



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



In the matter of:)
)
) ISCR Case No. 17-04206
)
Applicant for Security Clearance)

Appearances

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

07/24/2018

Decision

GLENDON, John Bayard, Administrative Judge:

This case involves security concerns raised under Guidelines B based upon family ties to the Russian Federation (Russia). Eligibility for access to classified information is denied.

History of the Case

On December 28, 2017, the Department of Defense (DOD) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline B. The DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended (Exec. Or.); Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on January 25, 2018, and requested a decision on the record without a hearing. Department Counsel submitted the Government’s written case on April 2, 2018. On April 5, 2018, Applicant received a complete copy of the file of

relevant material (FORM) and was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He submitted his response to the FORM and provided evidence on April 16, 2018. The case was assigned to me on June 19, 2018.

Administrative Notice

In her FORM, Department Counsel requested that I take administrative notice of relevant facts about Russia. (FORM at 3 and Item 6.) The request and supporting documents were not admitted into the record as evidence, but are attached to the record as Administrative Determination Exhibits (ADX) I and II. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact¹

In Applicant's answer to the SOR, he admitted the two SOR allegations. His admissions are incorporated in my findings of fact.

Applicant was born in Moscow in December 1957, when that city was the capital of the Union of Soviet Socialist Republics (USSR or Soviet Union). He is now 60 years old. Applicant served a mandatory, two-year period in the Soviet Union army. In 1986, he earned a bachelor's degree at a Moscow university. He immigrated to the United States in January 1996 under a special refugee program. (FORM Item 5 at 3.) He became a naturalized U.S. citizen in January 2001. In his security clearance application (SCA), Applicant denied that he was a dual citizen of the United States and Russia (FORM Item 4 at 8), but he has provided no evidence to support his contention that he has formally or legally renounced his Russian citizenship. His Russian passport, on which he traveled to the United States in 1996, expired in 2000 and has not been renewed. A stamp on that passport reflects that he was leaving Russia permanently. (FORM Item 5 at 3.) Applicant considers himself to be a "proud" American citizen and "only" an American citizen. (Response to FORM.)

Applicant presently works for a company that is not a government contractor. He is being sponsored for a clearance by a defense contractor on a pre-employment basis.

Applicant's parents were born in the Ukraine. They are both deceased. His mother was a Ukrainian citizen, and his father was a citizen of the USSR. (FORM Item 5 at 6.) In or about August 1995, his father immigrated to the United States. His mother immigrated with Applicant at a later date. She was a naturalized U.S. citizen at the time of her death. His father died as a Russian citizen with a U.S. Alien Registration card. While living in the USSR, and later in Russia, Applicant's father worked as a butcher. (FORM Item 5 at 6.) The record does not disclose whether his mother worked outside the home while living in Russia. Applicant has one sibling, a sister, who was born in Moscow and immigrated to

¹ Applicant's personal information is extracted from his security clearance application (FORM Item 4) unless otherwise indicated by a parenthetical citation to the record.

the United States sometime prior to her naturalization as a U.S. citizen in July 2000. (FORM Item 5 at 6.) His sister was trained as a seamstress, but is currently disabled and unemployed. (FORM Item 5 at 6.)

Applicant has been married three times. He married his first wife, a Russian citizen, in 1983. They have one daughter, who was born in 1985. His first marriage ended in divorce in May 1995. His daughter married in 2013 and has a son. (FORM Item 5 at 10, as corrected in Applicant's Response to the FORM.) The record evidence does not reflect whether Applicant's daughter is presently married. When Applicant immigrated to the United States, his daughter stayed with her mother. (FORM Item 5 at 7.) Applicant's first wife, daughter and grandson² are all citizens and residents of Russia.

Applicant's daughter is a real estate agent in Moscow. (FORM Item 5 at 7.) She lives with Applicant's first wife in Moscow. (FORM Item 5 at 5.) His first wife is a retired salesperson, who worked in a Moscow clothing store. (FORM Item 5 at 5.) Applicant speaks with his daughter four times per month via FaceTime or Skype. (FORM Item 5 at 7.) He also communicates with her via email. On very rare occasions, he speaks with his first wife when she answers his calls to his daughter. (FORM Item 5 at 5.) In October 2012, Applicant's daughter visited him for the first and only time in the United States for ten days. Applicant has provided financial support to his daughter for the benefit of his grandson two times per year since January 2014. (FORM Item 5 at 10.) The total amount of this support is \$1,800. (FORM Item 5 at 10.) He has also sent her baby gifts for his grandson. (FORM Item 5 at 10.) He provides this support to his daughter because he is not able to be in Moscow to help her as the grandfather of her son. (FORM Item 5 at 10.) Also, he provided this support to his daughter because she was struggling financially after the birth of her child because she was on medical leave for three years after the birth. (FORM Item 5 at 10.)

Applicant divorced his first wife when she declined to emigrate with Applicant from Russia. (FORM Item 5 at 5.) The same month, Applicant married another Russian woman, who he believed would immigrate with him to the United States. (FORM Item 5 at 5.) He did not want to emigrate from Russia without a Russian wife. (FORM Item 5 at 5.) The day before the two of them were scheduled to leave Russia, his new wife called him and told him that she had decided not to emigrate. (FORM Item 5 at 5.) On January 11, 1996, Applicant proceeded to travel as planned with his mother, who was ill. A month later, Applicant's marriage to his second wife was annulled in Russia. (FORM Item 5 at 6.) Applicant has had no contact with his second wife since he arrived in the United States. As of 1996, his second wife worked as a cashier in a Moscow bank. (FORM Item 5 at 6.)

Applicant remarried in the United States in 2006 to a woman who was born in the Ukraine and who, like Applicant, immigrated to the United States as a refugee. She subsequently became a naturalized U.S. citizen. She works as a case worker for a U.S.

² Pursuant to Directive ¶ E3.1.17, I move to amend SOR ¶ 1.a to conform to the evidence, so that the word "grandson" is substituted for the word "granddaughter." With this minor change in the SOR allegation about the gender of Applicant's grandchild, no additional time or opportunity to respond is necessary or appropriate. Motion is granted.

health care insurance company. (FORM Item 5 at 5.) In his SCA, Applicant represented that his wife's parents are deceased. In his Enhanced Subject Interview, he reportedly stated that his wife talks with her parents in the Ukraine by phone once per week. (FORM Item 5 at 5.) It is possible that Applicant was misunderstood by the investigator who conducted the interview and that he meant to communicate that when her parents were alive, she spoke to them weekly. According to their dates of birth provided by Applicant in his SCA, his wife's parents would have been 96 and 95 years old at the time of the interview. Applicant's present wife has a daughter, who is 32 years old. (FORM Item 5 at 4, as corrected in Applicant's Response to FORM.) Applicant did not list his stepdaughter in his SCA due to a misunderstanding. (FORM Item 5 at 4.)

Applicant has a friend who was born in the USSR and served with him in the Soviet Union Army (the Army Friend). In about 1989, the Army Friend immigrated to Israel and is presently residing there as a naturalized Israeli citizen. (FORM Item 5 at 8.) At that point, Applicant lost touch with his Army Friend until about 1999, when the friend contacted Applicant. (FORM Item 5 at 8.) Applicant and his Army Friend have contact about four times a year on special occasions. (FORM Item 5 at 8.) Applicant and his wife visited the Army Friend in Israel in 2014 for ten days. (FORM Item 5 at 8.) His Army Friend works as a technician for a semi-conductor company in Israel. (FORM Item 5 at 8.)

I have taken administrative notice that Russia is one of the top three most aggressive and capable collectors of economic information and technological intelligence from U.S. sources. Russian military programs continue to be driven by the perception that the United States and the North Atlantic Treaty Organization are its principal strategic challenges and greatest potential threat.

Russia is a leading intelligence threat to U.S. interests based upon its capabilities, intent, and broad operational scope. Russian intelligence services target national security information and proprietary information from U.S. companies and research institutions involved with defense, energy, finance, dual-use technology, and other areas. (FORM Item 6 at attachment I) Russia's highly capable intelligence services use human intelligence, cyber, and other operations to collect economic information and technology to support Russia's economic development and security. (FORM Item 6 at attachment II.) Russia's aggressive cyber posture was evident in its efforts to influence the 2016 U.S. election, and the U.S. Intelligence Community assessed that only Russia's senior-most officials could have authorized the 2016 U.S. election-focused data thefts and disclosures, based upon the scope and sensitivity of the targets. (FORM Item 6 at attachment I.)

Russia's intelligence services also use non-cyberspace collection methods to collect economic information and technology from U.S. targets. Two trends that may increase Russia's threat is that (1) many Russian immigrants with advanced technical skills and work for leading U.S. companies may be increasingly targeted for recruitment by Russian intelligence services, and (2) a greater number of Russian companies affiliated with the intelligence services will do business in the United States. (FORM Item 6 at attachment II.)

Russia's human rights record is uneven, and in some areas, it is poor. The judiciary is not independent and is subject to manipulation by political authorities. Abuses include attacks on journalists, physical abuse by law enforcement officers, harsh prison conditions, arbitrary detention, politically motivated imprisonment, electronic surveillance without judicial permission, warrantless searches of residences and other premises, and widespread corruption in the executive, legislative, and judicial branches. (FORM Item 6 at attachment XIII.)

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 § 2.

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, 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." 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. 15-01253 at 3 (App. Bd. Apr.20, 2016).

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.

Analysis

Guideline B, Foreign Influence

The SOR sets forth two allegations under Guideline B. SOR ¶ 1.a alleges that Applicant's daughter and granddaughter are citizens and residents of Russia. SOR ¶ 1.b alleges that Applicant's Army Friend is a citizen and resident of Israel.

The security concern under this guideline is set out in AG 6, as follows:

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 maybe 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 evidence establishes the following disqualifying conditions:

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.

Applicant has contacts with his daughter and by extension with his young grandson, who are citizens and residents of Russia. These contacts create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. These relationships also constitute connections to foreign persons that creates a potential conflict of interest between Applicant's obligation to protect classified or sensitive information or technology and Applicant's desire to help his daughter and grandson by providing that information or technology. Both AG ¶¶ 7(a) and 7(b) apply to Applicant's relationships with his daughter and grandson. (SOR ¶ 1.a)

With respect to Applicant's Army Friend, who is a citizen and resident of Israel (SOR ¶ 1.b), AG ¶ 7(b) is established because Applicant's Army Friend is a citizen and resident of Israel, which creates the same conflict of interest as that created by Applicant's daughter and grandson. AG ¶ 7(a) has not been established by the record evidence because the Government did not submit with its FORM a Request for Administrative Notice with respect to Israel for the purpose of proving that Applicant's contact with his Army Friend creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. The facts that the Applicant's Army Friend was born in the USSR and that he was a citizen of the Soviet Union and then Russia before becoming a naturalized citizen and resident of Israel do not establish a "heightened risk" security concern under AG ¶ 7(a) based upon the evidence and the requested administrative notice facts presented by the Government.

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(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.

With respect to the Government's SOR allegation in ¶ 1.a, Applicant has not presented sufficient evidence to meet his burden of persuasion to mitigate the security concerns under any of the three mitigating conditions quoted above. Applicant's close fatherly relationship with his daughter, and by extension with his grandson, who are both citizens and residents of Russia, preclude favorable application of AG ¶ 8(a). Based upon the very limited evidence presented by Applicant, I cannot reasonably conclude that it is "unlikely" that Applicant will be placed in a position of having to choose between the interests of his foreign family members and the interests of the United States.

Furthermore, Applicant's scant evidence does not begin to meet his burden of persuasion under AG ¶ 8(b) to prove that there is no conflict of interest. Applicant's sense of obligation to his Russian family members is not minimal. Also, he has presented no material evidence of the depth of his relationships in the United States other than his status as a former refugee and a U.S. citizen since 2001, his long-time employment in the United States, his 2006 marriage to a U.S. naturalized citizen, who was born in the Ukraine, and his relationship with her daughter, who is also a naturalized U.S. citizen. Applicant provided no significant additional information to evidence deep and long-standing ties to the United States.

AG ¶ 8(c) has also not been established. There is a rebuttable presumption that an applicant's contacts with immediate family members are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Applicant has not rebutted this presumption because he acknowledges that he has frequent communications with his daughter and provides gifts to her for his grandson. Accordingly, I conclude that he has not carried his burden of persuasion under AG ¶ 8(c) to establish that "there is little likelihood that [his communication with his daughter] could create a risk for foreign influence or exploitation." Directive ¶ E3.1.15.

With respect to his Army Friend, Applicant has provided sufficient evidence to establish the applicability of AG ¶ 8(c) because his communication with his foreign friend is casual and infrequent. This creates "little likelihood that [his communication with his Army Friend] could create a risk for foreign influence or exploitation." AG ¶ 8(a) is partially established for the same reason. Applicant's casual relationship with his Army Friend make it "unlikely [Applicant] will be placed in a position of having to choose between the interests of his friend and the United States. AG ¶ (8(b) is also established because the evidence shows that Applicant's "sense of loyalty or obligation to his [Army Friend]" is sufficiently "minimal" that Applicant can be expected to resolve any conflict of interest in favor of the U.S. interest.

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is denied.

John Bayard Glendon
Administrative Judge