



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



In the matter of:)	
)	
)	ISCR Case No. 14-05296
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Dominic Fahey, Esq.

10/21/2015

Decision

LYNCH, Noreen A., Administrative Judge:

On March 5, 2015, the Department of Defense (DOD) issued 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 an administrative decision based on the record. Department Counsel requested that a hearing be held and advised Applicant. Applicant agreed to a hearing before an administrative judge. The case was assigned to me on July 1, 2015. A notice of hearing was issued on August 11, 2015, scheduling the hearing for October 1, 2015. Government Exhibit (GX) 1 was admitted into evidence without objection. Applicant testified and submitted Applicant Exhibits (AX) A-C, which were admitted without objection. The transcript was received on October 9, 2015. 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 Russia and (Crimean Peninsula) 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 her answer to the SOR, Applicant admitted the SOR allegation under Guideline C , but denied the allegations under Guideline B with explanations.

Applicant is 27 years old. She was born in Yalta, Ukraine. In 1999, she came to the United States with her family. She became a naturalized citizen in 2009. She received her undergraduate degree in 2013 from an American university. She is married to a U.S. citizen. She completed a security clearance application in 2013. She has been employed with her current employer since 2013. (GX 1)

FOREIGN PREFERENCE

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

Applicant acknowledged that she had a foreign passport, but it was in the possession of her Facility Security Officer (FSO). She attached the document to her answer, but it was not in the file with her answer.¹ She produced a letter from her FSO at the hearing, which certified that in March 2015 the foreign passport issued by the Ukraine was destroyed. (AX A). She was never advised that this was an issue, even when she became a U.S. citizen. She had not used the passport from Ukraine since she became a U.S. citizen. (Answer to SOR; GX 1)

Applicant's 2013 security clearance application notes that she believed that when she became a U.S. citizen, her Ukrainian citizenship "would be lost." She understands that is not the case. She is now going through an official process to renounce her Ukrainian citizenship. (GX 1)

FOREIGN INFLUENCE

The SOR alleges under Guideline B that Applicant's father is a citizen and resident of Crimea and that he previously worked for the Ukrainian KGB. (2.a) It also alleges that Applicant's grandmother is a citizen and resident of Crimea, Ukraine, now under control of Russia. Finally, it alleges that she has several other relatives with whom

¹Applicant originally requested a FORM. She responded to it with documents. At the hearing, Department Counsel said that he did not produce the documents that were with the FORM.

she keeps in contact with who are citizens and residents of the Crimea Ukraine, now under the control of Russia.

Applicant's mother and her two sisters are U.S. citizens. They came to the United States in 1999. Her mother is married to a U.S. citizen. Applicant's sister and her husband's extended family live in the United States.

As to allegation 2.a, Applicant knows that at some point that her father was a citizen and resident of Crimea, Ukraine. When her parents divorced in 1988, she had no relationship with her father. However, she has not seen him since leaving the Ukraine in 1999. (Tr. 15) Her mother, who has since remarried an American citizen, officially had parental rights revoked in 1999 by the Court in Ukraine. (AX B) Her father left the family and did not visit or provide support to his family. The Court in Ukraine decreed that all parental rights of the father are terminated as of 1999. (AX C) She does not know where her father is. She has had no communications with him. Applicant is credible when she testified that her father has no bearing on her life. She does not even know if he is still alive. The Ukraine Court document (AX B) states that Applicant's father was working for the Security Service of Ukraine in the city of Yalta. Applicant's mother told Applicant that her father was discharged from his position at the "organization of Security Service."

Applicant's grandmother is a citizen and resident of Crimea, Ukraine. She is retired from a factory job. She is about 75. (Tr. 17) She has no connection to the Ukrainian government. Applicant speaks to her grandmother through Skype approximately once a month. Lately there have been internet issues, and she has not spoken to her in months. (Tr. 17)

Applicant's aunt and uncle live in the same household with her grandmother. They have no contact with the government. Applicant's cousin, who is 24, has little contact with her. The last time Applicant saw them was in 2007, before she became a U.S. citizen. (SOR 2.c)

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. . . .”² The burden of proof is something less than a preponderance of evidence.³ The ultimate burden of persuasion is on the applicant.⁴

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.”⁵ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁶ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁷ 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:

² See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

³ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁴ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁵ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁷ *Id.*

(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;
- (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 became a naturalized U.S. citizen in 2013. She had a passport from the Ukraine. 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 her passport from Ukraine to her FSO before the hearing, and provided documentation to corroborate her statement. The passport has been destroyed. She is in the process of officially renouncing her Ukrainian citizenship. She was never put on notice that she needed to relinquish it. At the time she had a Ukrainian passport she did not have a security clearance or have any reason to understand the import of such. No one advised her 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, grandmother, aunt, uncle, and cousin are citizens and residents of Ukraine. Applicant maintains some contact with them. Applicant has no idea where her father currently lives. Moreover, his parental rights were revoked through the Ukraine Court in 1999. She has not seen him or had any contact with him since that time. 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 her

extended family living in Ukraine or Crimea. but not to her father. 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 her relatives living in Ukraine and the Crimea, 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 her grandmother and relatives in Crimea 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 mother, two sisters, husband and in-laws live in the United States and are U.S. citizens. She occasionally contacts her grandmother. She has no relationship with her father. She has shown mitigation under AG ¶ 8(a), and Applicant met her 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. She has lived in the the United States since 1999. She is a naturalized U.S. citizen. She married a U.S. citizen. She has chosen a life in the United States. Her financial, professional, and personal ties are in the United States. Applicant took an oath and swore allegiance to the United States when she became a naturalized U.S. citizen. She manifested her 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 her relationship with her grandmother and relatives in the Ukraine. She has no connection with her father, she occasionally calls her grandmother and relatives who live in the house may speak to her. Moreover, there is no evidence, however, that terrorists, criminals, the Russian government or those conducting espionage have approached or threatened Applicant, or her 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. She is committed to her personal and professional life in the United States. She lives with her U.S. husband. Her mother and two sisters are U.S. citizens living in the United States. There is substantial mitigation in this case. Applicant spoke about her undivided loyalty to the United States. Her connections to the United States heavily outweigh her connections to her family in Crimea. She has such deep and longstanding relationships and loyalties in the United States that she 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

Paragraph 2, Guideline B : FOR APPLICANT

Subparagraphs 2.a-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 a security clearance. Clearance is granted.

NOREEN A. LYNCH.
Administrative Judge