



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



In the matter of:)
)
 1) ISCR Case No. 14-06788
)
 Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

05/12/2016

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s foreign family contacts create a heightened risk of foreign exploitation, inducement, manipulation, pressure, coercion, and an unacceptable security risk. Applicant’s mitigating information is insufficient to fully overcome the foreign influence security concerns. She surrendered her Ukrainian passport and mitigated the foreign preference concerns. Eligibility for access to classified information is denied.

Statement of the Case

On July 10, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF), issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline B (foreign influence) and Guideline C (foreign preference).²

¹ Applicant’s first name was spelled wrong in the SOR.

² The DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

Applicant answered the SOR on August 11, 2015, and requested a hearing before an administrative judge. The case was assigned to me on December 2, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 15, 2015, scheduling a hearing for January 15, 2016.

The hearing was convened as scheduled. Applicant testified and offered seven exhibits (AE 1 through 7). The Government offered exhibits (GE) 1 through 3. GE 1 and 2 and AE 1 through 7 were admitted without objections. GE 3 is a request for me to take administrative notice of facts concerning the government of Ukraine. GE 3 was marked and attached to the record, but not admitted into evidence. Applicant did not object, and I took administrative notice of facts concerning the government of Ukraine as outlined in the administrative notice request. DOHA received the hearing transcript (Tr.) on January 28, 2016.

Findings of Fact

Applicant did not admit or deny any of the SOR factual allegations. However, in her answer to the SOR she stated that she was willing to surrender her Ukrainian passport (valid until 2017) (SOR ¶ 1.a). She also indicated that her parents and one brother are citizens and residents of Ukraine (SOR ¶¶ 2.a, 2.b and 2.c).

Applicant also stated that her mother (64) was a U.S. permanent resident and divided her time living between Ukraine and the United States. Her younger brother is a resident of the Czech Republic, working for a U.S.-based corporation. (AE 6) The other brother is a citizen and resident of Ukraine. Applicant's mother applied for U.S. permanent residency status for both her sons, which is pending. According to Applicant, her brothers plan to move to the United States as soon as they receive their green cards.

Applicant's SOR and hearing admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, and having observed Applicant's demeanor while testifying, I make the following additional findings of fact:

Applicant is a 37-year-old employee of a large federal contractor. She was born, raised, and educated in Ukraine to Ukrainian parents. Applicant's parents and one brother are citizens and residents of Ukraine. She received a bachelor's degree from a Ukrainian university in 1999. Applicant stated her father paid for her education until she started working full time. She has contacts with her Ukrainian family and friends living in Ukraine through email and the Internet approximately twice a year. She visits with them when she travels to Ukraine.

Applicant immigrated to the United States in April 2001, and married a U.S. citizen that same month. Between 2005 and 2007, she attended post-graduate studies in a U.S. university and received a master's degree in 2007. She became a naturalized U.S. citizen in 2008, and was issued a U.S passport shortly thereafter. Applicant has been working for her current employer, a federal contractor, since 2008. She divorced

her husband in April 2009, and she has no children. She submitted her first security clearance application (SCA) in April 2010.

Applicant disclosed in her 2010 SCA that she was in possession of a valid Ukrainian passport issued to her in 2007, with an expiration date of June 2017. She also disclosed the following trips to foreign countries: China - 15 days in 2010; United Kingdom – 10 days in 2011, 7 days in 2009; Kosovo - 15 days in 2009 and 21 days in 2008; Spain - 8 days in 2009; France - 14 days in 2008-2009, 14 days in 2007, and 10 days in 2002-2003; Macedonia – 1 day in 2009, and 2 days in 2008; Morocco - 15 days in 2008; Russia - 7 days in June 2007, 5 days in April 2007, and 2 days in 2003; Ukraine – over a week in January 2015; 8 days in 2012; 7 days in 2007, 15 days in August 2006, 14 days in August 2005, 21 days in August 2004, and 7 days in 2003; Egypt - 14 days in 2006-2007; Canada - 6 days in 2004; Netherlands - 7 days in 2003; and Belgium - 5 days in 2003.

In February 2012, Applicant provided a sworn statement to a government background investigator. She stated that after receiving her U.S. passport in 2008, she used it to travel abroad and stopped using her Ukrainian passport. Applicant believes she was never a dual citizen of the United States and Ukraine. She believes she forfeited her Ukrainian citizenship when she became a U.S. citizen, but she is not sure. Applicant testified that she does not have any financial or property interests in Ukraine or any other foreign country. Applicant's assets in the United States include her salary, a \$200,000 401(k) retirement account, and a \$300,000 IRA. (Tr. 46)

Applicant stated in 2012 that she was not willing to renounce her Ukrainian citizenship or to surrender her Ukrainian passport. She was afraid that as a U.S. citizen she could be denied entrance to Ukraine and would not be able to visit her parents. She also believed that if she renounced her Ukrainian citizenship she would not be able to apply for Ukrainian citizenship again in the future. Applicant also did not want to pay for the Ukrainian visa required for a U.S. citizen to stay in the Ukraine. She wanted to keep her Ukrainian passport for her travel convenience.

Applicant stated that if a conflict arose between the United States and Ukraine, she was not sure where her loyalty would lie as it would depend on the nature of the conflict. She could not say that she would be completely loyal to the United States. If her parents were threatened, Applicant would follow security protocol and find a legal way to assist them. When Applicant retires, she would probably move to Italy and not retire in the United States or move back to Ukraine. She would move to Italy for the weather and not because of any allegiance to Italy. (AE 2; Tr. 49)

In her February 2012 statement, Applicant indicated that her father was 61 years old, and worked for a railway construction company. He does not want to come to the United States because he makes good money and does not want to move. Applicant's mother is 64 years old, and she is a U.S. permanent resident alien. (AE 3) Applicant's older brother is 35 years old. He was a social worker for the government and currently works as a nurse at a state-run clinic. Her younger brother is 25 years old and a student. Applicant's mother submitted a U.S. immigrant petition for relatives for both

siblings in January 2011. Applicant's mother and younger brother visited Applicant in the United States in 2007. Her mother also travelled to the United States in 2010.

On August 11, 2015 (after receipt of the SOR), Applicant submitted a statement to the DOD CAF indicating that her situation had changed and that she was now willing to surrender her Ukrainian passport with the hope that it would alleviate the security concerns it raised. On January 8, 2016, she surrendered her Ukrainian passport to her facility security officer. (AE 1) When asked at her hearing why she kept her Ukrainian passport, Applicant indicated that she felt it was part of her identity. (Tr. 29)

As part of her "changed situation," Applicant stated that both her parents were now retired and in their 60s. Applicant's mother was a chemical engineer and worked for a government railroad. Applicant claimed her mother retired in her late 40s and receives a small government pension. Applicant's mother resides with Applicant three to six months out of the year. Her father does not travel to the United States for health reasons. He also retired as a railroad engineer, and receives a government pension. When he was young, Applicant's father served in the then Soviet Union military forces. (Tr. 38) Applicant provides approximately \$300 a month in financial support for her parents. (Tr. 39) Applicant has Internet or phone contact with her parents several times a week. (Tr. 35)

Applicant's younger brother is working for an American company in the Czech Republic. Her older brother works in the agriculture industry for a small farm in Ukraine. She claimed her family supports western values of democracy and liberty. Applicant believes that because her mother and siblings intend to reside in the United States sometime in the future that should mitigate the foreign influence security concerns.

I take administrative notice of the following facts: Ukraine is a republic with a semi-presidential political system composed of three branches of government: a unicameral legislature, and executive, and judicial divisions. At the end of February 2014, the Ukrainian parliament approved a new government which caused Russia to respond by seizing Ukraine's Crimean peninsula. Russian President Vladimir Putin signed a "treaty" with Crimean leaders formally incorporating Crimea into Russia.

Unrests occurred during March 2014 involving eastern and southern Ukraine. Thousands of pro-Russian protestors demonstrated in the area. Some favor union with Russia and others seek more autonomy from the national government. Russia has been accused of orchestrating attacks by the separatists. On May 25, 2014, an election took place resulting in the election of Petro Poroshenko as President, signaling a strong democratic mandate for change in Ukraine.

According to the U.S. Department of State, the most significant human rights developments in the Ukraine in 2014 were the more than 100 civilian deaths and numerous injuries resulting from the government's forced dispersion of protesters; the displacement of more than 18,000 Crimeans and numerous human rights abuses that resulted from the Russian occupation of Crimea; and the thousands of deaths and injuries that resulted from the Russian-backed separatists violent occupation of territory

in Eastern Ukraine. Other problems reported during 2014 included abuse of persons in custody; harsh conditions in prisons and detention facilities; a corrupt judicial system; societal violence against women and abuse of children; societal discrimination against and harassment of ethnic minorities; and trafficking in persons. The government generally failed to take adequate steps to prosecute or punish most officials who committed abuse, resulting in a climate of impunity.

The new Ukrainian president attempted to establish a peace plan to restore order to the portions of Ukraine that have been seized by armed separatists. He offered amnesty to separatists who lay down their arms, political dialogue, broad decentralization of power to Ukraine's regions and localities, and he attempted to institute a unilateral cease fire, however, Russian-backed separatists did not respect the cease fire. There is no evidence that Russia's support for the separatists has ceased, but rather, it appears Russia has continued to supply heavy weapons, other military equipment and financing to separatists and has allowed militants to enter Ukraine.

Ukraine's security remains under threat and fierce fighting continues to rage in parts of eastern Ukraine. Heavy weapons, material and support continue to flow across the Russian border, and thousands of Russian troops have been deployed on Ukraine's eastern border. Additionally, the Crimean peninsula remains under occupation.

Due to ongoing clashes between separatists and Ukrainian forces, the Department of State has warned U.S. citizens to defer travel to eastern regions of Ukraine. The separatist groups have threatened, detained, or kidnapped persons, including U.S. citizens. The Department of State has also warned U.S. citizens to defer travel to the Crimean Peninsula, where Russian forces occupy the area in support of the attempted annexation. There are also reports of abuses against the local population by de facto authorities, particularly against those seen as challenging their authority on the peninsula.

Russia is one of the most aggressive countries conducting espionage against the United States, focusing on obtaining proprietary information and advance weapons technologies beneficial to Russia's military modernization and economic development. Russia is one of the most capable and persistent intelligence threats and aggressive practitioner of economic espionage against the United States. Russia's intelligence services as well as private companies and other entities frequently seek to exploit Russian citizens or persons with family ties to Russia who can use their insider access to corporate networks to steal secrets. They also have offered financial inducements to U.S. government officials and citizens to encourage them to compromise classified information. Russia's attempts to collect U.S. technological and economic information represent a growing and persistent threat to U.S. security.

Policies

Eligibility for access to classified information may be granted "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. The U.S. Supreme Court has recognized the substantial discretion of the Executive

Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline B, Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

[I]f the individual has divided loyalties or foreign financial interests, [he or she] 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.

The guideline indicates conditions that could raise a security concern and may be disqualifying AG ¶ 7 in this case:

(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; and

(b) 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

Applicant's parents and siblings are citizens and residents of Ukraine. Her mother is a U.S. permanent resident and spends three to six months of the year in the United States and the remainder of the year in Ukraine. Both of her siblings are citizens of Ukraine, but her younger brother is currently living in another foreign country. Both of her siblings' applications for U.S. permanent residency are pending. Her other brother is a resident of Ukraine.

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country and an applicant has contacts with that relative, this factor alone may be sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.³

Applicant has frequent contacts and a close relationship of affection and obligation with her parents, siblings, and friends in Ukraine. These contacts create a risk of foreign pressure or attempted exploitation because there is always the possibility that Ukrainian agents or individuals operating in Ukraine may exploit the opportunity to obtain sensitive or classified information about the United States. Applicant's relatives in Ukraine create a potential conflict of interest and a heightened risk of foreign exploitation, inducement, manipulation, pressure, and coercion, both directly or through her family members in Ukraine.

The Government produced substantial evidence raising potentially disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the Government. AG ¶¶ 7(a) and 7(b) apply, and further inquiry is necessary about potential application of any mitigating conditions.

³ See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

AG ¶ 8 lists conditions that could mitigate foreign influence security concerns including:

(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 U.S.;

(b) 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;

(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;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(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; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

Applicant was born, raised, and educated in Ukraine. She left Ukraine in 2001 to marry in the United States. She has lived in the United States for close to 15 years, and became a naturalized U.S. citizen in 2008. She has been working for a government contractor since 2008. Applicant divorced her U.S. spouse in 2009, and she has no children. She has a substantial financial interest in a 401(k) retirement plan, and on her employment position. She owns no property and disclosed no other financial interests in the United States.

Applicant's relationship with the United States must be weighed against the potential conflict of interest created by her relationships with her family members living in Ukraine. Although there is no evidence that Ukrainian government agents, or other entities, have approached or threatened Applicant or her family living in Ukraine, she is nevertheless potentially vulnerable to threats, coercion, inducement, and manipulation made against her or her family members living in Ukraine. As a good daughter and sibling, Applicant has a strong sense of obligation and loyalty to her parents and

siblings. She stated that she would do anything legal to assist them if they were threatened.

Considering Ukraine's government, its relationship and circumstances with Russia (and Russia's ongoing pervasive espionage practices against the United States), and with the United States, Applicant is not able to fully meet her burden of showing there is "little likelihood that [her relationships with her relatives who are Ukrainian citizens and living in Ukraine] could create a risk for foreign influence or exploitation." AG ¶¶ 8(d) through (f) have limited applicability and do not mitigate the foreign influence concerns.

Applicant has lived 15 years in the United States; however, her evidence is insufficient to establish deep and longstanding relationships and loyalties in the United States. Applicant intends to retire in Italy (not in the United States or Ukraine) because of weather concerns. Applicant stated she does not want to renounce her Ukrainian citizenship. In 2012, she refused to surrender her Ukrainian passport. In 2015, she averred that her situation had changed and surrendered her Ukrainian passport to her FSO. However, there is little evidence of changed circumstances other than her receipt of the SOR.

The risks of coercion, persuasion, or duress are significant because of Ukraine's unstable circumstances, political unrest, and Russia's military and political support for Ukrainian separatists. Apparently, her father and one brother had jobs related to the government, and although her mother splits her time between Ukraine and the United States, she still spends significant periods in Ukraine and depends on Applicant's father for support.

Guideline C, Foreign Preference

AG ¶ 9 explains the concerns about foreign preference stating:

When 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 indicates four conditions that could raise security concerns and may be disqualifying in this case:

(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;

(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 entered the United States in 2001 to get married, and has been living in the United States since then. She became a naturalized U.S. citizen in 2008. After becoming a U.S. citizen, Applicant stopped using her Ukrainian passport and used her U.S. passport exclusively. In 2012, Applicant refused to surrender her Ukrainian passport for her travel convenience. There is no evidence that she used her Ukrainian passport, in preference of her U.S. passport, to travel abroad after she was issued the U.S. passport. Applicant does not intend to renounce her Ukrainian citizenship. She surrendered her Ukrainian passport to her FSO in January 2015.

Foreign preference disqualifying condition AG ¶ 10(a) is supported by the evidence. If this condition is not mitigated it would disqualify Applicant from eligibility to hold a security clearance.

AG ¶ 11 provides conditions that could mitigate the security concerns for foreign preference:

(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.

AG ¶ 11(e) is applicable. Applicant surrendered her Ukrainian passport in 2015. She mitigated the security concerns alleged under Guideline C.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

I have incorporated my comments under Guidelines B and C in my whole-person analysis. I considered that Applicant has lived in the United States 15 years. She has worked for a government contractor since 2008, and became a naturalized U.S. citizen in 2008. Applicant has strong affection and a sense of obligation to her parents and siblings. Her father and one brother are residents and citizens of Ukraine. Her mother is a U.S. permanent resident that spends three to six months a year in the United States and the remainder of the year in Ukraine. Her younger brother is a Ukrainian citizen living in the Czech Republic. Both brothers are pending the approval of their U.S. permanent residency. Applicant has substantial 401(k) retirement accounts in the United States. She presented no other evidence of financial or property interests in the United States.

Applicant's foreign family contacts create a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion, and an unacceptable security risk. Considering Ukraine's government, its relationship and circumstances with Russia, and with the United States, Applicant's mitigating information taken together is insufficient to fully overcome the foreign influence security concerns under Guideline B.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude Applicant has not carried her burden of persuasion and the foreign influence security concerns are not mitigated. Eligibility for access to classified information is denied.

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: | AGAINST APPLICANT |
| Subparagraphs 2.a - c: | Against Applicant |

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

JUAN J. RIVERA
Administrative Judge