

DATE: February 18, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21251

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

August Bequai, Esq.

SYNOPSIS

Applicant, a dual citizen of the U.S. and Iran, is a 50-year-old married man employed by a defense contractor as a senior software engineer. The foreign preference security concern is mitigated by Applicant's clear preference for the U.S. His family ties (a brother and a half-sister) to Iran, a country that is a bona fide security concern to the U.S., raises a security concern for foreign influence that Applicant is unable to mitigate at this time. Clearance is denied.

STATEMENT OF THE CASE

On June 3, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B for foreign influence and Guideline C for foreign preference. Applicant answered the SOR on July 7, 2003, and he requested a clearance decision based on a hearing record. He admitted to the SOR's allegations except for subparagraphs 1.a, 1.f, and 2.a.

On September 24, 2003, the case was initially assigned to another administrative judge, but it was reassigned to me September 26 to conduct a hearing and issue a written decision. Thereafter, on October 9, 2003, a notice of hearing was issued to the parties scheduling the hearing for Friday, November 7, 2003. Thereafter, Applicant retained counsel who requested the hearing date be delayed. I granted the request, and on October 27, 2003, an amended notice of hearing was issued to the parties rescheduling the hearing for Thursday, November 20, 2003. Applicant appeared with counsel and the hearing took place as scheduled. DOHA received the transcript December 2, 2003.

RULINGS ON PROCEDURE

Before closing arguments, government counsel moved to amend the SOR to conform to the record evidence. Applicant did not object. Accordingly, the SOR was amended as follows:

- SOR subparagraph 1.a is amended to "Your spouse is a dual citizen of Iran and the United States."

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the record, I make the following essential findings of fact:

In general, I find that the record evidence as a whole is sufficient to establish, by substantial evidence, the occurrence of all the factual matters alleged in the SOR, as amended.

Applicant is a 50-year-old married man and a dual citizen of Iran and the U.S. He was born in Iran in 1953 and became a naturalized U.S. citizen in 1994. He has lived continuously in the U.S. since 1984. Previously, Applicant lived in the U.S. on a student visa during 1979 - 1980, but he then returned to Iran. Dissatisfied with the political situation and lack of freedom in Iran, Applicant decided to return to the U.S., and he was eventually successful, arriving here in 1984.

Applicant's first marriage to a U.S. citizen in 1986 ended in divorce in 1990. He remarried his second and current wife in 1990. She is also a dual citizen of Iran and the U.S. She was born in Iran and became a naturalized U.S. citizen in 1999. She holds a U.S. passport issued in July 2003.

He has two sons, the first born in 1989, the second in 1992. Both sons are native-born U.S. citizens. Both sons attend public schools in the U.S. Applicant describes his two sons as "Americanized."

Applicant earned a B.S. degree in industrial engineering from Tehran University. In 1996, he was awarded an M.S. degree in computer information systems from a U.S. university. He currently works for a defense contractor as a senior software engineer. He has worked for this company since June 2001. Included in the record are letters from eight persons attesting to Applicant's abilities and attributes as an employee as well as his trustworthiness and suitability for to hold a security clearance (Exhibits A and B).

In conjunction with his current employment, Applicant completed a security-clearance application (Exhibit 1) in July 2001 disclosing: (1) he was born in Tehran, Iran; (2) he has family members who are citizens of or residents in Iran; (3) he obtained U.S. citizenship in 1994; (4) he possessed a U.S. passport issued in 1994; (5) he holds dual citizenship with Iran and the U.S.; and (6) he possessed an Iranian passport with an expiration date of January 2002. He also disclosed traveling for pleasure to Iran in 1995 and 1996 - 1997, to Germany in 1997, and to Turkey in 1997. During his foreign travel, Applicant's current wife worked for a major U.S. airline and so the airline travel was at little to no expense. He has not traveled outside the U.S. since his last foreign trip in 1997. Neither he nor his wife intends to travel to Iran again unless doing so due to a family member's death.

Applicant's mother and father are Iranian citizens. They have lived in the U.S. since 1995 and both have obtained resident alien status. His parents live in the same state as Applicant. His father worked as a clerk for an Iranian oil company and he retired more than 30 years ago. His mother is a housewife.

Applicant has two brothers and one half-sister. His half-sister, born in 1947, is a retired elementary school teacher living in Iran. Applicant has not talked to his half-sister for more than two years. His older brother, born in 1952 and also a dual citizen of Iran and the U.S., is a day trader living in the same state as Applicant. The older brother obtained U.S. citizenship in 1992. Applicant's younger brother, born in 1957, is an unemployed salesman living in Iran. Applicant speaks to his younger brother by telephone approximately six times per year. Otherwise, Applicant does not communicate with anyone else in Iran.

Applicant's parents-in-law also live in the U.S. His father-in-law worked in Iran as a conductor for the railroad. He retired about 20 years ago. His mother-in-law is a housewife. They arrived in the U.S. in November 2001 and both have resident alien status.

When Applicant returned to the U.S. in 1984, he arrived with an Iranian passport. He used an Iranian passport, after becoming a naturalized U.S. citizen in 1994, to enter and exit Iran when he traveled there in 1995 and again in 1996 - 1997. Applicant's Iranian passport expired in January 2002, and he does not intend to renew it. Otherwise, Applicant has only used his U.S. passport for his foreign travel, including his two trips to Iran when he exited and reentered the U.S. He used the Iranian passport for his trips to Iran due to concerns for safety and security.

Applicant has no financial interests in Iran, but he does have financial interests in the U.S. The market value of the family home is more than half-a-million dollars. Applicant and his spouse also have assets in retirement accounts.

Applicant is willing to renounce his Iranian citizenship, but has not done so since renouncing Iranian citizenship is not a practical option. He considers himself a U.S. citizen only and feels no sense of allegiance or obligation to Iran. Applicant has not served in the Iranian military or worked for the Iranian government. He last voted in an Iranian election in 1980 and he has no intention of doing so in the future. Applicant denies any connections to any Iranian organizations.

On or about May 14, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS) as part of the required background investigation. The interview took two hours and thirty minutes. The DSS agent interviewed Applicant about his unofficial foreign connections (e.g., family members), unofficial foreign travel, and dual citizenship. According to the DSS agent, the questioning disclosed no information of security significance.

Iran, also known as the Islamic Republic of Iran, is a Middle East country that is a constitutional Islamic republic, which is governed by executive and legislative branches that derive national leadership primarily through the Muslim clergy (Exhibit 4). U.S.-Iranian relations have a history of difficulty since 1979 when the revolution overthrew the governing monarchy.

U.S. citizens born in Iran and the children of such persons are considered Iranian nationals by Iranian authorities (Exhibit 4). U.S.-Iranian citizens have been denied permission to depart Iran documented as U.S. citizens. To prevent confiscation of U.S. passports, the U.S. State Department suggests dual citizens use their Iranian passports to enter Iran (Exhibit 4).

Iran's human rights record is poor (Exhibit 5). For example, "systematic abuses included summary executions; disappearances; widespread use of torture and other degrading treatment, reportedly including rape; severe punishments such as stoning and flogging; harsh prison conditions; arbitrary arrest and detention; and prolonged and incommunicado detention" (Exhibit 5, at page 2 of 24). In his January 2002 State of the Union Address, ⁽²⁾ the Commander in Chief named Iran as one of three countries making up "an axis of evil," and he noted Iran pursues weapons of mass destruction and exports terror (Exhibit 7, at page 3 of 8). In his January 2003 State of the Union Address, the President noted the Iranian government continues to repress its people, pursue weapons of mass destruction, and support terror (Exhibit 6, at page 6 of 8).

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the record evidence as a whole, the following security guidelines are most pertinent here: Guideline B for foreign influence and Guideline C for foreign preference.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁵⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽⁸⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Foreign Preference Guideline

Under Guideline C for foreign preference, a security concern may exist when a person acts in such a way as to indicate a preference for a foreign country over the U.S. In such situations, the person may be prone to provide information or make decisions that are harmful to the interests of the U.S. A security concern may be raised by, among other things, the exercise of dual citizenship or some affirmative action demonstrating foreign preference as opposed to mere possession of foreign citizenship by virtue of birth.⁽¹¹⁾

Here, based on the record as a whole, the government has established its case under Guideline C. Applicant, a dual citizen of the U.S. and Iran, exercised dual citizenship by possessing an Iranian passport after his naturalization as a U.S. citizen.⁽¹²⁾ He also exercised dual citizenship by using the Iranian passport for his two trips to Iran. By doing so, he held himself out as an Iranian citizen. These are affirmative actions by Applicant that raise a security concern under DC 1⁽¹³⁾ and DC 2.⁽¹⁴⁾ Although a security concern is raised, when evaluating his foreign passport use, it's reasonable to consider Applicant used it because he was concerned about safety and security. Moreover, using the Iranian passport to enter and exit Iran is consistent with the State Department's guidance discussed above. These circumstances, although not *per se* mitigating, put his foreign passport use in context.

Turning to the mitigating conditions under Guideline C, two of the four apply. First, MC 1⁽¹⁵⁾ applies because Applicant's dual citizenship is based on his birth in Iran. Second, MC 4⁽¹⁶⁾ applies because Applicant has expressed a willingness to renounce his Iranian citizenship. Indeed, Applicant appears to be a fully assimilated naturalized American citizen. Since 1984, Applicant has lived and worked in the U.S. and that situation is unlikely to change as he and his wife are firmly settled here. Applicant is also raising two native-born U.S. citizen children who attend public school, and his financial interests are all in the U.S. In addition, although Applicant's possession and use of an Iranian passport are of concern, it is mitigated for at least three reasons. First, the passport is now expired and he does not intend to renew it. Second, his use of the Iranian passport in the mid-1990s is dated or not recent and has not recurred. Third, he used his U.S. passport for all other foreign travel. Given the totality of facts and circumstances, Applicant has mitigated the foreign preference security concern based on his clear preference for the U.S. Accordingly, Guideline C is decided for Applicant.

2. Foreign Influence Guideline

Under Guideline B for foreign influence, a security concern 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 U.S. 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 if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

In addition, the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service. Concerning family ties, the language of Guideline B does not require a conclusion that an unacceptable security concern exist based solely on an applicant's family ties in a foreign country.⁽¹⁷⁾ An administrative judge must consider the record evidence as a whole in deciding if the facts and circumstances of an applicant's family ties pose an unacceptable security concern under Guideline B.⁽¹⁸⁾ Finally, given the nature of the Iranian government and its poor human rights record, Applicant bears a "heavy burden" of showing the presence of his family members living in Iran does not pose a security concern.⁽¹⁹⁾

Here, based on the record as a whole, the government has established its case under Guideline B. In particular, DC 1⁽²⁰⁾ applies given Applicant has family members present in the U.S. who are Iranian citizens and two family members who are citizen residents in Iran (a brother and a half-sister).⁽²¹⁾ In particular, the presence of two family members in Iran raises a security concern due to the potential for foreign influence. The remaining disqualifying conditions of Guideline B do not apply given the record evidence.

In mitigation, Applicant's spouse is a dual citizen of the U.S. and Iran and a resident of the U.S. The same is true for his brother the day trader. Applicant's parents and parents-in-law are lawful residents of the U.S. None of these individuals are employed by or connected with the Iranian military, law enforcement, or a governmental agency. Moreover, living in the U.S., these individuals are not subject to Iranian laws and they are not within the physical reach of Iranian authorities. Given these circumstances, it is my commonsense assessment that the risk of foreign influence based on Applicant's connections to these family members is minimal or negligible. Accordingly, I conclude MC 1⁽²²⁾ applies in Applicant's favor and I find for him concerning these family members.

The presence of Applicant's brother and half-sister in Iran is more problematic. Both are citizens of and residents in Iran, and so, both are subject to Iranian laws and within the physical reach of Iranian authorities. Concerning the half-sister, Applicant has little contact with her as demonstrated by no communication for more than two years. Therefore, the distant relationship reduces the concern somewhat. The same is not true for his brother whom he speaks with approximately six times annually. His brother, unlike a half-sister, is an immediate family member, and thus, I presume there is a strong tie of affection or obligation. Moreover, given the Iranian government's poor human rights record and Iran's hostility toward the U.S. since 1979, I cannot rule out the possibility that both the brother and half-sister are vulnerable to the power of the Iranian government to exert pressure (or worse) on them. This situation, although perhaps unlikely, makes Applicant vulnerable to foreign influence by his connections to these family members. Accordingly, I conclude MC 1 does not apply and I find against Applicant concerning the family members alleged in SOR subparagraphs 1.e and 1.g.

In concluding MC 1 does not apply, I followed the Appeal Board's decision in ISCR Case No. 02-04786, dated June 27, 2003, which established that an applicant who has family members present in Iran has a heavy burden to mitigate a security concern for foreign influence. The dissenting opinion in that case expressed the concern "that the Board's decisions over time are having the unintended effect of narrowing mitigating condition 1 to the point where it is virtually unusable" as well as the view that "it is hard to envision a plausible set of circumstances where the current state of Appeal Board jurisprudence would permit mitigating condition 1 to be applicable."⁽²³⁾ I agree. Nevertheless, I am required to follow Appeal Board case law, and I'm doing so here. The remaining mitigating conditions of Guideline B do not apply given the record evidence. Accordingly, Guideline B is decided against Applicant.

This clearance decision should not be construed as an indictment of Applicant's loyalty or patriotism. By all accounts, he is a respectable and law-abiding American citizen. Instead, this clearance decision reflects the hard reality that Applicant has family ties--his brother and half-sister--to a foreign country that is a bona fide security concern to the U.S., and the presence of those two family members in Iran creates a security concern that he is

unable to mitigate at this time. And under the clearly consistent standard, I am required to err, if I must, on the side of denial.

FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline B: Against the Applicant

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: For the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: For the Applicant

Subparagraph 1.g: Against the Applicant

SOR ¶ 2-Guideline C: For the Applicant

Subparagraph 2.a: For the Applicant

Subparagraph 2.b: For the 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. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Although viewed by some as just another political speech, the President's State of the Union Address is required by the U.S. Constitution, Article II, Section 3.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
10. *Egan*, 484 U.S. at 528, 531.
11. *See* ISCR Case No. 97-0356 (April 21, 1998) at p. 4.
12. Department Counsel conceded that a Defense Department policy memorandum, dated August 16, 2000 (the so-called Money Memorandum), concerning an applicant's possession and use of a foreign passport, does not apply here because Applicant's Iranian passport expired in January 2002. Transcript at pp. 18-20.
13. "The exercise of dual citizenship" (Directive, Enclosure 2, E2.A3.1.2.1).
14. "Possession and/or use of a foreign passport" (Directive, Enclosure 2, E2.A3.1.2.2).
15. "Dual citizenship is based solely on parents' citizenship or birth in a foreign country" (Directive, Enclosure 2, E2.A3.1.3.1). *See* ISCR Case No. 99-0452 (March 21, 2000) at pp. 2-3 (Modifying its earlier rulings, the Appeal Board concluded the literal language of MC 1 allows it to be applied even when an applicant exercises their foreign citizenship after becoming a U.S. citizen).
16. "Individual has expressed a willingness to renounce dual citizenship" (Directive, Enclosure 2, E2.A3.1.3.4).
17. ISCR Case No. 98-0419 (April 30, 1999) at p. 5.
18. *Id.*
19. ISCR Case No. 02-04786 (June 27, 2003) at p. 4.
20. "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."
21. *See* ISCR Case No. 98-0507 (May 17, 1999) at pp. 10-11 (discussing various facets of security significance of family ties in a foreign country).
22. "A determination that the immediate family member(s), (spouse, father, 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, Enclosure 2, E2.A2.1.3.1).
23. ISCR Case No. 02-04786 at p. 9.