



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 21-01275
)
Applicant for Security Clearance)

Appearances

For Government: Nicholas Temple, Esq., Department Counsel
For Applicant: *Pro se*

07/19/2022

Decision

BENSON, Pamela C., Administrative Judge:

Although Applicant successfully refuted the foreign preference security concerns, he did not provide sufficient evidence to mitigate the risks of foreign influence raised by his familial ties with Djibouti. Eligibility for access to classified information is denied.

Statement of the Case

On October 15, 2021, 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). This action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines implemented by the DOD on June 8, 2017. On October 29, 2021, Applicant responded to the SOR and requested a hearing.

On April 7, 2022, a notice of hearing was issued, scheduling the hearing for April 26, 2022. The video-teleconference hearing proceeded as scheduled using Microsoft

Teams. Department Counsel submitted three documents, which I admitted into evidence as Government Exhibits (GE) 1, 2, and 3, without objection. Department Counsel submitted a two-page request for administrative notice of facts concerning the nation of Djibouti with two supporting documents. I admitted the entire packet as Administrative Notice (AN) I, without objection. Applicant testified and submitted two documents with his SOR response, which I admitted as Applicant Exhibits (AE) A and B, without objection. During the hearing, upon Applicant's request, I kept the record open until May 10, 2022, to provide him the opportunity to supplement the evidentiary record. Applicant did not provide additional documentation. The hearing transcript was received on May 5, 2022.

Findings of Fact

The SOR alleges foreign influence security concerns based on Applicant's brother (SOR ¶ 1.a.), two half-brothers (SOR ¶ 1.b.), two sisters (SOR ¶ 1.c.), six sisters-in-law (SOR ¶ 1.d.), and his mother-in-law (SOR ¶ 1.h.), who are citizens and residents of Djibouti. The SOR alleges additional foreign influence concerns based on his six brothers-in-law, also citizens and residents of Djibouti, with two of them serving in the Djibouti military, and one serving in the Djibouti Republican Guard. (SOR ¶¶ 1.e-1.g.) In his response to SOR, Applicant admitted all of the allegations under Guideline B. His admissions are incorporated herein as findings of fact.

The SOR also alleges foreign preference security concerns based on Applicant's intent to permanently relocate his family to Djibouti (SOR ¶ 2.a.) and his active membership in the Movement of Democratic Renewal (MRD), a Djibouti opposition party (SOR ¶ 2.b.). Applicant denied both Guideline C allegations. After a careful review of the pleadings, hearing transcript, and exhibits, I make the following findings of fact:

Applicant is 43 years old. He was born in Djibouti. He married his spouse in Djibouti in 2006. He entered the U.S. in 2013, and both he and his wife became naturalized U.S. citizens in 2019. They have three children, one a naturalized U.S. citizen, and the other two U.S. citizens by virtue of their birth in the United States. His employment offer for a linguist position with a federal contractor is contingent on his eligibility for a DOD security clearance. (GE 1, GE 2, GE 3; Tr. 23, 73)

Applicant has regular contact with some of his family members in Djibouti, and he talks with his sister approximately twice monthly. His spouse has frequent, almost daily, contact with her mother and some of her siblings. Over the years he has been contacted by several nieces, nephews, siblings, and his spouse's siblings for financial support. He has provided occasional financial assistance to these family members, and he has provided regular financial support (\$200-\$300 monthly) to his mother-in-law since 2013. Several family members are civil servants employed by the government of Djibouti, two serve in the Djibouti military, and one serves for the Republican Guard. (GE 1, GE 2, GE 3; Tr. 23-46)

In approximately 2002, while Applicant worked in Djibouti as a teacher, he joined the MRD, a political party opposed to the current Djibouti government. The MRD was declared illegal by the Djibouti government. In 2010, Applicant was arrested for being an

activist in the MRD. He was held in prison awaiting trial. After being incarcerated for about a month in inhumane conditions, his family was able to have Applicant released while his trial was pending. He immediately fled the country and illegally entered Ethiopia to escape his pending criminal trial and possible imprisonment. After about two months, he illegally re-entered Djibouti, and hid himself from police while waiting to hear the status of his wife and daughter, who had left Djibouti, and applied for asylum in the United States. In April 2012, he secretly left Djibouti and illegally crossed over to Ethiopia with the help of drug smugglers. For approximately one year he worked with the U.S. Embassy in Ethiopia until he was eventually provided travel documents to enter the U.S. based on a spousal visa. (Tr. 47-62, 66-67; GE 2, GE 3)

In September 2010, Applicant's wife and their two-year-old daughter entered the United States on a tourist visa. His wife was about two months pregnant at the time. She applied for asylum due to political persecution in Djibouti, which was granted by the U.S. She remained in the United States while Applicant was a fugitive, secretly hiding and traveling between Ethiopia and Djibouti to avoid police detection. His spouse sponsored Applicant to come to the U.S. In March 2013, Applicant arrived in the U.S. and rejoined his family. He became a naturalized U.S. citizen in September 2019. (Tr. 63-71; GE 2, GE 3)

Applicant did not go to trial for his pending criminal charge in Djibouti. Since April 2012, he has never returned to that country. It is his belief that if he did return to Djibouti in the future he would no longer be considered a fugitive by the Djibouti government since he was not an important or high-ranking leader in the MRD. The mission of MRD is to promote democratic values. In Djibouti there are restrictive voter-registration laws, and the elections are not fair. He continued to participate in the MRD upon his arrival in the U.S. in 2013, but he stopped all participation in the MRD in 2018. It is his intention to continue to promote democratic values, not only to the people of Djibouti, but also to the people in Africa living in countries that are not democratic. He believed his status as a U.S. citizen also bolstered his conviction to make all governments fair through the means of democracy. (Tr. 58-63; GE 2; AE A)

During Applicant's January 2020 background interview, he told the DOD authorized investigator that after his 2010 arrest, he went into hiding for about ten days, but he was picked up by the police again. He was fingerprinted and released. He told the investigator that the reason he was smuggled by drug dealers out of Djibouti was due to him being a teacher, since it was illegal for teachers to leave the country. During the hearing Department Counsel questioned Applicant about why he failed to mention to the investigator that he illegally fled the country due to a pending criminal trial for his participation in an illegal opposition political party and his fear of imprisonment in Djibouti. Applicant responded that he did not recall that information at the time he participated in his background interview. (Tr. 72-76; GE 3)

Applicant also told the investigator during his January 2020 background interview that he did not want to renounce his Djibouti citizenship because possibly one day he would like to return to Djibouti, perhaps even retire there. His loyalty was equally divided between Djibouti and the United States. During another interview Applicant stated that

renouncing his foreign citizenship would prevent him from being an effective advocate for the Djibouti people. In his June 2021 response to DOHA interrogatories, Applicant reported that Djibouti is currently unsafe for him and his family. The only way he would live in this country again depended on the establishment of a new democratic government in Djibouti free from dictatorship. (GE 3; Tr. 82-89)

In November 2020, Applicant participated in a counterintelligence (CI) interview by the U.S. Army. During the interview Applicant told the investigator that his wife applied for asylum in the U.S. due to her being a woman educator (not due to political persecution). Applicant was asked if he had ever been in any country illegally; if he had ever served in any foreign political party; had he ever been held against his will by a foreign government; and whether he had ever been arrested, held, detained, or imprisoned in any country? Applicant responded "NO" to all of the questions listed above. He failed to disclose his 2010 arrest in Djibouti; being held in a severely over-crowded jail for approximately one month before he was released; and his fleeing from the country to avoid prosecution in a pending criminal trial with possible imprisonment. (GE 2)

During the hearing, Applicant stated that if the U.S. government wanted him to renounce his Djibouti citizenship in order to receive a DOD security clearance, he would be willing to do so. He also stated his loyalty was to the U.S. only. Department Counsel questioned Applicant about his significant change of heart concerning his earlier statements provided during his background investigation. Applicant testified that he changed his mind about his previous beliefs after he received the SOR. (Tr. 82-89)

Administrative Notice

I have taken administrative notice of the following facts concerning Djibouti:

The 2020 Humans Rights report identified Djibouti as a republic with a strong elected president and a weak legislature. Djibouti has a multiparty political system in which parties must be registered and recognized by the ruling authorities. There are restrictive voter registration laws, voter intimidation, inadequate ballot security, and lack of opposition observers. Most opposition groups did not characterize the past presidential elections as free and fair. Political power is shared by Djibouti's two largest ethnic groups, the Somali-Issas and Afars.

Significant human rights issues included: unlawful or arbitrary killings including extrajudicial killings; cases of cruel, inhuman, or degrading treatment or punishment by the government; harsh and life-threatening prison conditions; arbitrary arrest or detention; arbitrary or unlawful interference with privacy; serious restrictions on free expression, the press, and the internet, including violence, threats of violence, or unjustified arrests or prosecutions against journalists, censorship, site blocking, and the existence of criminal libel laws; substantial interference with the freedom of peaceful assembly and freedom of association; and the worst forms of child labor committed throughout the country.

The United States' extraordinary commitment to Djibouti is balanced against the inherent dangers of the ongoing conflict in Djibouti to its citizens and residents and significant human rights issues. (AN 1)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines 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 national security eligibility will be resolved in favor of the national security."

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified 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 classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The security concern under this guideline is set out in AG ¶ 6 as follows:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

Two disqualifying conditions under this guideline (AG ¶ 7) are relevant to this case:

(a) contact, regardless of method, 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 classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology.

"The United States has a compelling interest in protecting and safeguarding [sensitive] 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).

To establish AG ¶ 7(a), the Government must demonstrate a "heightened risk" of exploitation due to Applicant's contacts with his family members in Djibouti, some who are employed by the Djibouti military and Djibouti Republican Guard. Given the activities of the Djibouti government and significant human rights violations, together with the possibility that Applicant may be considered by Djibouti to be a fugitive from justice, I find the Government has established the requisite "heightened risk" and potential conflict of interest regarding Applicant's contacts with his family members in Djibouti. AG ¶¶ 7(a), and 7(b) apply.

The following mitigating conditions under this guideline (AG ¶ 8) are potentially relevant:

(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 United States;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, 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.

Not every foreign contact or tie presents the heightened risk under AG ¶ 7(a). The "heightened risk" denotes a risk greater than the normal risk inherent in having a family member or a spouse's family member living under a foreign government. The nature and strength of the family ties or other foreign interests and the country involved (i.e., the nature of its government, its relationship with the United States, and its human rights record) are relevant in assessing whether there is a likelihood of vulnerability 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 on, the foreign government; or the country is known to conduct intelligence operations against the United States. In considering the nature of the foreign government, the administrative judge must take into account any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006).

There is a rebuttable presumption that a person has ties of affection for, or obligation to, his or her immediate family members, and this presumption includes in-laws. See, e.g., ISCR Case No. 07-06030 at 3 (App. Bd. Jun. 19, 2008); ISCR Case No. 05-00939 at 4 (App. Bd. Oct. 3, 2007) (citing ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002)).

Applicant has regular contact with some of his family members living in Djibouti, and he has frequent contact with his sister. Applicant and his spouse were born in Djibouti, and she also has frequent contact with her family members. Together they have family members who have served in or been employed by the Djibouti military and government. He has also provided financial support to his family members over the years, and he currently provides financial support to his mother-in-law. Applicant and his spouse's financial support and frequent contacts with relatives in Djibouti are manifestations of their care and concern for relatives living in that country.

It is not clear whether the Djibouti government still considers Applicant to be a fugitive from justice. The evidence shows that Applicant did not provide full and candid information during his security investigation about his 2010 arrest in Djibouti due to his illegal association with the MRD, and his unlawful entries and exits between Djibouti and Ethiopia in order to escape his pending trial. His failure to fully disclose these facts during his investigation, when required, taken together with his family members living in Djibouti, shows that he is subject to a heightened risk of foreign influence or exploitation.

Overall, the facts show there is a possibility that Applicant could be placed in a position of having to choose between the interests of his foreign family members and the interests of the United States. His ties to the United States, established over only the last nine years, are not enough to fully mitigate the risk of undue foreign influence. AG ¶¶ 8(a), 8(b), and 8(c) do not apply.

Guideline C, Foreign Preference

The security concern under this guideline is set out in AG ¶ 9 as follows:

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 provide information or make decisions that are harmful to the interests of the United States. Foreign involvement raises concerns about an individual's judgment, reliability, and trustworthiness when it is in conflict with U.S. national interests or when the individual acts to conceal it. By itself; the fact that a U.S. citizen is also a citizen of another country is not disqualifying without an objective showing of such conflict or attempt at concealment. The same is true for a U.S. citizen's exercise of any right or privilege of foreign citizenship and any action to acquire or obtain recognition of a foreign citizenship.

Although the SOR alleged that Applicant intended to permanently relocate his family to Djibouti, Applicant has denied this statement and there is no evidence in the record to support the allegation. During his January 2020 background interview, Applicant stated that maybe one day he would return to Djibouti, possibly to retire. Applicant clarified his statement by testifying that the only way he would return to Djibouti to live was if the government of Djibouti is democratic and not ruled by a dictator. Djibouti now is not safe for him or his family. (GE 3)

The SOR also alleged that Applicant remained a member of a Djibouti opposition party, (MRD), after relocating to the United States. Although he is no longer a member of the MRD, it is important to note that the mission of the MRD is to promote democratic and fair representation of the people, which is in conflict with the ruling government of Djibouti, but not in conflict with U.S. national interests. Applicant testified that it is his hope to promote democratic values not only to the people of Djibouti, but to all people in Africa living in a country without the benefit of a fair democratic process. Applicant has successfully refuted the foreign preference security concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance 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(d):

(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 security clearance must be an overall commonsense judgment based upon careful consideration of the adjudicative 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. I have incorporated my comments under Guideline B, Guideline C, and the factors in AG ¶ 2(d) in this whole-person analysis.

Applicant's connections to Djibouti are substantial and ongoing. Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationships with relatives who are citizens and residents of Djibouti. His and his spouse's families reside in Djibouti, and some of these family members serve in the Djibouti military or are employed by the Djibouti government. Like every other resident of Djibouti, they are at risk from human rights violations by the Djibouti government. His and his spouse's relationships with residents of Djibouti raise significant foreign influence security concerns.

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. Although Applicant successfully refuted foreign preference security concerns, I conclude foreign influence 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 B:	AGAINST APPLICANT
Subparagraphs 1.a.-1.h.:	Against Applicant
Paragraph 2, Guideline C:	FOR APPLICANT
Subparagraphs 2.a. and 2.b.:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, I conclude that it is not clearly consistent with national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge