

DATE: September 19, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-02741

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

#### FOR APPLICANT

#### *Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 29, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision based on the written record. On March 31, 2006, after considering the record, Administrative Judge LeRoy F. Foreman denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Administrative Judge's adverse security clearance decision under Guideline B is arbitrary, capricious or contrary to law. [\(1\)](#)

Applicant contends that the Administrative Judge's adverse decision should be reversed because the Judge erred in not applying Guideline B Mitigating Conditions 1-[\(2\)](#) and 5-[\(3\)](#). In support of that contention, Applicant argues that his family members in Sudan are not agents of a foreign power and not in a position to be exploited by a foreign power in any way. He also argues that his property interest in Sudan is minimal. The Board does not find these arguments persuasive.

The Administrative Judge made unchallenged sustainable findings that Applicant's mother, two siblings, parents-in-law, and half-brother are citizens of Sudan, residing in Sudan, and that Applicant was co-owner of property in Sudan valued at approximately \$100,000. Given those findings, the Judge concluded that Applicant's ties with those immediate family members raised security concerns under Guideline B and that Disqualifying Conditions 1-[\(4\)](#) and 8-[\(5\)](#) applied. That conclusion shifted the burden of persuasion to Applicant. If there are admitted or proven facts and circumstances that raise security concerns, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). As the trier of fact, the Administrative Judge has to weigh the evidence as a

whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Applicant had the burden of demonstrating that his family members in Sudan were not in positions where they are likely to be exploited by a foreign power. Applicant's arguments do not demonstrate that it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant had not met his burden of establishing that his relatives were not in a position to be exploited by a foreign power in a way that could force him to choose between loyalty to those relatives and the United States. The Board does not review a case *de novo*.

The absence of evidence that Applicant's family members in Sudan are currently employees or agents of the Sudanese government is not dispositive. Having relatives, cohabitants or associates who are connected with a foreign government is a disqualifying condition under Guideline B.<sup>(6)</sup> However, the absence of such a connection with a foreign government does not mean that there is no security concern under Guideline B. *See, e.g.*, ISCR Case No. 02-29665 at 5 (App. Bd. Nov. 10, 2004). A reading of Guideline B in its entirety shows that security concerns can be raised by a variety of foreign connections, not just having family members with foreign government connections. Additionally, the absence of a particular disqualifying condition does not compel a favorable security clearance decision. *See, e.g.* ISCR Case No. 02-08052 at 3 (App. Bd. June 23, 2003). In his decision, the Administrative Judge articulated a rational basis for his conclusion that Applicant's circumstances, including Sudan's political and human rights record, increased Applicant's vulnerability to foreign influence. Considering the record as a whole, it was not arbitrary, capricious or contrary to law for the Judge to conclude that Applicant had not met his burden of producing sufficient evidence to warrant the application of Mitigating Condition 1.

Whether an applicant's financial interest in a foreign country is "substantial" for purposes of applying Guideline B Disqualifying Condition 8, or "minimal" for purposes of applying Guideline B Mitigating Condition 5, does not turn simply on consideration of the dollar amount of that financial interest. The Administrative Judge is not required to engage in a piecemeal analysis of an applicant's financial ties separate from the other security concerns presented in the case. In assessing the significance of the foreign financial interest involved, a Judge must not only consider its value in comparison to the applicant's financial interests in the United States, but also other record evidence concerning the facts and circumstances of the applicant's foreign financial interest and foreign family and other ties. *See, e.g.*, ISCR Case No. 01-18860 at 4 (App. Bd. Mar. 17, 2003). Considering Applicant's foreign financial ties<sup>(7)</sup> in conjunction with his foreign family ties and the record as a whole, it was not arbitrary, capricious or contrary to law for the Judge to conclude that Applicant had not met his burden of producing sufficient evidence to warrant the application of Mitigating Condition 5. Moreover, given the Judge's other findings, a favorable application of Mitigating Condition 5 by itself, would not necessarily overcome the security concerns, considering Applicant's foreign family ties.

Given the record that was before him, the Administrative Judge's application of Guideline B Mitigating Conditions 1 and 5 is sustainable, and his overall unfavorable clearance decision is not arbitrary, capricious, or contrary to law.

### **Order**

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in Applicant's favor with respect to Guideline C. That favorable finding is not at issue on appeal.

2. Directive ¶ E2.A2.1.3.1. ("A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States.")

3. Directive ¶ E2.A2.1.3.5. ("Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.")

4. Directive ¶ E2.A2.1.2.1. ("An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country.")

5. Directive ¶ E2.A2.1.2.8. ("A substantial financial interest in a country, or in any foreign-owned or -operated business that could make the individual vulnerable to foreign influence.")

6. Directive ¶ E2.A2.1.2.3. ("Relatives, cohabitants, or associates who are connected with any foreign government").

7. Applicant indicated that he was a co-owner of property in Sudan, but he did not indicate his share was actually a one-third interest until he filed his appeal. The Board cannot consider this new evidence on appeal. *See* Directive ¶ E3.1.29.