

DATE: June 2, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-22861

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Julie Edmunds, Esq., Department Counsel

#### FOR APPLICANT

#### *Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 7, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On October 31, 2005, after the hearing, Administrative Judge Leroy F. Foreman granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Administrative Judge correctly concluded that Applicant's father is not an "agent of a foreign power" for purposes of Foreign Mitigating Condition 1 (FMC1) and is not subject to influence.

The Administrative Judge made the following dispositive findings of fact:

Applicant is a 26-year old employee of a defense contractor. Her parents were born in Sudan. Applicant came to the U.S. as an infant, attended grade school, high school and college in the U.S. and was raised as an American. Applicant and her parents were naturalized as U.S. citizens in September 1999. She does not speak Arabic, has no contact with or interests in Sudan, and has no contact with her extended family in Sudan except for one visit in 2001.

Applicant's father is a lawyer, licensed to practice in the U.S. as a foreign legal consultant. He came to the U.S. from Sudan in 1979 for postgraduate studies. He has worked as a contractor in the Saudi Arabian Embassy since 1985. He has a one-year contract with the embassy that has been renewed each year until the present. He works "at will," and either he or the embassy may terminate the contract at any time. He is not a diplomat, has no contact with the diplomatic staff, and takes no part in policymaking or diplomatic activities of the embassy. He also has a private law practice.

Applicant has five siblings. Three are native-born U.S. citizens. Applicant and one sibling became U.S. citizens at the same time their parents were naturalized. Applicant's oldest sister has applied for U.S. citizenship and expects to be naturalized in March 2006. Applicant and her family visited Sudan for about one month in 2001, to visit her father's brother, sister, aunt, uncle, and cousins. Applicant's father has little contact with his family in Sudan.

A department head in the U.S. government agency supported by Applicant's employer regards her as an "exceptional employee." Other witnesses testified Applicant is "a very loyal U.S. citizen" and "very dedicated and responsible."

Sudan is governed by a military dictatorship with a progovernment parliament. Sudan has been identified by the U.S. State Department as a state sponsor of terrorism since 1993. None of Applicant's extended family members were affected by the civil unrest in Sudan.

Saudi Arabia is a monarchy with a council of ministers and a consultative council. Despite economic ties and close cooperation between the U.S. and Saudi Arabia on security issues, the U.S. has expressed concern about human rights conditions in Saudi Arabia. Relations between Saudi Arabia and the U.S. were strained after the terrorist attacks on September 11, 2001. Currently, Saudi Arabia is an important partner of the U.S. in the global war on terrorism, providing assistance in the military, diplomatic, and financial areas.

The standard used to grant or continue a security clearance for an applicant is that such a clearance must be clearly consistent with the national interest. An Administrative Judge must resolve close cases in the favor of national security, rather than in favor of the applicant. Directive E2.2.2.

When the ruling or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (App. Bd. July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law.

On appeal, Department Counsel asserts that it was arbitrary and capricious for the Administrative Judge to conclude that Foreign Influence Mitigating Condition 1 applies to the Applicant's father. Department Counsel's argument has merit.

The Administrative Judge found that Disqualifying Conditions were established. The Judge then considered if Foreign Influence Mitigating Condition 1 applied to the Applicant. The Administrative Judge found that it did apply partly due to his conclusion that Applicant's father does not qualify as an "agent of a foreign power" as defined in the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801(b). Reliance on the narrow definition of "agent" in FISA is inappropriately applied to the security clearance process. *See*, ISCR Case No. 03-10954 at 4 (App. Bd. Mar. 8, 2006). The definitions in FISA are self-limiting, as the introductory phrase "As used in this subchapter" identifies.

For purposes of defining "agent of a foreign power" as used in the security clearance process, where the Guidelines and Directive do not have specific definitions, the case law of this Board must be followed. The Judge correctly acknowledged that the Appeal Board has defined "agent of a foreign power" in broad terms for security clearance adjudication purposes to include all employees of a foreign government. The Judge, however, then concluded that the Applicant's father is not an agent because he is an independent contractor, not an employee of the Saudi Arabian government. Department Counsel, in its appeal points out that the record evidence indicates that Applicant's father is subject to the authority of the Saudi government in that his boss is a Saudi diplomat. Also, as Department Counsel points out and the Applicant's father testified to, the majority of the Applicant's father's income comes from the Saudi embassy and he has a part-time law practice to supplement his income. The Administrative Judge's decision that FIMC 1 applies cannot be sustained.

When an appealing party demonstrates factual or legal error, the Board must consider whether: (a) the error is harmful or harmless; (b) the nonappealing party made a persuasive argument for how the Administrative judge's decision can be affirmed on alternate grounds; and (c) if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded. In this case, the Judges' favorable clearance decision is not sustainable, and the identified errors are unlikely to be remedied by remand. Therefore, the decision must be reversed.

**Order**

The Administrative Judge's decision is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board