



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



In the matter of:)
)
) ISCR Case No. 15-01641
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: Nancy Hollander, Esq.

09/28/2017

Decision

CERVI, Gregg A., Administrative Judge:

Applicant mitigated the foreign preference and foreign influence security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On March 24, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline C (foreign preference) and Guideline B (foreign influence). The action was taken under Executive Order (Exec. 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 the DOD on September 1, 2006.

Applicant responded to the SOR on April 8, 2016, and requested a hearing before an administrative judge. The case was assigned to me on January 18, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 19, 2017, scheduling the hearing for July 11, 2017. I convened the hearing as scheduled. DOHA received the hearing transcript (Tr.) on July 19, 2017.

Procedural and Evidentiary Rulings

Evidence

Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. The Government's exhibit list was appended to the record as Hearing Exhibit (HE) I. Applicant testified and submitted Applicant's Exhibits (AE) A through H, which were admitted in evidence without objection. After the hearing, the record was held open at Applicant's request to submit additional documentation. He submitted AE I, which was admitted without objection.

Request for Administrative Notice

Department Counsel requested that I take administrative notice of certain facts about Russia. The request was not admitted in evidence but was appended to the record as Hearing Exhibit (HE) II. The facts administratively noticed are summarized in the Findings of Fact, below.

Findings of Fact

Applicant is a 53-year-old employee of a government contractor, employed as a senior scientist since February 2016. He was a research assistant employed by another defense contractor from 2011 to 2016, but was laid-off because he did not have a security clearance. He has never held a DOD security clearance.

Applicant was born in Russia,¹ and came to the United States in 2003 to pursue a doctorate degree. His bachelor's and master's degree were attained at a Russian university. In 2007, he earned a Ph.D. in electrical engineering at an American university. He became a naturalized U.S. citizen in August 2011. Applicant was married in Russia in 1992 to a professional musician, but she refused to move to the United States when Applicant decided to become a U.S. citizen. They divorced in 2006. Applicant has a son, 23 years old, who is a student at an American college and is employed by a defense contractor. He became a permanent U.S. resident in 2015, and can apply for citizenship in 2020.

Applicant met his current spouse, a naturalized U.S. citizen from Russia, while at an American university, and they married in 2007. She testified at the hearing. She is a disability advocate for a non-profit organization with a master's degree in education. She has lived in the U.S. for 30 years, and became a naturalized U.S. citizen 10 years ago. She does not have a Russian passport. She has a special needs child, 17 years old, who is a U.S. citizen. Applicant has assumed paternal responsibilities for this child.

Applicant renewed his Russian passport in March 2011, before he naturalized as a U.S. citizen and obtained a U.S. passport. It expired in March 2016. He returned to Russia in 2009 to dissolve any remaining contacts to Russia, including relinquishing an

¹ In 1984, he served a mandatory two year enlistment as a private in the Russian air force.

interest in an apartment to his ex-spouse. At his Office of Personnel Management (OPM) interview, he expressed a willingness to renounce his Russian citizenship, and besides his mother and mother-in-law, he has no interests in Russia. At the hearing, he acknowledged that he did not know he could relinquish his passport to his employer while holding a security clearance. After the hearing, he promptly relinquished the expired passport to his facility security officer. (AE B)

Applicant's mother is an elderly widow, who is a citizen and resident of Russia. She retired as a worker at an oil refinery in the 1980's. His father passed-away in 1993. Applicant is their only child. He speaks to his mother weekly on the phone. Applicant's spouse speaks to her mother about every four months. She is an 82-year-old widow. She is a retired teacher, living on a government pension. Applicant has very limited contact with his mother-in-law. Applicant's spouse has spoken to his mother twice in the last 10 years.

Applicant considers himself exclusively a U.S. citizen. He expressed his love and appreciation for his life in the United States, and is known to have photos of a former U.S. president in his home. He owns his residence and a second, country home, in the U.S. His primary residence, purchased in 2006, is valued at about \$300,000. He has financial assets, a time-share, and investments worth about \$71,000. Neither he nor his spouse have property or financial interests in Russia.

Applicant's co-workers and a former supervisor testified on his behalf. All are research scientists, have long-standing and high level government security clearances, and work in the defense industry. One published a scientific paper with Applicant and holds a patent together with him. He attended Applicant's naturalization ceremony. Another, a university professor, has known Applicant since he was a Ph.D. student. The third was Applicant's supervisor and group leader for six years while Applicant worked for a U.S. defense contractor. All of the witnesses attested to Applicant's trustworthiness, honesty, positive work ethic, and value to the United States. Applicant was twice awarded recognition for his innovations and process improvements while working at a defense contractor. The witness described this as an unprecedented accomplishment. The witness wanted Applicant to stay employed with the government contractor, but he was laid off because of the extremely lengthy period of time waiting for a security clearance. At that time, the entire department expressed concern for the significant loss of a valuable employee. One witness considered Applicant to be a U.S. national asset because of his expertise in a unique scientific specialty.

Russia

Russia continues to be one of the leading state intelligence threats to U.S. interests. Russian intelligence services continue to target U.S. and allied personnel with access to sensitive computer network information. Russia remains one of the top two most aggressive and capable collectors of sensitive U.S. economic information and technologies, particularly in cyberspace. Non-cyberspace collection methods include targeting of U.S. visitors overseas, especially if the visitors are assessed as having access to sensitive information. One of the two trends that may increase Russia's threat

over the next several years is that many Russian immigrants with advanced technical skills, who work for leading U.S. companies, may be increasingly targeted for recruitment by Russian intelligence services.

Russia's extensive and sophisticated intelligence operations are motivated by Russia's high dependence on natural resources, the need to diversify its economy, and the belief that the global economic system is tilted toward the United States at Russia's expense. As a result, Russia's highly capable intelligence services are using human intelligence (HUMINT), cyber, and other operations to collect economic information and technology to support Russia's economic development and security. In June 2010, the U.S. Department of Justice announced the arrests of ten alleged secret agents for carrying out long-term, "deep-cover" assignments on behalf of Russia. Within weeks, all ten defendants pled guilty in federal court, and were immediately expelled from the United States.

Russia continues to take information warfare to a new level, working to fan anti-U.S. and anti-Western sentiment both within Russia and globally. Moscow will continue to publish false and misleading information in an effort to discredit the West, construe or distort events that threaten Russia's image, undercut consensus on Russia, and defend Russia's role as a responsible and indispensable global power.

The most significant human rights problems of 2015 in Russia involved the following: restrictions on the ability to choose one's government and freedoms of expression, assembly, association, and the media, as well as internet freedoms; political prosecutions and administration of justice; and government discrimination against racial, ethnic, religious, and sexual minorities. Other problems include allegations of torture and excessive force by law enforcement officials that sometimes led to deaths, executive branch pressure on the judiciary, electoral irregularities, and extensive official corruption. The government failed to take adequate steps to prosecute or punish most officials who committed abuses, resulting in a climate of impunity.

Although Russian law prohibits officials from entering a private residence, except in cases prescribed by federal law or when authorized by a judicial decision, government officials entered residences and premises without warrants. In addition, while Russian law prohibits government monitoring of correspondence, telephone conversations, and other means of communication without a warrant, government officials engaged in electronic surveillance without appropriate authorization.

The U.S. reaffirmed its commitment to a united, sovereign Ukraine, and is deeply concerned by the situation in Russian-occupied Crimea, where occupation "authorities" suppress dissent and where ethnic and religious minorities, especially Crimean Tatars and ethnic Ukrainians, face serious and ongoing repression. The U.S. does not accept the redrawing of borders by force and sanctions related to Crimea will remain in place as long as the occupation continues.

Russia is considered to be at a high risk of local, regional, and international terrorism threats and concerns. In September 2015, Russia initiated military operations

in Syria. In response, the Islamic Group of Iraq and the Levant and affiliated terrorist organizations have issued threats vowing retaliatory terrorist attacks in Russia. The Russian Federal Security Service reported no terrorist attacks in the Russian Federation in 2015, however in October 2015, a Russian charter plane exploded in mid-air over Egypt due to an improvised explosive device on board. All 224 people on board, including 219 Russian nationals, were killed. Russian authorities, in addition to the United States and the United Kingdom, determined the incident was an act of terrorism.

Law and Policies

The Director of National Intelligence (DNI) issued revised adjudicative guidelines (AG) in a Security Executive Agent Directive, effective on June 8, 2017. My ultimate decision would be the same under either set of adjudicative guidelines.

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 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 applicant’s 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 meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 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 “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. See *also* Exec. Or. 12968 § 3.1, (Aug. 2, 1995).

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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[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 C (Foreign Preference)

The security concern under Guideline C (Foreign Preference) is set out in AG ¶ 9, as follows:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may provide information or make decisions that are harmful to the interests of the United States. Foreign involvement raises concerns about an individual's judgment, reliability, and trustworthiness when it is in conflict with U.S. national interests or when the individual acts to conceal it. *By itself*; the fact that a U.S. citizen is also a citizen of another country is not disqualifying without an objective showing of such conflict or attempt at concealment. The same is true for a U.S. citizen's exercise of any right or privilege of foreign citizenship and any action to acquire or obtain recognition of a foreign citizenship.

Possession of a current foreign passport was a listed disqualifying condition under this guideline in the 2006 AG,² but is not listed under the 2017 AG. The 2017 AG do not contain any listed disqualifying conditions that apply to mere possession of a foreign passport, and Applicant did not obtain or renew his foreign passport while he was a U.S. citizen. In response to the 2006 AG, Applicant relinquished his expired Russian passport to his employer. Accordingly, I conclude that the SOR does not allege a disqualifying Guideline C concern.

² 2006 AG ¶ 10(a) (1).

Guideline B, Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

AG ¶ 7 has two conditions that could raise a security concern and may be disqualifying in this case:

- (a) contact, regardless of method, 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
- (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology.

Applicant is a U.S. citizen whose mother and mother-in-law are Russian citizens living in Russia. Applicant and his spouse have regular contact with their mothers. Additionally, Applicant's son is a Russian citizen, living and working in the U.S.

The mere possession of close family ties with one or more family members living in 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. *See Generally* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001). There is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. *See generally* ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at *8 (App. Bd. Feb. 20, 2002).

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 or inducement. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, the government ignores the rule of law including widely accepted civil liberties, a family member is associated with or dependent upon the government, the government is engaged in a counterinsurgency, terrorists cause a substantial amount of death or property damage, or the country is known to conduct intelligence collection operations against the United States. The relationship of Russia with the United States, places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his relationships with his family members living in Russia do not pose a security risk. Applicant should not be placed into a position where he might be forced to choose between loyalty to the United States and a desire to assist a family member living in Russia.

Applicant's relationship with his mother, mother-in-law, and son who are foreign citizens or living in Russia create a potential conflict of interest because the Russian government could place pressure on his son, a Russian citizen, and those living in Russia, in an effort to cause Applicant to compromise classified information. These relationships create "a heightened risk of foreign inducement, manipulation, pressure, or coercion" under AG ¶ 7. Department Counsel produced substantial evidence of Applicant's contacts with family and a friend who are citizens of Russia and has raised the issue of potential foreign pressure or attempted exploitation. AG ¶¶ 7(a) and (b) apply, and further inquiry is necessary about potential application of any mitigating conditions.

AG ¶ 8 lists conditions that could mitigate foreign influence security concerns, including:

(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 United States;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(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;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the agency head or designee;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

AG ¶¶ 8 (a), (b), and (c) apply. Applicant has regular contact with his mother, but she is a retired oil factory worker with no relationship with the Russian government. Applicant has infrequent contact with his mother-in-law.

Applicant has “deep and longstanding relationships and loyalties in the U.S.,” including a U.S. doctorate degree and successful employment history by defense contractors. He owns two homes, is married to a U.S. citizen, and his sole financial interests are in the U.S. Applicant expressed his love and appreciation for his life in the United States. He is the defacto father of his spouse’s special-needs child, a U.S. citizen, living in the United States. Applicant’s son is a student at an American college and is employed in the U.S. He became a permanent U.S. resident in 2015, and can apply for citizenship in 2020. Overall, the Applicant and his spouse’s ties to the U.S. far outweigh their ties to Russia, and I would expect that he would resolve any conflict of interest in favor of the U.S. interest.

In sum, Applicant’s connections to Russia are less significant than his connections to the United States. His ties to the United States are sufficient to fully overcome the foreign influence security concerns implicated by his contact with his retired and elderly mother and mother-in-law. Foreign influence concerns under Guideline B are mitigated.

Whole-Person Concept

Under the whole-person concept, the 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. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

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.

I have incorporated my comments under Guidelines B and C in my whole-person analysis. After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant mitigated the security concerns raised in the SOR. Accordingly, I conclude he has 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

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:	For Applicant
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline B:	For Applicant
Subparagraphs 1.a - 1.c:	For Applicant

Conclusion

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

Gregg A. Cervi
Administrative Judge