



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-05037

Appearances

For Government: Alison O' Connell, Esq., Department Counsel

For Applicant: *Pro se*

02/06/2017

Decision

LYNCH, Noreen A., Administrative Judge:

On March 11, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) listing security concerns arising under Guideline C (Foreign Preference) and Guideline B (Foreign Influence). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR and requested that a hearing be held before an administrative judge. The case was assigned to me on August 11, 2016. A notice of hearing was issued on October 19, 2016, scheduling the hearing for January 12, 2017. Government Exhibit (GX) 1 was admitted into evidence without objection. Applicant testified and submitted Applicant Exhibit (AX) A, which was admitted without objection. The transcript was received on January 17, 2017. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is granted.

Procedural Issue

Department Counsel requested that I take administrative notice of certain facts regarding the Ukraine. Applicant did not object, and the documents proffered in support of the request were labeled Hearing Exhibit I and entered into the record.

Findings of Fact

In his answer to the SOR, Applicant admitted the SOR allegation under Guideline C , but denied allegation SOR 2.b under Guideline B with explanations.

Applicant is 50 years old. He was born in Tuzly, Ukraine. In 1987, he graduated from university in the Ukraine with a degree in physics, receiving his undergraduate and a masters degree. In 1997, he was invited to come to the United States to work for a company on a visa (HIB). In 2001, he married and his wife and one child live with him in the United States. He completed a security clearance application in 2015. He has been employed with his current employer since 2015, working as a software engineer. (GX 1) He has not held a security clearance.

FOREIGN PREFERENCE

The SOR alleges under Guideline C that Applicant maintained his foreign passport issued to him by the Ukraine, which had an anticipated expiration date of June 11, 2017.

Applicant acknowledged that he had a foreign passport, but it was only kept in his safe as a memento and to keep a record of his travels. (Tr. 16) He did not use it after becoming a U.S. citizen. Applicant confirmed that he last used it in 2007, before receiving his U.S. citizenship. (AX A) He stated that he never received verbal or written instructions regarding the Ukrainian passport after becoming a U.S. citizen or when applying for a security clearance. (Answer to SOR) In his answer, he offered to send the Ukrainian passport to proper authorities. He had no intention of using his Ukrainian passport in the future. (Tr.19)

Applicant presented a copy of his foreign passport at the hearing, along with his certificate of naturalization. After the hearing, and understanding the issue of the Ukrainian passport and the security concern of the Government, Applicant surrendered his Ukrainian passport in January 13, 2017, to the Facility Security Officer (FSO) at his company of employ. Applicant presented a letter confirming the details. (AX B)

Applicant's 2015 security clearance application notes that he believed that when he became a U.S. citizen, his Ukrainian citizenship "would be lost." He understands that the Ukraine does not allow dual citizenship. (GX 1)

FOREIGN INFLUENCE

The SOR alleges under Guideline B that Applicant's brother, mother-in-law, and father-in-law are citizens and residents of Ukraine. (2.a) It also alleges that Applicant's father-in-law is an employee of the Ukrainian government. (2.b)

Applicant's mother and father are deceased. His one sibling, a brother, is a citizen and resident of the Ukraine. Applicant's brother is retired from the fish industry. (Tr. 21) He never served in the Ukrainian military. Now that he is retired, he spends his time making honey from bees. Applicant does not provide his brother with any financial support. Applicant's brother does not know the nature of Applicant's work.

Applicant's father-in-law and mother-in-law are both retired, and citizens and residents of the Ukraine. His mother-in-law was a food preparer with no connections to the Ukrainian government. His father-in-law is not an employee of the Ukrainian government. He sometimes works at night as a guard for a private company. (Tr.23)

Applicant owns a home in the United States. He does not have any financial property or interests in the Ukraine. His wife sometimes sends a few dollars to her parents, but they usually decline any help. (Tr. 26) He may talk to his relatives a few times a year. His mother-in-law has visited Applicant and his family about five or six times to take care of Applicant's child. (Tr.33)

ADMINISTRATIVE NOTICE

The United States established diplomatic relations with Ukraine in 1991, following its independence from the Soviet Union. U.S. policy is centered on realizing and strengthening a democratic, prosperous, and secure Ukraine more closely integrated into Europe and Euro-Atlantic structures.

Ukraine's transition to an independent, democratic state that is a full member of the global economy has faced significant internal and external challenges; none greater than that resulting from Russia's unlawful annexation of the Crimean Peninsula and support of so-called separatists in Eastern and Southern Ukraine. Russia's actions followed peaceful protests by ordinary Ukrainians that brought down a "corrupt regime bent on cheating people of their sovereign choice to associate with Europe." Despite the signing of a cease fire in September 2014, the situation in Ukraine remains precarious. Violent clashes between Russia-backed separatists and Ukrainian forces continue in parts of the country, resulting in thousands of injuries and deaths. In addition, Russian military forces continue to occupy the Crimean Peninsula and are present on the eastern border of Ukraine. Numerous checkpoints have been established by the Russia-backed separatist forces and the State Department warns that "individuals, including U.S. citizens, have been threatened, detained, or kidnapped for hours or days after being stopped at checkpoints." The State Department also warns that "Russia-backed separatist groups have taken on an increasingly strident anti-American tone", and in light

of ongoing unrest, the U.S. Embassy's ability to provide consular services may be limited.

In March 2014, Russian forces occupied the Crimean Peninsula of Ukraine, which remains part of Ukraine notwithstanding Russia's illegal intervention. In March 2014, the U.N. General Assembly approved a resolution affirming Ukraine's territorial integrity and terming the March 16th referendum on annexation in Crimea illegitimate. The international community, including the United States and Ukraine does not recognize this purported annexation through Russia's illegal military intervention. Russian military forces continue to maintain an extensive military presence in Crimea and along the border of eastern Crimea. The Russian Federation is likely to take further actions in Crimea in 2015 consistent with their attempted unlawful annexation of occupation of this part of Ukraine. Russian authorities are requiring that non-Russian citizens obtain a Russian visa to enter and exit Crimea. In the Ukraine, Russia has demonstrated its willingness to covertly use military and paramilitary forces in a neighboring state.

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

The U.S. Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ."¹ The burden of proof is something less than a preponderance of evidence.² The ultimate burden of persuasion is on the applicant.³

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

A person seeking access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”⁴ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁶ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline C, Foreign Preference

Under AG ¶ 9 the security 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, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.”

AG ¶ 10 describes conditions that could raise a security concern and may be disqualifying:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport;

(2) military service or a willingness to bear arms for a foreign country;

⁴ See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁶ *Id.*

- (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
 - (4) residence in a foreign country to meet citizenship requirements;
 - (5) using foreign citizenship to protect financial or business interests in another country;
 - (6) seeking or holding political office in a foreign country; and
 - (7) voting in a foreign election;
- (b) action to acquire or obtain recognition of a foreign citizenship by an American citizen;
- (c) performing or attempting to perform duties, or otherwise acting, so as to serve the interests of a foreign person, group, organization, or government in conflict with the national security interest; and,
- (d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

Applicant was born in the Ukraine, but came to the United States in 1997 for employment. He is a naturalized U.S. citizen. He had a Ukrainian passport that would expire in 2017. AG ¶¶ 10(a)(1) applies.

AG ¶ 11 provides conditions that could mitigate security concerns:

- (a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;
- (b) the individual has expressed a willingness to renounce dual citizenship;
- (c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;
- (d) use of a foreign passport is approved by the cognizant security authority.
- (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and
- (f) the vote in a foreign election was encouraged by the United States Government.

Applicant surrendered his passport from Ukraine to his FSO and provided documentation to corroborate his statement. The passport is in the possession of his FSO of his employer. He was never put on notice that he needed to relinquish the foreign passport. At the time he had a Ukrainian passport, he did not have a security clearance or have any reason to understand the import of such. No one advised him that this could be an issue. AG ¶ 11(e) applies. Applicant has mitigated the security concerns under the foreign preference guideline.

Guideline B, Foreign Influence

The security concern under Guideline B 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.

A disqualifying condition may be raised by “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(a). A disqualifying condition also may be raised by “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(b).

Applicant’s brother, mother-in-law, and father-in-law are citizens and residents of the Ukraine. Applicant maintains some contact with them. Security concerns could arise in connection with the potential that hostile forces might seek classified information from Applicant by threatening harm or offering benefits to his extended family living in Ukraine. Based on this evidence, AG ¶¶ 7(a) and 7(b) are raised.

Since the Government produced evidence to raise disqualifying conditions in AG ¶¶ 7(a) and (b), the burden shifted to Applicant to produce evidence 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).

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, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). 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, or the foreign country is associated with a risk of terrorism.

While there is no evidence that intelligence operatives or terrorists from Ukraine or Russia seek or have sought classified or economic information from or through Applicant, or his relatives living in Ukraine, nevertheless, it is not possible to rule out such a possibility in the future. International terrorist groups are known to conduct intelligence activities as effectively as capable state intelligence services, and Ukraine now has clashes with Russia. Applicant’s relationship with his brother and in-laws in Ukraine could create a potential conflict of interest because these relationships are sufficiently close to raise a security concern.

Security concerns under this guideline can be mitigated by showing that “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(a). 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). Similarly, AG ¶ 8(b) can mitigate concerns when “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(c) can mitigate if “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) and 8(c) have applicability. Applicant’s immediate family, his wife and child live in the United States and are U.S. citizens. He occasionally contacts his brother. His wife contacts her parents and they came to the United States a few times to care for Applicant’s daughter. He has shown mitigation under AG ¶ 8(a), and Applicant met his burden of showing there is “little likelihood that [his relationships with relatives living in Ukraine could create a risk for foreign influence or exploitation.”

AG ¶ 8(b) applies. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S." Applicant has significant connections to the United States. He has lived in the the United States since 1997. He is a naturalized U.S. citizen. His wife is a U.S. citizen. He has chosen a life in the United States. His financial, professional, and personal ties are in the United States. Applicant took an oath and swore allegiance to the United States when he became a naturalized U.S. citizen. He manifested his patriotism, loyalty, and fidelity to the United States over all other countries.

Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationship with his brother and in-laws in the Ukraine. Moreover, there is no evidence, however, that terrorists, criminals, the Russian government or those conducting espionage have approached or threatened Applicant, or his family members. As such, there is a reduced possibility that either Applicant or her grandmother or relatives living in Ukraine would be specifically selected as targets for improper coercion or exploitation.

In sum, Applicant has not been to the Ukraine since 2007. Applicant's connections to the United States are strong. He is committed to his personal and professional life in the United States. There is substantial mitigation in this case. Applicant spoke about his undivided loyalty to the United States. His connections to the United States heavily outweigh her connections to his family in Crimea. He has such deep and longstanding relationships and loyalties in the United States that he can be expected to resolve any conflict of interest in favor of the United States. Foreign influence security concerns are mitigated under Guideline B. Even if security concerns are not mitigated under Guideline B, they are mitigated under the whole-person concept, *infra*.

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 an applicant's conduct and all the circumstances. The 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.

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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is 50 years old. He came to the United States in 1997 on a visa, because he was invited to work for a company in the United States. He is married to a U.S. citizen and has one child who is a U.S. citizen. He has relinquished his Ukrainian passport. I found him candid and sincere in his testimony. He has been candid about her foreign connections throughout the security clearance process. I had the opportunity to observe his demeanor while he testified. I found him forthcoming and resolute in his ability to resolve any potential conflict of interest in favor of the United States. Accordingly, if any foreign entity were to attempt to influence him through his foreign familial connections, I am convinced he would report any such attempt to the appropriate authorities and not succumb to any adverse pressure or influence. His entire personal, professional and financial interests are in the United States. For all the foregoing reasons, I find that Applicant mitigated the foreign preference and foreign influence concerns.

Applicant provided sufficient information to establish good judgment and reliability. He has mitigated the security concerns under the foreign preference and, foreign influence guidelines.

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 2.a-b:	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 a security clearance. Clearance is granted.

NOREEN A. LYNCH.
Administrative Judge

