices that could be important to a loved one).

Guideline C, Foreign Preference

The SOR alleges that Applicant's acquisition of Serbian citizenship, work in Serbia between 2000 and 2010, and exercise of Serbian citizenship indicates a preference for Serbia over the United States. Under AG ¶ 9, the concern involving foreign preference arises "[w]hen an individual acts in such a way as to indicate a preference for a foreign country over the United States." Such an individual "may be prone to provide information or make decisions that are harmful to the interests of the United States."

Applicant's exercise of the rights and privileges of Serbian citizenship, to include possessing and using a Serbian passport, raises this concern and also establishes the disqualifying condition at AG ¶ 10(a), "exercise of any right, privilege or obligation of foreign citizenship."⁸

Applicant's exercise of foreign citizenship was strictly due to his residency in Serbia for the majority of his life. However, he has repeatedly shown through his words and actions that his preferences lie with the United States. He credibly testified that he and his wife plan to remain in the United States, and surrendered his Serbian passport to his FSO. He established the mitigating condition at AG ¶ 11(e), "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated."

Guideline E, Personal Conduct

The SOR alleges that Applicant's failure to register with selective service raises a security concern under the personal conduct guideline. AG ¶ 15 addresses the personal conduct concern:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant's failure to register implicates the above concern and establishes the disqualifying condition at AG ¶ 16(c).⁹

⁸ Applicant was a minor when he acquired foreign citizenship and his work in Serbia from 2000 to 2010 was in direct support of the United States. Neither of these matters raises a security concern under Guideline C. Therefore, SOR ¶¶ 2.a – 2.b is decided in Applicant's favor.

⁹ Credible adverse information . . . which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not safeguard protected information.

Applicant's failure to register with selective service was not a conscious, intentional act of disloyalty or preference for a foreign country. Instead, it merely reflects the fact that Applicant was living overseas for the majority of his life and unintentionally failed to register.¹⁰ Applicant has repeatedly demonstrated, through his prior service to the United States and current application to work as a translator in Kosovo, that his preference is to serve the United States Government. This one-time mistake has never been repeated and no longer casts doubt on Applicant's reliability, trustworthiness, or good judgment. In short, Applicant established the mitigating condition at AG 17(c).¹¹

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).¹² Applicant has lived overseas in Serbia for the majority of his life. He recently moved to the United States and has applied to work as a federal contractor in the Balkans, a region he is familiar with and previously served as a USG contractor. He has demonstrated his reliability and trustworthiness to the United States in the past, including managing millions of dollars in U.S. aid without issue. These favorable whole-person factors, in conjunction with the mitigating conditions noted above, mitigate the foreign preference and personal conduct concerns.

On the other hand, the foreign influence concern is a far more complicated issue. In light of the geopolitical situation and hostility to the United States by a segment of the Serbian population, the possibility exists that Applicant may be placed in a position of having to choose between his security obligations and the interest of his only child living in Serbia. Notwithstanding Applicant's long history of fidelity to the United States, questions and doubts linger as to his potential reaction if a foreign government or entity were to attempt to leverage his son's vulnerable position. Such questions and doubts must be resolved in favor of national security. AG ¶ 2(b). Accordingly, although the

¹⁰ See ISCR Case No. 04-06216 (Mar. 30, 2006) (AJ Leonard) (security concerns mitigated because failure to register was unintentional,); ISCR Case No. 04-04139 (AJ Matchinski) (clearance granted because failure to register was unintentional); ISCR Case No. 01-03111 (July 31, 2001) (AJ Erck) (applicant genuinely did not believe he was required to register). *Contrast with* ISCR Case No. 03-02799 (Jul. 26, 2004) (AJ Young) (intentional failure to register); ISCR Case No. 02-27728 (Apr. 26, 2004) (AJ Ablard) (not being told of requirement to register insufficient to mitigate concerns).

¹¹ The offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

¹² The non-exhaustive list of adjudicative 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.

record evidence presents an *exceedingly* close case, I resolve the foreign influence security concerns against Applicant.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence):	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraphs 1.c – 1.d:	For Applicant
Paragraph 2, Guideline C (Foreign Preference):	FOR APPLICANT
Subparagraphs 2.a – 2.d:	For Applicant
Paragraph 3, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

In light of the record evidence and for the foregoing reasons, 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.

Francisco Mendez
Administrative Judge