DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-00303
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric H. Borgstrom, Esquire, Department Counsel
For Applicant: *Pro se*

March 11,2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86) on November 17, 2004. On October 9, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines B (Foreign Influence) and E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on October 18, 2007; answered the SOR on October 22, 2007; submitted a clarification of his answer on October 29, 2007, and requested a hearing before an administrative judge. DOHA received the request on October 31, 2007. Department Counsel was prepared to proceed on November 30, 2007, and the case was assigned to me on December 6, 2007. DOHA issued a notice of hearing on December 14, 2007, and I convened the hearing as scheduled on January

16, 2008. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified on his own behalf, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through HH, which were admitted without objection. The record closed at the end of the hearing. DOHA received the transcript of the hearing (Tr.) on January 22, 2008. Eligibility for access to classified information is granted.

Procedural Ruling

Department Counsel requested that I take administrative notice of relevant facts about Sudan (Tr. 28). The request and the documents attached as enclosures were not admitted in evidence but are attached to the record as Hearing Exhibits (HX) I and II. I took administrative notice as requested by Department Counsel (Tr. 33-34). The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations under Guideline B and denied the allegation under Guideline E. His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 47-year-old native of Sudan. He completed high school in Sudan, attended a maritime college in Yugoslavia from 1980 to 1983, and worked as a third mate on a Sudanese ship after graduation. He came to the U.S. from Sudan in November 1987 (GX 3 at 9-10; Tr. 79), and he became a U.S. citizen in November 1992, at which time he renounced his Sudanese citizenship and surrendered his Sudanese passport (GX 3 at 10). From November 1994 to July 1997, he worked as a courier for a commercial parcel carrier. He served as a seaman on various U.S. merchant ships from July 1997 to February 2002. He has worked as a linguist for federal contractors from March 2003 until the present. He worked in Kuwait in March 2003, Iraq in June 2003, Guantanamo from March 2004 until March 2006, and again in Iraq from February to July 2007 (GX 2 at 5; AX K; AX P). He has held a security clearance since May 2003.

Applicant submitted his SF 86 in November 2004, seeking to obtain a top secret clearance (Tr. 8). His application was supported with "utmost enthusiasm" by a Marine Corps captain, based on observation of Applicant's performance for six months as a linguist at the Navy and Marine Corps Intelligence Training Center (AX A).

Applicant's supervisor at Guantanamo, a Navy lieutenant commander, described him as a talented, dependable linguist, a person of "highest caliber intellect and integrity," and a trusted friend (AX B). An Army first lieutenant commended him for his performance, dedication, and personal courage at Guantanamo (AX C). His civilian project manager described him as a "stellar and dedicated employee" who accepted difficult assignments and volunteered to be a team leader (AX L). One of his

subordinates in Guantanamo described him as "of the highest caliber" and "a positive asset" to any organization having the opportunity to utilize his skills (AX M). Another subordinate described him as an excellent leader, highly motivated, and enthusiastic (AX N). His performance reviews as a linguist at Guantanamo were outstanding (AX G, H, and I), and he received numerous commendations for his service (AX P, Q, R, S, T, and U).

His supervisor in Iraq, an Air Force major, commended him for his outstanding duty performance and described him as a "true patriot" for volunteering for more than 80 difficult and extremely dangerous assignments to counter-insurgency missions (AX D). One of his coworkers described his performance as a linguist in Iraq in glowing terms, describing him as "unquestionably one of the best," and strongly recommending him for a position of trust (AX F).

Applicant worked as a linguist at the U.S. Military Academy during cadet summer training in 2006. A fellow linguist who worked with him described him as pleasant, hard working, dedicated, and professional (AX O). He received a certificate of appreciation from the Director, Department of Military Instruction (an Army colonel) for his "exceptional professionalism, motivation, and dedication to duty" during the summer training (AX V).

Applicant was married to a native-born U.S. citizen in March 1989 and divorced in May 1994. He married his current spouse, also a native-born U.S. citizen, in November 1995. He has four sons from his current marriage, ages 11, 9, and 8 months, who are native-born U.S. citizens. The two youngest are twins (Tr. 81).

Applicant's spouse testified he is a very honest, trustworthy person, and is very responsible and caring toward his family (Tr. 117-18). She testified their marriage is built on commitment and sacrifice (Tr. 118). Applicant is frequently away from home, but he calls frequently to check on the children (Tr. 118).

Applicant's parents were citizens and residents of Sudan. His mother died in 1993 and his father died in 1996. His father owned a blacksmith shop, and his mother did not work outside the home (Tr. 83-84). He has two brothers who are citizens and residents of the U.S. (Tr. 85). One brother drives a vehicle for handicapped persons, and the other is a government contractor currently working for the U.S. in Iraq (Tr. 86).

Applicant declined to sponsor his two brothers for immigration to the U.S. because he was concerned about an appearance of a conflict of interest. They made their way to the U.S. and became citizens without his help. He testified he wanted to be "on the safe side" as far as his loyalty to the U.S. was concerned (Tr. 52).

Applicant has three brothers who are citizens and residents of Sudan. The oldest is a 55-year-old blacksmith and lives in Khartoum. He last saw this brother in 2000. He rarely communicates with this brother and has had no contract for at least a year (Tr. 87). His 49-year-old brother worked with the older brother as a blacksmith.

Applicant is unaware of this brother's current occupation, but knows he lives in Omdurman (Tr. 88-89). He rarely communicates with this brother and saw him last in 2000 (Tr. 90). The youngest brother lives in Khartoum, previously worked as a blacksmith, and is now unemployed (Tr. 90-91). None of his brothers served in the military or have ever been connected with the government, nor have they been detained or questioned by government authorities or subjected to violence by government authorities, rebels, or terrorists (Tr. 92). None of his siblings in Sudan have ever visited him in the U.S. (Tr. 101).

Applicant has four sisters who are citizens and residents of Sudan. The oldest lives in Al Ubayyid and is married to a tailor (Tr. 93). Applicant does not know how many children she has (Tr. 93). The second oldest is divorced and is unemployed (Tr. 94-95). The third oldest is widowed and disabled. The youngest sister is married, but Applicant knows little about her (Tr. 99).

Applicant sent money to care for his widowed and disabled sister and his brother's daughter, because he promised his mother he would make sure they were cared for (Tr. 126). The money was wired by Western Union by Applicant's spouse, who has a power of attorney that enables her to send money to Applicant's siblings on his behalf (Tr. 103-04, 119-20). Until November 2007, he sent his disabled sister about $300 per month (Tr. 95, 98, 126). When Applicant learned that sending his disabled sister money raised security concerns, he broke the promise to his mother and stopped sending his sister money (Tr. 54). He continues to send about $500 a month to his brother, a U.S. citizen working for the U.S. government in Iraq, for the care of his brother's daughter, who lives in Sudan (Tr. 54, 96-97, 125-27).

None of Applicant's siblings know he works for the U.S. government. They believe he works on a ship. He has intentionally concealed his occupation from them because he knows they can be threatened (Tr. 104).

Applicant traveled to Sudan in 1993 for his mother's funeral and in January 1996, while on his honeymoon, to introduce his wife to his family (AX GG and HH). He traveled to Sudan in March 1996 to attend his father's funeral and be with his family for the mourning period (AX HH). He visited Sudan for about three days in 2000 while serving on a U.S.-flagged ship that docked in Sudan to unload humanitarian aid supplies. While the ship was in port, he visited some of his siblings who lived close to Khartoum (GX 2 at 5; AX FF; Tr. 100-01).

Applicant was sincere and scrupulously candid during the hearing, but he was puzzled and distraught about the security concerns raised in the SOR. Several times he stated he could not understand what he had done to trigger any security concerns (Tr. 50, 52, 140).

I take administrative notice of the following adjudicative facts about Sudan. Sudan became an independent country on January 1, 1956 under a provisional constitution. There were 17 years of civil war, ending in 1972 but beginning again in

January 1983. After a series of regional efforts to end the civil war, a peace agreement was signed in January 2005, establishing a new Government of National Unity and an interim Government of Southern Sudan, and providing for a six-year period to implement the peace agreement.

Implementation of the peace agreement has faltered. A rebellion in Darfur has caused deaths of tens of thousands. There are an estimated 2 million displaced persons in Sudan, and 234,000 refugees in neighboring Chad. The State Department has found the Sudanese government complicit in the bombing, murder, and rape of innocent civilians in Darfur, and the Sudanese president has refused to honor his commitments to end the violence in Darfur.

Sudan has been designated as a state sponsor of terrorism since August 1993. It is under a broad U.S. trade embargo. In two executive orders, the policies and actions of Sudan have been declared by the President of the U.S. to constitute "an unusual and extraordinary threat to the national security and foreign policy of the United States" because of support for international terrorism, ongoing efforts to destabilize neighboring governments, human rights violations, and the pervasive role played by the government of Sudan in the petroleum and petrochemical industries in Sudan.

Sudan has a poor human rights record. Serious problems include genocide in Darfur; extrajudicial killings; torture, beatings, rape, and other cruel and inhumane treatment by security forces; arbitrary arrest and detention; infringement of personal rights; and executive interference with the judiciary. The government and security forces monitor internet communications. Terrorist groups seek opportunities to attack U.S. citizens and interests.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "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 and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline B (Foreign Influence)

The SOR alleges Applicant has brothers and sisters who are citizens and residents of Sudan (¶ 1.a), he sends $200 a month to a sister in Sudan (¶ 1.b), and he traveled to Sudan in 1997 and 2000 (¶ 1.c). He admitted all these allegations.

The security concern relating to 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.

Two disqualifying conditions under this guideline are relevant to this case. First, 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). Second, a disqualifying condition 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). 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).

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 U.S., 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 U.S.

AG ¶ 7(a) differs from previous adjudicative guidelines in that it requires a "heightened risk." Applicant's siblings do not live in Darfur, where the worst violence and human rights violations have occurred. He has concealed his involvement with the U.S. government. His siblings' belief that he works as a crew member on a ship is plausible, because his siblings know he attended the maritime college in Yugoslavia and visited some of them in Khartoum when he was serving as a seaman on a U.S.-flagged ship. He has taken positive steps to minimize the risk posed by the presence of

his siblings in Sudan, but the risk is nevertheless "heightened" because of the internal turmoil, human rights violations, and activities of terrorists in Sudan. I conclude AG ¶ 7(a) is raised.

The presence of Applicant's siblings in Sudan also raises the "potential conflict of interest" in AG ¶ 7(b). Thus, I conclude AG ¶ 7(b) also is raised.

Applicant's financial support of his widowed and disabled sister and travel to Sudan has no independent security significance other than as evidence of his ties of obligation to his family members. He terminated his financial support of his sister in November 2007. His travel to Sudan in 2000 was as crew member of a U.S.-flagged ship on a humanitarian mission, and it has no independent security significance.

Since the government produced substantial evidence to raise the 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).

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).

Applicant does not appear to have strong emotional attachments to his siblings in Sudan, but he has demonstrated a sense of obligation by his financial assistance to a disabled sister and his brother's daughter and by his occasional contact with his siblings. He has reduced the likelihood of a conflict of interest by concealing his work for the U.S. from his siblings. However, due to the nature of the government of Sudan and the continuing terrorism and violence in that country, there is still some likelihood that he might have to choose between the interests of the U.S. and those of one or more siblings. I conclude AG ¶ 8(a) is not established.

Security concerns under this guideline also can be mitigated by showing "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(b).

Under the old adjudicative guidelines, a disqualifying condition based on foreign family members could not be mitigated unless an applicant could establish that the family members were not "in a position to be exploited." Directive ¶ E2.A2.1.3.1. The Appeal Board consistently applied this mitigating condition narrowly, holding that an applicant should not be placed in a position where he or she is forced to make a choice

between the interests of the family member and the interests of the U.S. *See* ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006); ISCR Case No. 03-24933 at 6 (App. Bd. Jul. 28, 2005); ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2005); ISCR Case No. 03-15205 at 3 (App. Bd. Jan. 21, 2005). Thus, an administrative judge was not permitted to apply a balancing test to assess the extent of the security risk. Under the new guidelines, however, the potentially conflicting loyalties may be weighed to determine if an applicant "can be expected to resolve any conflict of interest in favor of the U.S. interest."

Applicant's sense of obligation to his siblings is more than minimal, but his relationships and loyalties in the U.S. are exceptionally strong. He has lived in the U.S. for more than 20 years and has been a U.S. citizen for 15 years. He has worked as a linguist for the U.S. for five years and held a clearance for most of that time. He is married to a native-born U.S. citizen and has four sons who are native-born U.S. citizens. Two of his four brothers are U.S. citizens, and one is working for the U.S. in Iraq. He has put his life on the line for the U.S., volunteering for more than 80 dangerous counter-insurgency missions in Iraq. He is trusted and highly regarded by his colleagues and supervisors.

Applicant has demonstrated by his actions that he will resolve a conflict of interest in favor of the U.S. He broke his promise to his mother and stopped sending money to his disabled sister, because he feared that sending money to his sister would jeopardize his security clearance. He declined to sponsor his two brothers for immigration to the U.S. to avoid raising any question about his loyalty to the U.S. I conclude AG ¶ 8(b) is established.

Security concerns under this guideline also may be mitigated by showing that "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(c). There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Although Applicant's contacts with his siblings are infrequent, he has not rebutted the presumption that they are not casual. I conclude AG ¶ 8(c) is not established.

Guideline E (Personal Conduct)

The SOR alleges, "Your colleagues, with whom you worked at GTMO in Cuba from 2004 to 2006, were not entirely comfortable recommending you for access to classified information." Applicant denied this allegation. At the hearing, Department Counsel announced that the government would not pursue this allegation and would not provide any evidence regarding it (Tr. 27). Accordingly, this allegation is resolved in Applicant's favor.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. An 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) 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 security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant has held a clearance for almost five years and volunteered for numerous dangerous assignments with U.S. military units. Paradoxically, the inquiry about his suitability for a clearance was triggered by an application for a higher level of clearance. He was sincere and exceptionally candid at the hearing. The intensity of his commitment to the interests of the U.S. is not fully reflected on the written transcript, but it was patently obvious from his tone of voice and body language at the hearing. He has backed up his words with actions by breaking his promise to his mother to financially support his disabled sister and declining to sponsor his two brothers for immigration to the U.S.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence. The government chose not to pursue the allegations under Guideline E and presented no evidence to support them. Accordingly, I conclude Applicant has carried his burden of showing that it is clearly consistent with the national interest to grant him continued eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 2.a:	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 eligibility for a security clearance. Eligibility for access to classified information is granted.

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LeRoy F. Foreman
Administrative Judge