



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



In the matter of:)	
)	
)	ADP Case No. 14-03219 ¹
)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

03/27/2015

Decision

COACHER, Robert E., Administrative Judge:

Applicant did not mitigate the foreign influence or foreign preference trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On July 25, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline B, foreign influence, and Guideline C, foreign preference. DOD acted under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant answered (Answer) the SOR on November 10, 2014, and elected to have his case decided on the written record. Department Counsel submitted the

¹ The Statement of Reasons (SOR) erroneously captioned this case as "ISCR Case: 14-03219."

Government's File of Relevant Material (FORM) on January 6, 2015. The FORM was mailed to Applicant and he received it on January 26, 2015. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He declined to submit any additional information. The case was assigned to me on March 16, 2015.

Procedural Ruling

Department Counsel requested that I take administrative notice of facts concerning the Russian Federation (Russia).² Department Counsel provided supporting documents that verify details and provide context for these facts in the Administrative Notice request. See the Russia section of the Findings of Fact of this decision, *infra*, Department Counsel's material facts on Russia.

Administrative or official notice is the appropriate type of notice used for administrative proceedings.³ Usually administrative notice in ISCR proceedings is accorded to facts that are either well known or from government reports.⁴

Findings of Fact

In his answer to the SOR, Applicant admitted all SOR allegations. The admissions are incorporated as findings of fact. After a review of the pleadings and evidence, I make the following additional findings of fact.

Applicant is a 40-year-old employee of a government contractor. He works as an information technology consultant and has held that position since November 2003. He attended high school in Russia until 1991, served one year of mandatory military service in Russia, and entered the United States in 1998. He became a naturalized U.S. citizen in 2005. He retained his Russian citizenship and passport. He is married and his wife is a dual citizen of Russia and the United States. She was naturalized in January 2013.⁵

Applicant was interviewed by a defense investigator in March 2013. He told the investigator that he used his Russian passport for travel to Russia because it made traveling easier. Since gaining U.S. citizenship, he traveled to Russia in 2005-2008 and 2010-2012. If asked to give up his Russian passport or renounce his Russian citizenship, he would not do so. He admitted that his allegiance and loyalty was to

² Item 6.

³ See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)).

⁴ See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

⁵ Items 4-5.

Russia. His Russian passport was due to expire in August 2013. There is no evidence in the record that it was not renewed.⁶

Applicant has the following relatives and friends who are residents and/or citizens of Russia:

1. His wife as stated above is a dual citizen of the United States and Russia. She is eligible for medical, retirement, and social welfare benefits from Russia.⁷

2. His mother. His mother is a retired accountant. He speaks to her by telephone weekly and sees her yearly.⁸

3. His father-in-law and mother-in-law. He has quarterly contact with his father-in-law and his mother-in-law and sees them yearly when he travels to Russia.⁹

4. Eight friends who are residents and citizens of Russia. Applicant listed three of his Russian friends as references on his security clearance application. He told the defense investigator about five more friends that he has ongoing contact with and whom he is bound by affection.¹⁰

Russia:

Russia's intelligence services are conducting a range of activities to collect economic information and technology from US targets, and Russia remains one of the most aggressive and capable collectors of sensitive US economic information and technologies, particularly in cyberspace. Non-cyberspace collection methods include targeting of US visitors overseas, especially if the visitors are assessed as having access to sensitive information. Two trends that may increase Russia's threat over the next several years are that many Russian immigrants with advanced technical skills who work for leading U.S. companies may be increasingly targeted for recruitment by the Russian intelligence services; and a greater number of Russian companies affiliated with the intelligence services will be doing business in the United States.

Russia's extensive and sophisticated intelligence operations are motivated by Russia's high dependence on natural resources, the need to diversify its economy, and the belief that the global economic system is tilted toward the U.S. at the expense of Russia. As a result, Russia's highly capable intelligence services are using human

⁶ Items 4-5.

⁷ Items 4-5.

⁸ Items 4-5.

⁹ Items 4-5.

¹⁰ Items 4-5.

intelligence (HUMINT), cyber, and other operations to collect economic information and technology to support Russia's economic development and security.

On June 28, 2010, the U.S. Department of Justice announced the arrests of ten alleged secret agents for carrying out long-term, deep-cover assignments on behalf of Russia. Within weeks, all ten defendants pleaded guilty in federal court and were immediately expelled from the United States. On January 18, 2011, convicted spy and former CIA employee Harold Nicholson, currently incarcerated following a 1997 espionage conviction, was sentenced to an additional 96 months of imprisonment for money laundering and conspiracy to act as an agent of the Russian government for passing information to the Russian government between 2006 and December 2008.

Beyond collection activities and espionage directed at the United States, Russia has provided various military and missile technologies to other countries of security concern, including China, Iran, Syria, and Venezuela. Continuing concerns about U.S. missile defense plans will reinforce Russia's reluctance to engage in further nuclear arms reductions and Russia is unlikely to support additional sanctions against Iran. Russian intelligence and security services continue to target Department of Defense interests in support of Russian security and foreign policy objectives.

Although Russian law allows officials to enter a private residence only in cases prescribed by federal law or on the basis of judicial decision, authorities did not always observe these restrictions in practice. Problems remain due to allegations that government officials and others engaged in electronic surveillance without judicial permission and entered residences and other premises without warrants. The Russian government also requires that telephone and cellular companies grant the Ministry of Interior and the Federal Security Service (FSB) 24-hour remote access to their client databases, as well as requiring telecommunications companies and Internet service providers to provide dedicated lines to the security establishment, enabling police to track private e-mail communications and monitoring Internet activity.

In March 2014, Russian forces occupied the Crimean Peninsula in Ukraine, in support of Russia's claim of Crimean annexation. The United States and Ukraine do not recognize this annexation through illegal military intervention by Russia. The Russian Federation maintains an extensive military presence in Crimea and along the border of Eastern Ukraine. 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. Russian authorities are requiring that non-Russian citizens obtain a Russian visa to enter Crimea.¹¹

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the

¹¹ Item 6 (and source documents).

person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The 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 [sensitive] 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon 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 sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline B, Foreign Influence

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

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.

AG ¶ 7 indicates conditions that could raise a trustworthiness concern and may be disqualifying 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;
- (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; and
- (d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

The mere possession of close family ties with family members or friends living in Russia is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one friend or relative living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.

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 or inducement. 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, the country is known to conduct intelligence collection operations against the United

States, or the foreign country is associated with a risk of terrorism. The relationship of Russia with the United States places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his relationships with his relatives and friends living in Russia do not pose a security risk. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist his relatives or friends living in Russia who might be coerced by governmental entities.

AG ¶¶ 7(a) and 7(b) apply because of Applicant's relationships with his relatives and friends who are living in Russia. Applicant communicates with his relatives on a regular basis and visits them yearly. He also stated that he has ties of affection for his Russian friends. There is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. Applicant has not attempted to rebut this presumption. Given Russia's hostility toward the United States and its efforts to obtain intelligence from U.S. sources, Applicant's relationships with his relatives and friends living in that country are sufficient to create "a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion." AG ¶ 7(c) applies because Applicant resides with his wife.

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

(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; and

(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.

AG ¶ 8(a) does not apply. Applicant's current position could cause him to be placed in a position to choose between the interests of his friends and relatives, and those of the United States. AG ¶ 8(b) does not apply. Applicant stated his loyalties remain with Russia even though he is now a U.S. citizen. The evidence does not support that he has deep seated loyalties toward the United States. AG ¶ 8(c) does not apply given the extensive contact he has with friends and family and his loyalty toward Russia.

Guideline C, Foreign Preference

AG ¶ 9 expresses the foreign preference trustworthiness concern:

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 describes conditions that could raise a trustworthiness concern and may be disqualifying. The following is potentially applicable:

(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; . . . (7) voting in a foreign election.

Applicant is a dual citizen with Russia and refuses to renounce that citizenship. Even after gaining U.S. citizenship in 2005, he continued to use his Russian passport to enter Russia in 2005-2008 and 2010-2012. He does not intend to discontinue using his Russian passport. It was set to expire in 2013, but there is no evidence in the record that it was not renewed. AG ¶ 10(a) applies.

I also considered all the mitigating conditions under AG ¶ 11 and determined the following are potentially applicable under this guideline:

(b) the individual has expressed a willingness to renounce dual citizenship; and

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.

As discussed above, Applicant refused to renounce his Russian citizenship or discontinue using his foreign passport. I find mitigating conditions AG ¶¶ 11(b) and 11(e) do not apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a trustworthiness determination by considering the totality of the applicant's conduct and all relevant circumstances. The 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a trustworthiness determination must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The circumstances tending to support denying Applicant's access to sensitive information are more significant than the factors weighing towards granting his access to sensitive information at this time. I considered his continued stated loyalty to Russia and his close ties with friends and family there. He has not demonstrated longstanding loyalty to this country even though he gained citizenship in 2005. Therefore, he provided insufficient evidence to mitigate the trustworthiness concerns.

Overall the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a position of trust. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising under Guideline B, foreign influence, and Guideline C, foreign preference.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B: Subparagraphs 1.a – 1.e:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline C: Subparagraph 2.a:	AGAINST APPLICANT Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Robert E. Coacher
Administrative Judge