



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



In the matter of:)	
)	
REDACTED)	ISCR Case No. 17-00218
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

06/15/2018

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant's longstanding U.S. ties, coupled with appropriate safeguards and conditions, mitigate security concerns raised by his familial relations in Russia. Clearance is granted.

Statement of the Case

On March 14, 2018, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) alleging security concerns under the foreign influence guideline. Applicant answered the SOR and requested a hearing.

On May 9, 2018, I was assigned Applicant's case and, after coordinating with the parties, scheduled the hearing for the following afternoon.¹ Applicant waived his right to 15-days advance written notice of the hearing.² He testified and the exhibits offered by the parties were admitted into the record without objection.³ The transcript was received on May 21, 2018.

¹ See Appellate Exhibit II (notice of hearing and other correspondence).

² Transcript (Tr.) at 4 -5.

³ Government Exhibits 1 – 2 and Applicant's Exhibits A – D.

Findings of Fact

Applicant, 49, was born and raised in the United States. He earned a doctorate in 1993 from a prestigious U.S. university and thereafter continued his studies, earning master's degrees in 2002, 2007, and 2013. He was granted a security clearance in 1994, when he was 25 years old, and has held a clearance continuously to the present day. He has been employed as a federal contractor since 2008. He currently works for a federal law enforcement agency as a contractor and recently received an award from the agency for his efforts in support of the agency's mission.⁴

Applicant met his wife in 2005 and they married two years later. They have lived together in the United States since getting married and have resided at the same rental unit since 2002. Their savings and retirement accounts total approximately \$650,000. They own no property or assets outside the United States. Applicant earns approximately \$155,000 annually. His wife does not work outside the home, but has held jobs with different U.S. employers over the years. She has volunteered in the past with lobbying firms and the U.S. Congress.⁵

Applicant's wife's mother, sister, and grandmother are citizens and residents of Russia. Applicant is not particularly close to his mother-in-law or sister-in-law. He has not visited Russia in over 20 years and they have not visited the United States. He speaks to them on rare occasions, usually during the holidays, birthdays, or on other special occasions.

Applicant's mother-in-law is a retired grade-school teacher. His sister-in-law works in low-pay retail jobs. They share a home in Russia. Neither have any known connection to the Russian government, military, or its intelligence services. Applicant suspects that his mother-in-law and sister-in-law partially support themselves through financial aid provided by the Russian government.

Applicant described his wife's relationship with her mother and sister as contentious. She last traveled to Russia about four years ago to visit them, but hardly got to see her sister while in Russia. She and her mother were speaking on a somewhat frequent basis (once every two weeks) about five years ago, but for the past two years Applicant's wife has had no contact with her mother and sister. She became aware through her grandmother that her sister recently gave birth to a child, but does not know the child's name. Applicant and his wife do not provide financial support to his mother-in-law or sister-in-law, but they did pay for his sister-in-law's education in Russia.⁶

⁴ Tr. at 14-20; Exhibit 1; Exhibit A; Exhibit D.

⁵ Tr. at 21-22, 33-35; Exhibit 1; Exhibits A – C.

⁶ Tr. at 22-33; Exhibit 1; Exhibit A.

Administrative Notice – The Russian Federation (Russia).⁷

Russia has a highly centralized, authoritarian political system dominated by President Vladimir Putin. Although the United States has long sought a full and constructive relationship with Russia, current relations between the two old war allies appears to have again turned adversarial. Of note, in May 2017, the Director of National Intelligence (DNI) reported to Congress that:

Russia is a full-scope cyber actor that will remain a major threat to U.S. Government, military, diplomatic, commercial, and critical infrastructure. Moscow has a highly advanced offensive cyber program, and in recent years, the Kremlin has assumed a more aggressive cyber posture. This aggressiveness was evidence in Russia's efforts to influence the 2016 U.S. election, and we assess that only Russia's senior-most officials could have authorized the 2016 US election-focused data thefts and disclosures, based on the scope and sensitivity of the targets. Outside the United States, Russian actors have conducted damaging and disruptive cyber attacks, including on critical infrastructure networks. In some cases, Russian intelligence actors have masqueraded as third parties, hiding behind false online personas designed to cause the victim to misattribute the source of the attack. Russia has also leveraged cyberspace to seek to influence public opinion across Europe and Eurasia. We assess that Russian cyber operations will continue to target the United States and its allies to gather intelligence, support Russian decisionmaking, conduct influence operations to support Russian military and political objectives, and prepare the cyber environment for future contingencies.⁸

The DNI went on to state that leading state intelligence threats to U.S. interests will continue to come from two main countries, one of which is Russia.⁹ And, that "Russia is likely to be more assertive in global affairs, more unpredictable in its approach to the United States, and more authoritarian in its approach to domestic politics."¹⁰ A recent U.S. State Department human rights report on Russia reflects the commission of significant human rights abuses.

Law, Policies, and Regulations

This case is decided under Executive Order (E.O.) 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 National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017.

⁷ The information herein on Russia is generally taken from Exhibit 2.

⁸ Exhibit 2, Item 1 at 1, *Cyber Threat*.

⁹ Exhibit 2, Item 1 at 9, *Counterintelligence*.

¹⁰ Exhibit 2, Item 1 at 18, *Russia*.

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

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

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

Administrative Judges must remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a “substantial evidence” standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive, ¶ E3.1.32.1. See *also* ISCR Case No. 16-03712 at 3 (App. Bd. May 17, 2018).¹¹

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). See *also* Security Executive Agent Directive 4 (SEAD 4), ¶ E.4. Additionally, the Supreme Court has held that responsible officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain

¹¹ However, a judge’s mere disbelief of an applicant’s testimony or statements, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on non-alleged matters. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice that an issue raises a security concern, such matters can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Foreign connections, contacts, and interests are a national security concern if they result in divided allegiance or could leave a person vulnerable to pressure or coercion by any foreign interest. However, a person is not *per se* disqualified from holding a security clearance because they have familial or other ties to a foreign country. Instead, in assessing a person's potential vulnerability to foreign influence, a judge considers the foreign country involved, the country's human rights record, and other pertinent factors.¹²

In assessing the security concerns at issue, I considered the disqualifying and mitigating conditions listed under Guideline B, including:

AG ¶ 7(a): contact . . . with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

AG ¶ 7(b): connections to a foreign person . . . 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 . . . by providing that information or technology;

AG ¶ 7(e): shared 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;

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 United States;

AG ¶ 8(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;

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; and

¹² See *generally* AG ¶ 6. See also ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (setting forth factors an administrative judge must consider in foreign influence cases).

AG ¶ 8(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.

An applicant with relatives, financial interests or other substantial connections to a foreign country faces a high, but not insurmountable hurdle, in mitigating security concerns raised by such foreign ties. An applicant is not required “to sever all ties with a foreign country before he or she can be granted access to classified information.”¹³ However, what factor or combination of factors may mitigate security concerns raised by an applicant with relatives in a foreign country is not easily identifiable or quantifiable.¹⁴ Moreover, an applicant with familial or other connections to a hostile foreign country faces a *very heavy burden* in mitigating security concerns raised by such foreign ties.¹⁵

Applicant’s contacts with his wife’s family in Russia is minimal. His wife’s present relationship with her mother and sister appears to be, at best, strained. However, familial relationships can be fluid and security adjudications require an assessment about the nature of a person’s relationship with his foreign relatives that is far more encompassing than a one-time view at any particular point in time. Instead, a careful examination of the nature of the familial relationships is required, especially when a close relative resides in a country that is considered a U.S. national security threat and has a less than ideal record when it comes to respecting the human rights of its citizens.

Here, Applicant’s relationship to his wife’s family in Russia is far deeper and more complex than the presently strained situation would tend to indicate. Of note, Applicant and his wife paid for his sister-in-law’s education and, until relatively recently, Applicant’s wife and her mother were in frequent contact. After considering and weighing the evidence, I find that Applicant did not rebut the legal presumption of close familial bonds or ties to his mother-in-law and sister-in-law. This relationship leaves him vulnerable to foreign influence.¹⁶ AG ¶¶ 7(b) and 7(e) apply.

Once security concerns are raised, either through an applicant’s admissions or through evidence provided by the Government, it is the applicant’s responsibility to present evidence in mitigation.¹⁷ In this case, as noted above, Applicant bears a very heavy burden of proof and persuasion in mitigating security concerns and establishing his eligibility for continued access to classified information. Applicant’s strong and longstanding ties to the United States, including his work as a cleared federal contractor, raises favorable inferences regarding his suitability. Additionally, there is no evidence that

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

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

¹⁵ ISCR Case No. 12-05092 at 5 (App. Bd. Mar. 22, 2017).

¹⁶ ISCR Case No. 12-01295 at 3 (App. Bd. Jan. 20, 2015) (“In-laws represent a class of persons who are contemplated by the Directive as presenting a potential security risk. As a matter of common sense and human experience, there is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person’s spouse.”)

¹⁷ ISCR Case No. 14-00715 at 3 (App. Bd. Dec. 10, 2014).

Russia or other foreign power has tried to use Applicant's family in Russia as a means to influence him. However, this favorable evidence is not sufficient to *fully* mitigate security concerns raised by Applicant's familial connections to Russia, a hostile foreign power.¹⁸

In rare cases, an administrative judge may grant initial or continued eligibility for a security clearance, *despite the presence of an issue(s) that can be partially but not completely mitigated*, with the provision that additional security measures shall be required to mitigate the issue(s). See SEAD 4, Appendix C (emphasis added).¹⁹ Applicant's unique qualifications, work as a federal contractor, honesty in self-reporting his foreign connections, and the candor he exhibited at hearing all favor granting a conditional clearance in this case. In exercising this discretionary authority, I have carefully considered and weighed the foreign influence security concern, as well as the facts and circumstances giving rise to said concern. After doing so, I find that the grant of a conditional clearance is consistent with the national security interests of the United States and will appropriately address any remaining issues. Specifically, Applicant's continued eligibility for a security clearance is conditioned on the following:

- (1) Applicant will report to his facility security officer (FSO) his and his wife's contacts with foreign family members, foreign nationals, and / or foreign entities within 48 hours of the contact or becoming aware of the contact;
- (2) Applicant will submit to and cooperate with any additional screening and monitoring requested by his employer or the U.S. Government, including, but not limited to, counterintelligence polygraph interviews and access to his social media account(s); and
- (3) Applicant will provide his FSO a copy of this decision, so his FSO can be aware of the above conditions.²⁰

¹⁸ In reaching this conclusion, I also considered the whole-person concept. See *generally* AG ¶ 2. Although the favorable whole-person matters raised by the evidence were insufficient to fully mitigate the foreign influence security concern, they and the other favorable record evidence weigh in favor of granting a conditional clearance.

¹⁹ See *also* Memorandum, Director for Defense Intelligence (Intelligence and Security), dated January 12, 2018 ("Appendix C identifies authorized exceptions that are to be utilized when making adjudicative decisions to grant initial or continued eligibility for access to classified information or to hold a sensitive position . . . Effective immediately, authority to grant clearance eligibility with one of the exceptions enumerated in Appendix C is granted to any adjudicative, hearing, or appeal official or entity now authorized to grant clearance eligibility when they have jurisdiction to render the eligibility determination.")

²⁰ Although I do not have the authority to compel a third party, such as Applicant's employer, to monitor Applicant's compliance with the conditions set forth herein, an FSO has an independent obligation to report to the Government any information raising a security concern that comes to his or her attention.

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 B (Foreign Influence): FOR APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

Conclusion

In light of the record evidence, it is clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information subject to the additional conditions and safeguards set forth herein.

Francisco Mendez
Administrative Judge