

DATE: November 25, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-02892

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq. Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

SYNOPSIS

Applicant is a 44 year old employee of a defense contractor. He was born in Yemen in 1959, and with his family, he moved to Saudi Arabia in 1967. He moved to the United States in 1985 and became a naturalized United States citizen in 1998. Applicant's immediate family members, including his parents, his three sisters, and three brothers are citizens of Yemen and reside in Saudi Arabia. The evidence establishes that Applicant is vulnerable to foreign influence. By not mitigating these foreign influence security concerns, Applicant failed to demonstrate it is clearly consistent with the national interest to grant or continue his security clearance. Clearance is denied.

STATEMENT OF THE CASE

On February 24, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on foreign influence (guideline B) concerns because of the foreign residency and/or citizenship of close family members (mother, father, brothers, and sisters).

Applicant filed a signed and sworn, notarized response, dated March 19, 2003, to the allegations set forth in the SOR. He requested a clearance decision based on a hearing record before a DOHA Administrative Judge. The case was initially assigned to another Administrative Judge, but because of medical reasons, the case was reassigned to me to conduct a hearing on July 25, 2003. A Notice of Hearing was issued to the parties on August 22, 2003, and the hearing was held on September 9, 2003.

At the hearing, Department Counsel offered one documentary exhibit (Government Exhibit 1), and no witnesses were

called. Applicant, through counsel, offered 26 documentary exhibits (Applicant Exhibits A through Z) and offered the testimony of his sister, his wife, his supervisor, and himself. All exhibits were entered into evidence. The transcript (TR) was received on September 18, 2003.

FINDINGS OF FACT

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline B of the Directive because Applicant's immediate family members are not United States citizens, some of them reside in Saudi Arabia, and they may be subject to duress. The SOR contains nine allegations, 1.a. through 1.i., under Guideline B (Foreign Influence). In his response to the SOR, Applicant admits all nine allegations. These allegations are incorporated as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the testimony of the witnesses at the hearing, and the documents, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is a 44 year old employee of a defense contractor. He was born in Yemen in 1959. He and his family moved from Yemen to Saudi Arabia in 1967. After spending some time in England, and then returning to Saudi Arabia, he moved to the United States in 1985 and became a naturalized United States citizen in 1998. He received a bachelor of science degree from a United States university in 1998 in computer science. His wife, whom he married in 1986, is a United States citizen, and they have one son and one daughter. He also has one other daughter.

Applicant's father and mother are citizens of Yemen and reside for the majority of the time in Saudi Arabia. They also own a home in the United States, in the same state as that of Applicant and his sister. They spend some time every year in the United States. Applicant has three brothers and three sisters, who are citizens of Yemen and reside in Saudi Arabia. Applicant also has one brother and one sister who are citizens of Yemen and reside in the United States. Applicant has sporadic contact with his parents, more frequent when they are in the United States. Applicant testified that his parents are retired and neither one ever worked for the government of Yemen or Saudi Arabia. He also testified that neither his brothers or sisters work for the government of Yemen or Saudi Arabia.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, etc.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

FOREIGN INFLUENCE (GUIDELINE B)

E2.A2.1.1. The Concern: 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 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.

E2.A2.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A2.1.2.1. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident in, a foreign country;

E2.A2.1.3. Conditions that could mitigate security concerns include:

E2.A2.1.3.1. A determination that the immediate family member(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.

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONSBased on the evidence of record, the Government has established reason to deny Applicant a security clearance because of foreign influence. Applicant's immediate family members, his parents, three sisters, and three brother are citizens of Yemen and reside in Saudi Arabia. The Saudi Arabian residency of members of Applicant's immediate family creates the potential for foreign influence that could result in the compromise of classified information because it makes Applicant potentially vulnerable to coercion, exploitation, or pressure. The possession of such ties raises a security concern sufficient to require Applicant to present evidence in rebuttal, extenuation, or mitigation sufficient to meet his burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for him. ISCR Case No. 99-0424, 2001 (App. Bd. Feb. 8, 2001). The result is Applicant has a very heavy burden of showing that these family members do not pose a security risk. ISCR Case No. 01-26893 (October 16, 2002). Applicant has not met this burden.

Applicant testified to a hypothetical question at the hearing that he would not betray the United States if his family was threatened (Tr. at 117,118). Since there has been no actual set of circumstances that occurred similar to the hypothetical fact pattern, I can not give his statement serious consideration. ISCR Case No. 02-26826 (November 12, 2003).

Based on Applicant's family status as citizens of Yemen and residents of Saudi Arabia, Disqualifying Condition E2.A2.1.2.1. applies. I cannot conclude that his family is not in a position to be exploited by a foreign power. Accordingly, Foreign Influence Mitigating Condition E2.A2.1.3.1. does not apply to this case. Guideline B is found against Applicant. Applicant has failed

to mitigate these security concerns, thereby failing to demonstrate that it is clearly consistent with national security to grant him the clearance.

FORMAL FINDINGS

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Martin H. Mogul

Administrative Judge