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

| | | |
|---|---|---|
| In the matter of: | ) | |
| | ) | |
| [REDACTED] | ) | ISCR Case No. 17-00333 |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

06/11/2018

Decision

HESS, Stephanie C., Administrative Judge:

Applicant has mitigated the foreign influence security concerns raised by the fact that her parents and four siblings are citizens and residents of Ukraine. Access to classified information is granted.

## Statement of the Case

Applicant submitted a security clearance application (e-QIP) on August 13, 2015. On March 8, 2017, the Department of Defense (DOD) sent her 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 the DOD on September 1, 2006.

Applicant answered the SOR on March 16, 2017, and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case

and a complete copy of the file of relevant material (FORM), which included Government Exhibits (GX) 1 through 6, was sent to Applicant on August 15, 2017. She was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. She received the FORM on August 23, 2017, and did not file a Response.[1] The case was assigned to me on January 2, 2018.

The SOR was issued under the AG implemented on September 1, 2006. The DOD implemented the amended AG on June 8, 2017, while this decision was pending. This decision will be based on the amended AG effective June 8, 2017.

Department Counsel requested that I take administrative notice of facts concerning Ukraine. The relevant facts are discussed below.

## Findings of Fact

The SOR alleges that Applicant's parents, sister, and three brothers are citizens and residents of Ukraine. Applicant admits each of the allegations and her admissions are incorporated in my findings of fact.

Applicant is a 48-year-old housekeeping lead currently employed by a federal contractor since May 2014. She has been employed by federal contractors since at least 2004, however, this is her first application for a security clearance. She is married, and she and her husband have six children. Four of Applicant's children were born in Ukraine, and two were born in the United States. Applicant properly disclosed her foreign contacts during her background investigation. (GX 4; GX 5.)

Applicant was born and reared in Ukraine. She came to the United States in 1996 with her husband and four young children, and became a naturalized US citizen in March 2015. Initially, Applicant's parents and siblings intended to move to the United States with her. However, after Applicant had prepared the requisite paperwork, Applicant's parents decided against moving to a foreign country where they did not know the language, and her parents and younger siblings remained in Ukraine. Applicant has monthly contact with her family members. Two of Applicant's sisters and their families immigrated to the United States when Applicant did. Applicant visited her family in Ukraine in 2008 and 2013. Applicant has lived in the United States for over 20 years, and considers it to be her home. (GX 4; GX 5 .)

In 2014, Russia seized and occupied Crimea in an effort to annex it, which caused the United States to impose sanctions against those entities and individuals responsible for the aggression. The conflict is ongoing. The U.S. State Department advises U.S. citizens to avoid separatist-controlled areas of Ukraine, particularly the eastern regions of Donetsk and Luhansk where separatist groups have detained and kidnapped U.S.

[1] The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated August 15, 2017, and Applicant's receipt is dated August 23, 2017. The DOHA transmittal letter informed Applicant that she had 30 days after receiving it to submit information.

citizens. The U.S. State Department has also warned U.S. citizens to avoid all travel to Crimea due to the continued presence of Russian Federation military forces occupying the region as a *de facto* government and committing abuses against the local population.

Applicant's family members live and work near Ukraine's capital city, which is controlled by the Ukrainian government. The capital is nearly 1,000 kilometers away from the separatist-controlled areas. While the Ukrainian government has committed human-rights violations against its citizens, including prisoners, women, and children, the focus appears to be on political dissidents. Applicant's parents are retired and none of Applicant's family members currently serve in the military or work for the government. The record does not contain any evidence to suggest that Applicant's family members are involved in any political activity. There is no evidence that Applicant travels to separatist-controlled areas or the Crimea Peninsula.

## 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 "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 concern is set forth in AG ¶ 6:

> 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.

The following disqualifying conditions are applicable: AG ¶ 7

> AG ¶ 7(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

> 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 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.

AG ¶¶ 7(a) requires evidence of a "heightened risk." The "heightened risk" required to raise this disqualifying condition is a relatively low standard. "Heightened risk" denotes a risk greater than the normal risk inherent in having a family member living under a foreign government or owning property in a foreign country. The mere possession of ties with family in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has such a relationship, 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 totality of Applicant's family ties to a foreign country as well as each individual family tie must be considered.

The Ukrainian government is known to commit human rights violations, including government intervention on personal freedoms. Separatist groups, present in several regions, are known to specifically target U.S. citizens. Given the ongoing conflicts in Ukraine between the elected government and separatist groups and the potential threats against U.S. citizens, Applicant's relationships with her family members create a heightened risk of foreign exploitation and coercion and the potential risk for a conflict of interest. AG ¶¶ 7(a) and 7(b) 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, (App. Bd. Mar. 29, 2002).

The following mitigating conditions are potentially applicable:

> 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; and
>
> AG ¶ 8(d): 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.

The evidence in the record mitigates the concerns about Applicant's relationships with her family members who are Ukrainian nationals. Applicant's family members are not involved in professions or activities that are likely to place Applicant in a position of having to choose between foreign interests and U.S. interests. Applicant has lived in the United States for more than 20 years and considers it to be her home. She became a naturalized U.S. citizen in 2015. Furthermore, there is no indication that Applicant travels to areas in Ukraine that increase her exposure to separatist groups that may have anti-American sentiments. AG ¶¶ 8(a), 8(b), and 8(d) apply.

**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 considered the following:

Applicant has worked for a defense contractor for nearly 14 years. She has lived in the United States for over 20 years and became a naturalized U.S. citizen in 2015.

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 mitigated the security concerns raised by her contacts with her family in Ukraine. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with the national interest to grant her 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): | FOR APPLICANT |
| Subparagraphs 1.a – 1.d: | For Applicant |

## Conclusion

I conclude that 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.

Stephanie C. Hess
Administrative Judge