



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



In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 14-06653
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Chris Morin, Esq., Department Counsel  
For Applicant: *Pro se*

08/09/2016

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**Decision**

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HESS, Stephanie C., Administrative Judge:

Applicant failed to mitigate the security concerns raised under Guideline B (Foreign Influence) due his wife's ties to Ukraine. Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (e-QIP) on April 29, 2014. On November 9, 2015, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline B. The DOD acted under Executive Order (Ex. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant answered the SOR on December 24, 2015, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February 23, 2016, and the case was assigned to me on March 14, 2016. On March 23, 2016, the

Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for April 12, 2016. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. DOHA received the transcript (Tr.) on April 21, 2016.

### **Procedural Issues**

Department Counsel requested that I take administrative notice of certain facts about Ukraine. Without objection, I approved the request. The relevant facts are highlighted in the Administrative Notice section, below.

Following the hearing, Applicant contacted Department Counsel and requested permission to submit additional documentary evidence. Department Counsel did not object, and on June 2, 2016, I reopened the record for the limited purpose of admitting Applicant's Exhibits (AX) A and B.

### **Administrative Notice: Ukraine**

Ukraine is a republic with a political system composed of three branches of government. In February 2014, the parliament voted to remove President Yanukovich from office after he fled the country. This followed three months of massive anti-government protests over his decision to postpone signing political and trade agreements with the European Union, in favor of closer ties with Russia, as well as his violent responses to the protests. Also in February, Russian armed forces intervened militarily in Crimea, which Russia occupied and purported to "annex" in March 2014. Additional unrest and civilian deaths occurred when pro-Russian protesters in eastern and southern Ukraine, some favoring greater union with Russia, others seeking greater autonomy from the national government, clashed with government forces. In May 2014, President Poroshenko was elected, which signaled a strong democratic mandate for change in Ukraine.

The Russian occupation of Crimea has displaced more than 18,000 Crimeans and caused numerous human rights abuses. Thousands of deaths and injuries resulted from the Russian-backed separatists' occupation of eastern Ukraine. Ukraine has also been cited for abuse of persons in custody, harsh prison conditions, a corrupt judiciary, societal violence against women, children, and ethnic minorities, and human trafficking.

Despite attempts to cease hostilities and establish peace through political dialog, the government's efforts have been largely rejected and the situation in Ukraine remains precarious. Violent clashes between Russian-backed separatists and Ukrainian forces continue in eastern regions of the country. In addition, Russian military forces continue to occupy the Crimean Peninsula, supply weapons and material support to the separatists, and are present on the eastern border of Ukraine.

The United States has condemned the invasion of Crimea and Russia's continued efforts to destabilize eastern Ukraine. In December 2015, the State Department issued a warning to U.S. citizens to defer all travel to Crimea and the eastern regions of Donetsk and Luhansk Oblasts. Separatist groups have threatened, detained or kidnapped persons, including U.S. citizens, and violent clashes have caused over 9,000 deaths. There are reports of abuse against local populations that oppose separatist goals. The situation in Ukraine remains unpredictable and potentially volatile.

### **Findings of Fact**

The SOR alleges that Applicant's cohabitant and mother of his child resides in the United States on an H1B visa, and is employed by the defense contractor where Applicant serves as president. The SOR also alleges that her parents are citizens and residents of Ukraine. Applicant admitted each of these allegations, and his admissions are incorporated in my findings of fact.

Applicant is the 44-year-old sole owner and key management official of a defense contracting company since October 2010. He graduated from high school in June 1989, and served honorably in the U.S. Army from November 1989 until December 1995. He attended community college for approximately two years.

Applicant's wife was born in Russia. She lived there with her family as a young child, and then moved with her family to Ukraine. She first came to the United States in 2003 on a student visa, and attended a university for one year. She returned to Ukraine, completed her bachelor's degree, and worked as an interpreter for a non-profit organization which promotes democracy throughout the world. In August 2006, she returned to the United States on another student visa. She attended a community college to complete several prerequisite courses, then matriculated into a university where she completed her master's degree in 2009.

Applicant and his wife met in 2009, when she started working at a company where Applicant had been employed since 1999. (Tr. 18; GX 1.) In 2010, Applicant started his own business, which includes defense contracts, and is seeking a facility clearance. (Tr. 12.) In 2011, Applicant's now-wife started working for Applicant's company. They began dating in mid-2012, had their daughter in March 2014, and moved in together in July 2014. They were married in September 2015. (Tr. 27-28.)

Applicant's company has 11 employees. His wife continues to work for the company. He considers her to be his "right hand." (Tr. 43.) Despite the stated concern that Applicant's foreign national, non-cleared wife works in a facility that administers government contracts and is seeking a facility clearance, Applicant offered no testimony or evidence to mitigate the concern. While Applicant's company might have a defined protocol for protecting classified or proprietary information from those individuals without clearances, there is no record evidence supporting such protocol.

Applicant's wife's parents, sister, brother-in-law, and aunt are citizens and residents of Ukraine.<sup>1</sup> Her parents, sister, and brother-in-law reside in an area in eastern Ukraine where separatists have seized control. The U.S. State Department's Travel Warning specifically warns U.S. citizens against traveling to this region, recommends U.S. citizens living there to depart, and states that, "[s]eparatist groups have threatened, detained, or kidnapped persons, including U.S. citizens."

Applicant's father-in-law is retired from an unspecified occupation, but has been employed at a local history museum for about 15 years, which he helped to found. Applicant's mother-in-law is a retired librarian, and also works at the museum. (Tr. 49-50.) His in-laws are active in their community, where they have many personal ties. Applicant would like them to move to the United States, but does not think they would choose to do so. (Tr. 42-43; Tr. 50.) Applicant's wife maintains weekly contact via Skype with her parents and sister. Her sister resides very close to their parents, and often Skypes with Applicant's wife at the same time as their parents do. Applicant periodically exchanges pleasantries with his in-laws while his wife Skypes with them. Applicant's in-laws have visited him and his wife twice. Most recently, they visited on a six-month visa, which expired in May 2016. Applicant's wife has a close relationship with her parents. Applicant has a good relationship with his in-laws. (Tr. 33-38) He believes they are "phenomenal people" and states "[t]hey are the parents I wish I had." (Tr. 43.) Applicant's wife maintains a close relationship with her aunt, which includes Skyping and in-person visits. (Tr. 38-39.) Applicant's wife last visited Ukraine in approximately 2013. (Tr. 32.) Her international passport, issued by Ukraine, expires in 2023. (Tr. 52.)

Applicant's wife first applied for U.S. citizenship in 2009 or 2010. (Tr. 52.) Since she has been employed, she has been legally in the United States on a work visa, sponsored by Applicant's company, which was valid until September 2017. However, after they married, Applicant sponsored her for permanent resident status, for which she was recently approved. (AX A; AX B.) Applicant's wife has been working to build her life in the United States, and states that, "Since I have been here for a while, I call this my home now . . . It would be my desire, and honor, to be part of this country, given the opportunity." (Tr. 48-49.)

In addition to owning his business, Applicant's owns his home, and three rental properties. Applicant's wife is on the deed, but not the mortgage, of their primary residence. They do not have any jointly held bank accounts. (Tr. 25-26) Neither Applicant nor his wife has any foreign property or financial interests. (Tr. 36.)

## **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to

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<sup>1</sup> Applicant's wife's other foreign relatives were not alleged in the SOR. Applicant's connections to and contacts with these foreign relatives through his wife is only being considered in assessing his mitigation case and whole-person factors.

“control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant’s meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Guideline B: Foreign Influence**

The SOR alleges that Applicant’s spouse is a citizen of the Ukraine, that she works for a defense contractor seeking classified contracts, and that Applicant’s mother-in-law and father-in-law are citizens and residents of the Ukraine. The security concern under this guideline is set out in AG ¶ 6 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.

Two disqualifying conditions under this guideline are relevant:

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; and

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.

When foreign family ties are involved, the totality of an applicant’s family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). “[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person’s spouse.” ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at \* 8 (App. Bd. Feb. 20, 2002); see *a/so* ISCR Case No. 09-06457 at 4 (App. Bd. May 16, 2011). Thus, I have considered not only Applicant’s relationships with his in-laws and Applicant’s wife’s relationship with her parents, but also the region where her parents reside, which may make them vulnerable to kidnapping or exploitation by separatist groups.

The instability of the Ukrainian government, the pervasive threats from Russian-backed separatist groups, and the government's poor human rights record are sufficient to establish the heightened risk required by AG ¶ 7(a) and the potential conflict of interest in AG ¶ 7(b). Additionally, Applicant's wife's employment at Applicant's company, which services defense contracts and is seeking a facility security clearance, creates a potential conflict of interest. These two disqualifying conditions are established.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Furthermore, "even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security." ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at \*\*15-16 (App. Bd. Mar. 29, 2002).

Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

Three mitigating conditions under this guideline are potentially relevant:

AG ¶ 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;

AG ¶ 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; and

AG ¶ 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.

AG ¶ 8(a) is not established, for the reasons set out in the above discussion of AG ¶ 7(a). AG ¶ 8(c) is not established. Applicant's contacts with his in-laws, and his wife's contacts with her parents, are frequent and not casual.

AG ¶ 8(b) is not established. Applicant is a U.S. citizen by birth with substantial personal and financial ties to the United States, including a business, a house, three rental properties, a family, and military service. He has sponsored his wife for citizenship, and she is now a U.S. permanent resident. Nevertheless, he is clearly bound by affection to his wife, who is a non-citizen employee of his company that services defense contracts. He has close personal ties to his Ukrainian-citizen in-laws. His wife maintains a close relationship and frequent contact with her parents, remains a citizen of Ukraine, and possesses a valid foreign passport. Applicant's wife's ties to Ukraine are significant, and these connections are imputed to Applicant. Although his connections to the United States are strong, they are insufficient to outweigh his connections to his wife and her foreign ties.

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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.

I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but I have also specifically considered that Applicant served honorably in the U.S. Army, and he is a small business owner with 11 employees.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has



not mitigated the foreign influence security concerns. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

### **Formal Findings**

As required by section E3.1.25 of Enclosure 3 of the Directive, I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence): AGAINST APPLICANT

Subparagraphs 1.a and 1.b: Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Stephanie C. Hess  
Administrative Judge