KEYWORD: Foreign Influence; Foreign Preference

DIGEST: Forty-four year old Applicant, who immigrated to the U.S. from Egypt in 1986, and became a naturalized U.S. citizen, resides in the U.S. with his Egyptian-born U.S. citizen wife and four U.S. born minor children. He has spent the last 21 years in the U.S. and is a loyal and dedicated U.S. citizen. Given the mitigating evidence submitted, and under the "whole person" concept, Applicant has mitigated security concerns pertaining to foreign preference and foreign influence because of his strong connections to the U.S. Under the specific facts in evidence, the government's security concerns have been mitigated. Clearance is granted.

CASENO: 05-01998.h1

DATE: 04/30/2007

DATE: April 30, 2007

In re:	)	
	)	
----------	)	ISCR Case No. 05-01998
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT
Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT
William F. Savarino, Esq.

SYNOPSIS

Forty-four year old Applicant, who immigrated to the U.S. from Egypt in 1986, and became a naturalized U.S. citizen, resides in the U.S. with his Egyptian-born U.S. citizen wife and four U.S. born minor children. He has spent the last 21 years in the U.S. and is a loyal and dedicated U.S. citizen. Given the mitigating evidence submitted, and under the "whole person" concept, Applicant has mitigated security concerns pertaining to foreign preference and foreign influence because of his strong connections to the U.S. Under the specific facts in evidence, the government's security concerns have been mitigated. Clearance is granted.

STATEMENT OF THE CASE

On May 2, 2003, Applicant applied for a security clearance and submitted a Security Clearance Application (SF-86).[1] On November 3, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.[2] The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B (foreign influence) and Guideline C (foreign preference).

On November 22, 2005, Applicant responded to the SOR, and submitted his case for decision without a hearing. By an undated facsimile, Applicant amended his answer and requested that his case be decided by a hearing, and his request was approved by Director, DOHA. On February 16, 2006, Applicant further amended his Answer to SOR, which was received by DOHA on February 21, 2006. On March 31, 2006, Department Counsel filed a ready to proceed letter.

On April 10, 2006, the hearing office received the case and it was assigned to another administrative judge. On June 5, 2006, Applicant's counsel submitted his notice of appearance. On June 19, 2006, the case was reassigned to me due to caseload considerations. On August 9, 2006, DOHA issued a notice of hearing, scheduling the hearing for August 24, 2006. The hearing commenced and was completed on the scheduled date.

The government submitted nine documents that were marked as Government Exhibits (GE 1 through 9), and were admitted into the record without objection. Applicant credibly testified and submitted eight documents that were marked as Applicant's Exhibit (AE) A through H. Department Counsel objected to AE G, which I overruled, and the remaining documents were admitted into the record without objection.

On September 6, 2006, DOHA received the transcript. I held the record open to afford both parties the opportunity to submit additional evidence. On September 8, 2006, Applicant submitted eight additional documents that were marked as AE I through P. AE I through L are DOHA Administrative Judge cases favorable to Applicant's position. On October 16, 2006, Department Counsel forwarded Applicant's additional documents to me indicating he had no objection to AE

[1]GE 1. (Electronic Standard Form (SF) 86, Security Clearance Application is dated May 2, 2003.

[2]This action is taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

I through L, but did object to AE M through P, if they were being admitted for administrative notice purposes. I admitted AE I through P, and AE M through P were admitted for the limited purpose of providing additional argument to Applicant's position. I took administrative notice of the information contained in GE 5 through 9, and AE F through H. See discussion under Procedural Matters, *infra.*

PROCEDURAL MATTERS

At the hearing, Department Counsel asked me to take administrative notice of Government Exhibits 5 to 9, U.S. Department of State, *Background Note: Egypt*, September 2005; U.S. Department of State, *Consular Information Sheet, Egypt*, January 18, 2006; U.S. Department of State, *Country Reports on Human Rights Practices - 2004,* February 28, 2005; U.S. Department of State, *Dual Nationality,* January 18, 2006; and U.S. State Department, Office of the Coordinator for Counterterrorism, *Country Reports on Terrorism 2004,* April 2005, respectively.

Additionally, Applicant submitted AE F to H, which are duplicate or additional documents, and I considered them for administrative notice as well. Duplicate documents are AE F (GE 6) and AE H (GE 5). Additional documents are National Counterintelligence Center, *Annual Report to Congress on Foreign Economic Collection and Industrial Espionage,* 1999; U.S. Department of State, *Background Note: United Arab Emirates,* February 2006 (AE I); The Office of the United States Trade Representative, *United States to Begin Free Trade Negotiations This Week with the United Arab Emirates and Oman,* March 8, 2005 (AE J); The White House press release, *The United States – UAE Bilateral Relationship,* February 22, 2006 (AE K); U.S. Department of State, *Secretary Rice Meets With Leaders of the United Arab Emirates,* February 23, 2006 (AE L); and U.S. Department of State, *United Arab Emirates, 2005 Investment Climate Statement – United Arab Emirates* (AE M).

Administrative or official notice is the appropriate type of notice used for administrative proceedings. *See* 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); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings is to notice facts that are either well known or taken from government reports. *See* Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Applicant did not object to my consideration of Exs. I to IX for purposes of administrative notice. Tr. 15-33.

Following the presentation evidence, Department Counsel moved to amend the SOR by adding the following additional allegation under Guideline B:

2.f. *Your sister and her husband are citizens of Egypt and residents of the United Arab Emirates.*

I allowed Department Counsel's motion to amend over Applicant's objection. Applicant's testimony provided the basis for the amendment to the SOR. Both parties were given additional time to present additional evidence, discussed *supra*.

FINDINGS OF FACT

In his Answer and Amended Answer, Applicant admitted in part several of the SOR allegations. His admissions are incorporated into my findings, and after a thorough review of the record, I make the following additional findings of fact:

Applicant testified and I found his testimony credible. Applicant is 44 years old.[3] He was born and raised in Egypt. Applicant went to a large university in Alexandria, Egypt, and was awarded a BSC degree in electrical engineering in May 1986. In 1986, at age 24, he immigrated to the U.S. for "economic improvement" with the intent of becoming a U.S. citizen. Tr. 23. Applicant became a naturalized U.S. citizen in January 1994, and has held a U.S. passport since February 1994. GE 1.

After arriving in the U.S., he secured employment primarily in food service-related ventures and, in particular, working in and/or owning businesses that sold bagels. While a co-owner of a bagel shop, Applicant met and developed a rapore with one of his patrons, the president and chief executive officer (CEO) of his current employer. The CEO subsequently offered Applicant a position as a systems designer where he has been continuously employed since May 2002. Applicant is a first-time applicant for a security clearance. There were no allegations of security violations against him, or negative judicial involvement.

Applicant possessed an Egyptian passport issued to him in May 1992, which was the only passport he was eligible to have until he became a U.S. citizen in January 1994. His Egyptian passport expired in May 1999 (SOR ¶ 1.b.).[4] When his passport expired, he did not renew it, and did not have any other foreign passport. Subsequently, Applicant returned his expired Egyptian passport to the Egyptian Embassy. Tr. 11, 81, 137, Answer to SOR. Applicant also held dual citizenship as an Egyptian as a result of birth in Egypt to Egyptian parents (SOR ¶ 1.a.). In addition to the oath Applicant took when he became a U.S. citizen, he took the additional affirmative step of renouncing his Egyptian citizenship in a sworn statement. Tr. 36-39, Answer to SOR. The SOR alleged Applicant retained his Egyptian passport in order to eliminate Egyptian visa requirements (SOR ¶ 1.c.). Applicant denied this allegation and following Applicant's denial, the government did offer any evidence to rebut Applicant's denial.

Applicant's 68-year-old mother is an Egyptian citizen and a permanent resident of the U.S. After receiving her "green card" in 1994, she moved to the U.S. and resides with Applicant and his

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[3]GE 1, *supra* n. 1, section 1.1, at 1.

[4]Assistant Secretary of Defense Memorandum, dated August 16, 2000, for Secretaries Of The Military Departments, et al, SUBJECT: Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Guideline, commonly known as the "Money Memorandum" states in part the possession or use of a foreign passport may be a disqualifying condition unless sanctioned by the U.S. government. The Memorandum further stated that any clearance be denied or revoked unless the applicant surrenders the foreign passport. GE 5.

family (SOR ¶ 2.a). Tr. 101. In August 2000, Applicant's mother applied to become a U.S. citizen. AE A. Applicant's mother has completed all aspects of the application process to become a U.S. citizen except for meeting the English reading, speaking, and writing requirements. AE A. Although she failed the English literacy requirement portion of her citizenship examination, she remains determined to overcome this shortcoming as evidenced by her having completed an intensive English study course. AE A. Applicant's mother was a housewife her entire adult life. Her husband, Applicant's father, passed away in 1974. She receives a small widow's pension from her late husband's employer, an Egyptian insurance company. Applicant's mother is not politically affiliated with or connected in any way with the Egyptian government. Tr. 45.

Applicant was previously married from February 1990 to August 1994. That marriage ended by divorce. He has been married to his second and current wife since October 1994. Applicant's second marriage was an "arranged" marriage by his mother. Tr. 46. Applicant's wife is Egyptian born, and became a U.S. citizen in October 1991. GE 1. Applicant's wife was trained as an accountant, but is currently a housewife caring for their four U.S. born minor children. Tr. 94-95.

Since arriving in the U.S., Applicant traveled to Egypt on four separate occasions (SOR ¶ 2.c.). In 1994, Applicant's visit to Egypt was for the purpose of getting married. In 1995, Applicant visited Egypt for the purpose of visiting his dying grandmother. In 2004, Applicant's current employer sent him to Egypt on a one-week company sponsored trip. In 2005, Applicant's current employer sent him to Egypt on a company sponsored trip a second time to deliver a work-related report at a conference. AE E. Applicant used his U.S. passport on all four of these visits to Egypt.

Applicant's mother-in-law, father-in-law, sister-in-law, and brother-in-law are resident citizens of Egypt (SOR ¶ 2.b). Applicant's mother-in-law is the general manager for a private company that makes pipeline tubes. Tr. 49. His father-in-law is a retired systems engineer, who was employed by a private company. Tr. 48. Applicant's sister-in-law lives with her parents and is employed as an accountant with the same company as her mother. Tr. 51. Applicant's brother-in-law also lives with his parents and just completed high school and plans to go to college. Tr. 52. Applicant's father-in-law has never visited his family in the U.S. since he and his wife were married, and his mother-in-law visited his family in the U.S. one time approximately one year after they were married in 1995. Tr. 53. Applicant's wife visited her family in Egypt twice since they were married in 1994. Tr. 54. Applicant's contact with his in-laws averages approximately three telephone calls per years, typically on holidays, when his wife initiates calls to her family. Tr. 54. Applicant estimates that his wife telephones her family approximately four times a year. Tr. 54.

Applicant's sister and brother-in-law are citizens of Egypt and residents of the United Arab Emirates (UAE) (SOR ¶ 2.f.). His sister is employed as a dentist and his brother-in-law is employed as an accountant for a private oil company. Applicant last saw his sister in November 2005 when he was visiting the UAE on a work-related and funded trip to the UAE. Tr. 84. Applicant estimates he speaks to his sister on the telephone approximately two to three times a year. Tr. 85. Neither Applicant's sister or brother-in-law are employed by or associated with the Egyptian or UAE governments.

Applicant's wife does not know the specific nature of his work nor does he discuss his work with her. Tr. 56. Applicant's in-laws in Egypt do not know the nature of his work. When Applicant

traveled to Egypt in 2004 and 2005 on his company sponsored trips, he stayed in a hotel and did not visit his in-laws. Tr. 58.

Applicant has received extensive security training from his company which covered the procedures to follow if contacted or approached by a foreign national. In this regard, Applicant was approached by an individual from Morocco while on a company sponsored trip and this individual asked him to subscribe to two U.S. trade magazines on his behalf. Applicant became uncomfortable with this request and promptly reported the request to his company president. This contact was reported to the FBI, who investigated this contact, and took no further known action. Tr. 61.

Before beginning employment with his current employer, Applicant closed down his bagel business in 2002. As part of the liquidation process and as part of his responsibilities, he transferred the remaining share of $1,500.00 to $2,000.00 to one of his former business partners, who happened to be vacationing in Egypt (SOR ¶ 2.d.). Tr. 62-63, 97, 109. This transfer took place at the request of his former business partner.

Applicant sent $2,000.00 to a U.S. citizen friend's father in Egypt for his medical care in 2001 (SOR ¶ 2.e.). His friend's father needed $2,000.00 immediately to get admitted to a hospital. His friend was at work and had forgotten to take his wallet with his credit card, otherwise his friend would have sent the money himself on his father's behalf. Applicant accommodated his friend under these circumstances and his friend's father was admitted to the hospital. His friend promptly repaid Applicant and that was the extent of Applicant's involvement with this money transfer. Tr. 66-68. Other than these two self-reported money transfers, Applicant has never sent any other funds to Egypt. Tr. 69, 109-111.

Applicant has no assets in Egypt. He and his wife rent a home in the U.S, and own two automobiles. Applicant and his wife exercise their right to vote in the U.S., pay taxes, and exercise all rights and privileges of being U.S. citizens. Tr. 103. Applicant's wife is actively involved with school activities for their four children. Tr. 104. He further testified he would promptly report any contacts of any kind from a foreign government to the proper authority. He testified credibly of his loyalty to the U.S. and how proud he was to be involved in the type of work he does as a defense contractor.

Applicant provided one work-related reference letter from a colleague, who is a retired Air Force Officer having served as a Security Forces Officer. This letter was quite compelling in describing Applicant's character and trustworthiness concluding that Applicant "is one of the most honorable people I have ever met." AE C.

The president and CEO of Applicant's company, who holds a top secret clearance, testified on his behalf. The CEO stated that Applicant was given a pay raise based on his work performance that his company is "very, very satisfied with [Applicant's] dedication, commitment and . . . high integrity to the organization." Tr. 116. The CEO added that he would trust Applicant "with anything that we have in the company," and that Applicant needed a security clearance to perform the duties required of him. Tr. 116. The CEO stated Applicant is held in very high regard by company employees, and is very reliable and trustworthy.

As indicated, *supra,* the government and Applicant offered documents prepared by the U.S. Government on Egypt and the UAE. The collective evidence discusses the strong and friendly relationship the U.S. enjoys with Egypt and the UAE. These documents, GE 5 to 9 and AE F to M, discuss a range of topics pertaining to those two countries, which I considered in their entirety.

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into disqualifying conditions (DC) and mitigating conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision in Section E2.2, Enclosure 2, of the Directive. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision. Specifically, an administrative judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to the relevant adjudicative guidelines are set forth and discussed in the Conclusions section below. Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests 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.

In the decision-making process, facts must be established by "substantial evidence."[5] The government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to the applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, "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, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." The burden of disproving a mitigating condition never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).[6]

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an 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.

The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance 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." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline C - Foreign Preference

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[5]"Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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).

[6]"The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, [evaluates] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and [decides] whether Applicant [has] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

Under Guideline C, a security concern may exist 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. Directive E2.A3.1.1.

Foreign Preference Disqualifying Condition (FP DC) 1. *The exercise of dual citizenship;* and FP DC 2: *Possession and/or use of a foreign passport*; are acts that demonstrate a foreign preference. At the time the SOR was issued, Applicant held dual citizenship by birth in Egypt to Egyptian parents, and he held an expired Egyptian passport. Applicant has formally renounced his Egyptian citizenship and surrendered his expired Egyptian passport to the Egyptian Embassy. These acts permit application of Foreign Preference Mitigating Condition (FP MC) 4: *Individual has expressed a willingness to renounce dual citizenship,* and demonstrate full compliance with the Money Memorandum.[7] Applicant has not only met applicable mitigating conditions in effect at the time his SOR was issued, he has exceeded them.

Guideline B - Foreign Influence

Under Guideline B, a "security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure." Directive ¶ E2.A2.1.1.

This allegation is based on the fact that Applicant's Egyptian citizen mother lives with his family, that he has Egyptian citizen in-laws living in Egypt, that he has an Egyptian sister and brother-in-law living in the UAE, that he took four trips to Egypt in 1994, 1995, 2004, and 2005, and the fact he sent money on two occasions to Egypt to a former business partner in 2002 and on behalf of a friend's father to cover his hospital admission costs in 2001.

Two of eight possible foreign influence disqualifying conditions (FI DC) could raise a security concern in this case. FI DC 1 applies where 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." Directive ¶ E2.A2.1.2.1. "Immediate family members" include a spouse, father, mother, sons, daughters, brothers, and sisters. Directive ¶ E2.A2.1.3.1. Although Applicant's in-law are not "immediate family members" as defined by the Directive, they can be said to be individuals with whom he has "close ties of affection or obligation." The government produced evidence to establish FI DC 1 because Applicant's in-law are Egyptian citizens currently living in Egypt with whom he has occasional contact. Also, Applicant has an Egyptian sister and brother-in-law living in the UAE.

FI DC 2 applies when "sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." Directive ¶ E2.A2.1.2.2. The fact that Applicant's mother is an Egyptian citizen living with his family raises

[7] *See fn 4, supra.*

this as a potential concern. Noteworthy, is the fact Applicant's mother moved to the U.S. in 1994 and in 2000 applied for U.S. citizenship. Apart from failing the English literacy portion of her citizenship examination, she has done everything required to become a U.S. citizen. Regarding the English literacy requirements, she has also taken an intensive course in English to meet this requirement.

Although, the mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B, if only one relative lives in a foreign country, and an applicant has contacts with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. *See* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001). Because FI DCs and 1 and 2 apply, Applicant has the burden to present evidence of rebuttal, extenuation or mitigation to show that it is clearly consistent with the national interest to grant her a security clearance.

Once the government meets its burden of proving controverted facts[8] the burden shifts to an applicant to present evidence demonstrating extenuation, mitigation, or changed circumstances.[9] Further, the government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating conditions, and an administrative judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition.[10]

Security concerns based on foreign influence can be mitigated by showing the applicability of one or more foreign influence mitigating conditions (FI MC). FI MC 1 recognizes that security concerns are reduced when there is "[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." Directive ¶ E2.A2.1.3.1. Notwithstanding the facially disjunctive language of FI MC 1, the Appeal Board has decided that Applicant must prove that his family members, cohabitant or associates are not agents of a foreign power, and are not in a position to be exploited by a foreign power in a way that could force Applicant to chose between the person(s) involved and the United States. ISCR Case No. 02-14995 at 5 (App. Bd. July 26, 2004). Applicant satisfies the first prong of FI MC 1 even under the Appeal Board's very broad definition of "agent of a foreign power."[11] Also, the

[8]Directive, Additional Procedural Guidance, Item E3.1.14.

[9]Directive, Additional Procedural Guidance, Item E3.1.15.

[10]ISCR Case No. 99-0597 (December 13, 2000).

[11]*Compare* ISCR Case No. 03-10954 (App. Bd. Mar. 8, 2006); *with* ISCR Case No. 03-10312 at 6-9 (A.J. May 31, 2006); ISCR Case No. 02-21927, 2006 DOHA Lexis 229, at *15-*45 (A.J. May 17, 2006) (discussing the parameters and application of FI MC 1, especially the scope and definition of "agent of a foreign power"). 50 U.S.C. § 1801(b) defines "agent of a foreign power." The statutory definition for "agent of a foreign power" was explicitly included in Executive Order 12968, Aug. 2, 1995, Part 1.1f, which established, "a uniform Federal personnel security program for employees who will be considered for initial or continued access to classified information." The Appeal Board's decision in ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 7, 2007) reiterating the broad definition of "agent of a foreign

Appeal Board has specifically indicated that receipt of a foreign pension does not cause a person to be an agent of a foreign power.[12]

The second prong of FI MC 1 provides that it is potentially mitigating where the "associate(s) in question are not . . . 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 involved and the United States." The Appeal Board interprets this language as establishing an absolute standard; i.e., an applicant must affirmatively prove that there is *no possibility* that anyone might attempt to exploit or influence a foreign relative or acquaintance in the future. *See* ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) ("[FI MC] 1 does not apply because, as is well settled, it requires that Applicant demonstrate that his relatives are not in a position which could force Applicant to choose between his loyalty to them and his loyalty to the United States."); ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2005).

Egypt and the UAE enjoy a cordial relationship with the U.S. The Appeal "Board has warned 'against reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B.'"[13] In any event, Applicant should not be placed into a position where he may be forced to choose between loyalty to the U.S. and his in-laws living in Egypt and his sister and brother-in-law living in the UAE.[14] *See* ISCR Case No. 03-06267 at 4 (App. Bd. Jan. 24, 2006); ISCR Case No. 02-30535 at 4 (App. Bd. May 4, 2005). Thus, FI MC 1[15] cannot be applied.

FI MC 3 can mitigate security concerns where "contact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. Applicant's contacts are limited to occasional telephone contact, but more accurately his contact at least in the case of his in-laws in Egypt is vicariously maintained through his wife's telephone calls to family members in Egypt. He personally makes limited telephone calls to his sister in the UAE.

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power" does not address why Executive Order 12968 is not controlling. *See* ISCR Case No. 04-03720 at 4 (App. Bd. June 14, 2006); ISCR Case No. 04-02233 at 3 (App. Bd. May 9, 2006), *see generally Nickelson v. United States*, 284 F.Supp.2d 387, 391 (E.D. Va. 2003) (requiring agency to follow own rules in security clearance determinations); ISCR Case No. 04-12648 at 10-13 (App. Bd. Oct. 20, 2006) (Harvey, J., dissenting) (explaining limitations on Appeal Board's authority to reverse).

[12]*See* ISCR Case No. 03-17071 at 3 (App. Bd. Nov. 22, 2006), *see also* ISCR Case No. 02-2454 at 4-5 (App. Bd. June 29, 2004) (employee of a city government was an "agent of a foreign power").

[13]ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005) (quoting ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002)).

[14]The Appeal Board has not increased an applicant's burden of persuasion in cases involving contacts with family members living in Israel. This situation may be compared to the Appeal Board's decision to place a "very heavy burden of persuasion" on applicants to demonstrate that contacts with immediate family members living in Iran do not pose a security risk. *See* ISCR Case No. 02-13595 at 3 (App. Bd. May 10, 2005) (stating an applicant has "a very heavy burden of persuasion to overcome the security concerns" when parents and siblings live in Iran); ISCR Case No. 04-11463 at 4 (App. Bd. Aug. 4, 2006) (articulating "very heavy burden" standard when applicant's family members live in Iran).

[15]Another less significant reason not to apply FI MC 1 is the history of terrorist activity in Israel. The Appeal Board has limited the applicability of FI MC 1 where there is a history of terrorist activity in the foreign country in question. ISCR Case No. 03-22643 (App. Bd. Jun. 24, 2005); ISCR Case No. 02-22461 at 5 (App. Bd. Oct. 22, 2005).

Two of the four visits Applicant made to Egypt were of short duration. The first visit in 1994 was to get married, and the second visit was to visit his dying grandmother. The last two visits in 2004 and 2005 were company sponsored trips in which he did not visit his in-laws.

Applicant has failed to establish that his contacts with her siblings-in-law are casual under the definition established by the Appeal Board. *See* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 7, 2007). The term "casual" means a contact that is "more fortuitous in nature than planned or designed" or "resulting from, or occurring by chance." ISCR Case No. 04-08870 at 3 n.1 (App. Bd. Nov. 29, 2006). Arguably this definition of "casual" is inconsistent with the Directive, as it so narrows the applicability of FI MC 3 that it would only be applicable in very rare circumstances. In any event, I must follow the directions of the Appeal Board and accordingly, I conclude that FI MC 3 cannot be applied.

Applicant does not have any financial interests in Egypt. This fact does not mitigate the foreign influence concerns based on FI DC 1 or 2. *See* ISCR Case No. 04-02233 at 3 (App. Bd. May 9, 2006).

I conclude that no Guideline B Mitigating Conditions apply, and I expressly and specifically indicate that I have not relied "explicitly or implicitly" on any of the Mitigating Conditions listed under Guideline B of the Directive. *See* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 7, 2007).

Once the government meets its burden of proving controverted facts[16] the burden shifts to an applicant to present evidence demonstrating extenuation, mitigation, or changed circumstances.[17] Further, the government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating conditions, and an administrative judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition.[18]

I find Applicant's clarification and explanation of his one-time money transfer to his former business partner and one-time money transfer to help his friend's father credible and accordingly find for him on this SOR allegation. His paying his former business partner, who happened to be in Egypt, his portion of liquidated proceeds is reasonable under the circumstances. Also, his one-time transfer of money to help his friend's father to be admitted in Egypt to a hospital for a life threatening illness is also reasonable under the circumstances. These two self-reported transfers of money to Egypt were one-time occurrences and are not ongoing.

"Whole Person" Analysis

In addition to the enumerated disqualifying and mitigating conditions as discussed previously, I have considered the general adjudicative guidelines related to the whole person concept under Directive ¶ E2.2.1. The Appeal Board has repeatedly held that a Judge may find in favor of

[16]Directive, Additional Procedural Guidance, Item E3.1.14.

[17]Directive, Additional Procedural Guidance, Item E3.1.15.

[18]ISCR Case No. 99-0597 (December 13, 2000).

an applicant where no specific mitigating conditions apply.[19] Moreover, "[u]nder the whole person concept, the administrative judge must not consider and weigh incidents in an applicant's life separately, in a piecemeal manner. Rather, the Judge must evaluate an applicant's security eligibility by considering the totality of an applicant's conduct and circumstances."[20] The directive lists nine adjudicative process factors (APF) which are used for "whole person" analysis. Because foreign influence does not involve misconduct, voluntariness of participation, rehabilitation and behavior changes, etc., the eighth APF, "the potential for pressure, coercion, exploitation, or duress," Directive ¶ E2.2.1.8, is the most relevant of the nine APFs to this adjudication.[21] In addition to the eighth APF, other "[a]vailable, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." Directive ¶ E2.2.1. Ultimately, the clearance decision is "an overall common sense determination." Directive ¶ E2.2.3.

The Appeal Board requires the whole person analysis address "evidence of an applicant's personal loyalties; the nature and extent of an applicant's family's ties to the U.S. relative to his [or her] ties to a foreign country; his or her ties social ties within the U.S.; and many others raised by the facts of a given case." ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007). In that same decision, the Appeal Board commended the whole person analysis in ISCR Case No. 03-02878 at 3 (App. Bd. June 7, 2006), which provides:

> Applicant has been in the U.S for twenty years and a naturalized citizen for seven. Her husband is also a naturalized citizen, and her children are U.S. citizens by birth. Her ties to these family members are stronger than her ties to family members in Taiwan. She has significant financial interests in the U.S. , and none in Taiwan. She testified credibly that she takes her loyalty to the U.S. very seriously and would defend the interests of the U.S. Her supervisors and co-worker assess her as very loyal and trustworthy.

There are many countervailing, positive attributes to Applicant's life as a U.S. citizen that weigh towards granting his clearance. His Egyptian passport has expired and has been returned to the issuing authority. Applicant has formally renounced his Egyptian citizenship. He has strong links or connections to the United States: (1) Applicant and his wife became U.S. citizens, (2) Since 1986, for the past 21 years and Applicant's adult life, has lived in the U.S., (3) Applicant and his wife have four U.S. born minor children, (4) Applicant's wife is very involved with their children's school activities, (4) Applicant's mother has lived in the U.S. since 1994 as a permanent resident, she has done everything possible to become a U.S. citizen. Like many senior citizens, she is having

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[19] ISCR Case No. 02-30864 at 4 (App. Bd. Oct. 26, 2005); ISCR Case No. 03-11448 at 3-4 (App. Bd. Aug. 10, 2004); ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004); ISCR Case No. 02-32006 at 5 (App. Bd. Oct. 28, 2004).

[20] ISCR Case No. 03-04147 at 3 (App. Bd. Nov. 4, 2005) (quoting ISCR Case No. 02-01093 at 4 (App. Bd. Dec. 11, 2003)).

[21] *See* ISCR Case No. 02-24566 at 3 (App. Bd. July 17, 2006) (stating that an analysis under the eighth APF apparently without discussion of the other APFs was sustainable); ISCR Case No. 03-10954 at 5 (App. Bd. Mar. 8, 2006) (sole APF mentioned is eighth APF); ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (remanding grant of clearance because Judge did not assess "the realistic potential for exploitation"), *but see* ISCR Case No. 04-00540 at 6 (App. Bd. Jan. 5, 2007) (rejecting contention that eighth APF is exclusive circumstance in whole person analysis in foreign influence cases).

difficulty meeting the English literacy requirement, but has shown good faith in correcting this shortcoming, (5) Applicant holds a responsible position for a defense contractor, (6) Applicant's employer holds him in the highest regard and views him as a trustworthy and critical employee, (7) Applicant's whole life is in the U.S. He lives here, his immediate family is here, his four children were born in the U.S. and are being educated in the U.S., (8) All his personal property is in the U.S. All her financial connections are in the United States;[22] and (9) Applicant credibly stated that he would never do anything to harm the U.S., and (10) Very importantly, when Applicant had the slightest suspicion of an improper contact by a foreign national, he immediately reported such contact to his CEO thus establishing he knew the correct security procedures and acted accordingly.

There is no reason to believe that he would take any action which could cause potential harm to his U.S. family or to this country. He is patriotic, loves the United States, and would not permit any country to exploit him. He has close ties to the United States. His closest family members are his wife and four children. They are U.S citizens and live with him. Because his children live in the United States, they are not vulnerable to coercion or exploitation by a foreign power. The realistic possibility of pressure, coercion, exploitation or duress is low. I base this conclusion on his credible and sincere testimony, and I do not believe he would compromise national security, or otherwise comply with any foreign threats or coercion. His CEO and coworker describe him as very honest, loyal, and trustworthy. He is an asset to his community and company.

After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has mitigated or overcome the security concerns pertaining to foreign influence and foreign preference. I have no doubts concerning Applicant's security eligibility and suitability. I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my "careful consideration of the whole person factors"[23] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive. I conclude Applicant is eligible for access to classified information.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

[22]Department Counsel did not allege financial interests as a FI DC and as stated earlier, no FI MCs apply. However, I observe Applicant has no financial interests in Israel. *See* ISCR Case No. 04-02233 at 3 (App. Bd. May 9, 2006) (stating lack of foreign financial interests do not mitigate Guideline B security concerns based on an applicant's relationship with relatives); ISCR Case No. 03-04300 (App. Bd. Feb. 16, 2006), 2006 DOHA Lexis 264 at *17 (accepting the Judge's conclusion applying FI MC 5 because that applicant's foreign financial interests were minimal and not sufficient to affect her security responsibilities).

[23]*See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

Paragraph 1. Guideline C: FOR APPLICANT

Subparagraph 1.a.: For Applicant
Subparagraph 1.b: For Applicant
Subparagraph 1.c.: For Applicant

Paragraph 2. Guideline B: AGAINST APPLICANT

Subparagraph 2.a.: For Applicant
Subparagraph 2.b.: For Applicant
Subparagraph 2.c.: For Applicant
Subparagraph 2.d.: For Applicant
Subparagraph 2.e.: For Applicant
Subparagraph 2.f.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Robert J. Tuider
Administrative Judge