

KEYWORD: Foreign Influence

DIGEST: Applicant is a 51-year-old naturalized citizen of the United States. He was born in Saudi Arabia and came to the U.S. in 1980 on a Saudi scholarship. He has worked for defense contractors since 1992, and became a naturalized U.S. citizen in 1997. After becoming a U.S. citizen, Applicant twice used his Saudi passport to return to that country for personal visits, but later renounced his Saudi citizenship and returned the passport. Applicant's mother, three brothers, and two sisters live in Saudi Arabia. He also has extensive ties to the United States, including his spouse, his professional career, and substantial financial interests. Applicant has mitigated the security concerns arising from the possible foreign preference and foreign influence. Clearance is granted.

CASENO: 02-21927.h2

DATE: 05/17/2006

DATE: May 17, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21927

REMAND DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

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FOR APPLICANT

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SYNOPSIS

Applicant is a 51-year-old naturalized citizen of the United States. He was born in Saudi Arabia and came to the U.S. in 1980 on a Saudi scholarship. He has worked for defense contractors since 1992, and became a naturalized U.S. citizen in 1997. After becoming a U.S. citizen, Applicant twice used his Saudi passport to return to that country for personal visits, but later renounced his Saudi citizenship and returned the passport. Applicant's mother, three brothers, and two sisters live in Saudi Arabia. He also has extensive ties to the United States, including his spouse, his professional career, and substantial financial interests. Applicant has mitigated the security concerns arising from the possible foreign preference and foreign influence. Clearance is granted.

STATEMENT OF THE CASE

On March 6, 2002, Applicant submitted a security clearance application. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (the "Directive"). On August 25, 2003, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under Guideline B, Foreign Influence, Guideline C, Foreign Preference, and Guideline E, Personal Conduct, of the Directive.

Applicant answered the SOR in writing on October 2, 2003. He elected to have a hearing before an administrative judge. On October 20, 2003, Applicant submitted an amended answer to the SOR.

The case was assigned to me on August 18, 2004. With the concurrence of the parties, I conducted the hearing on September 27, 2004. At the outset of the hearing, Government counsel moved to withdraw the allegations under

Guideline E, without objection, and I granted the motion. The government presented nine exhibits. Applicant's counsel presented eight exhibits, the testimony of two witnesses, and Applicant's testimony on his own behalf. DOHA received the transcript (Tr.) on October 7, 2004. On January 18, 2005, I issued a decision granting a security clearance to Applicant.

The Department Counsel appealed the decision. On December 30, 2005, the Appeal Board issued an opinion finding error in the application of Mitigating Condition 1 under Guideline B of the Directive, and remanding the case for further consideration. Applicant's counsel submitted a brief on remand on March 20, 2006. On March 31, 2006, Department Counsel submitted a brief on behalf of the Government.

FINDINGS OF FACT

Applicant denied the allegations in ¶¶ 1.a, 1.b, and 3.a of the SOR. (Amended Answer to SOR, dated October 20, 2003.) He admitted the factual allegations in ¶¶ 2.a, 2.b (in part), and 2.c of the SOR, with explanations. (*Id.*) Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is 51 years old. (Ex. 1 at 1.) He was born in Saudi Arabia, grew up there, and obtained his bachelor's degree there in 1977. (Tr. at 24.) Applicant worked at a major university in Saudi Arabia from 1977 to 1980.

Applicant received a scholarship from the Saudi university to study in the United States. (Amended Answer to SOR, *supra*, at 3.) He was a student at a university in the United States from 1980 until his graduation in 1985. (Tr. at 23.) The Saudi university considered Applicant an employee of that institution while he was studying in the U.S. (Tr. at 38; Amended Answer to SOR, *supra* at 3; Ex. 1 at 9.) He did post-graduate work at a prestigious university in the United States from 1986 until 1992. (Tr. at 23.)

From 1992 until 1995, Applicant worked as an information systems security engineer for a U.S. company. (Ex.1 at 6; Tr. at 25.) He next worked for an information technology firm from 1995 to 2001. (Tr. at 26; Ex. 1 at 6.) In that capacity, he worked on projects for numerous federal agencies and garnered several commendations. (Exs. A and B.) In order to perform his duties, he applied for and received access to confidential material. (Ex. 2; Tr. at 31.)

Applicant became a naturalized citizen of the United States in December 1997. (Tr. at 23; Ex. 1 at 1.)

In 2001, Applicant began working for his present employer, a defense contractor, as an information security systems manager. (Tr. at 30; Ex. 1 at 5.) The employer handles projects for the federal government requiring security clearances. (Tr. at 31.) Applicant was recognized for his leadership in 2003 by being selected for special training and being certified as a project manager. (Tr. at 30.)

Applicant got married in the United States in 1985. (Ex. 1 at 7.) His wife was born in Lebanon and has been a naturalized citizen of the United States for 33 years. (Tr. at 24; Ex. 1 at 9.) Her father was 93 at the time of the hearing, and lives in Lebanon; her siblings live in the United States. (Tr. at 47-48.) Applicant's wife has a Ph.D. in philosophy, logic, and ethics, and also has a law degree. (Tr. at 82.) She is a law school professor and also serves as a guest speaker for a U.S. government agency overseas, specializing in the topic of democracy and Islam. (Tr. at 83-84.) She has made several U.S. government-sponsored trips overseas to speak to foreign audiences on related subjects. (Tr. at 84-85.)

Applicant's father worked for an Arabian and American oil company in Saudi Arabia all his adult life until he retired. (Tr. at 32.) He then began an ironwork shop, which he ran until he passed away in January 2000. (*Id.*; Tr. at 11.)

Applicant's mother was 70 years old at the time of the hearing. She is a retired homemaker living in Saudi Arabia with one of Applicant's brothers. (Tr. at 32, 33, 51; Ex. 1 at 8.) She has no ties to the government. (Tr. at 32.) Applicant has seen his mother twice in the last four years. (Tr. at 34.) His mother and one of his sisters came to visit him in the U.S. in January 2004 following his surgery. (Tr. at 58.) He gives his mother money several times a year, totaling about \$6,000.00 per year. (Tr. at 36.) Applicant talks with his mother by telephone once or twice a month. (Tr. at 55.) He does not discuss his work with his mother. (Tr. at 37.)

Applicant has two sisters living in Saudi Arabia. (Tr. at 33.) Both were school teachers and later principals. (*Id.*) One sister is now retired. Neither has any other connection to the government. (*Id.*) Applicant saw one of his sisters twice in the last four years; he has not seen his other sister in four years. (Tr. at 34-35.) He speaks with his sisters by telephone once or twice a month. (Tr. at 55.) Applicant does not provide support to his sisters. (Tr. at 36.)

Applicant has three brothers; all live in Saudi Arabia. (Tr. at 33.) One operates the ironwork shop started by his father. Two brothers are commercial airline pilots who were educated in the U.S. (Tr. at 57), and certified as pilots by the Federal Aviation Administration. (Tr. at 33-34.) Neither ever served in the military. (Tr. at 34.) Both fly commercial aircraft to the United States on occasion, giving Applicant the opportunity to meet them. (*Id.*) One brother flies to the U.S. more frequently, and Applicant sees him during layovers. (Tr. at 35.) Applicant has not seen his other two brothers in four years. (*Id.*)

Applicant traveled to Saudi Arabia twice since becoming a U.S. citizen. (Tr. at 39.) In 1999, he elected to travel to the mid-east to join his wife for a part of her government-sponsored lecture tour. (Tr. at 39.) He used the opportunity to visit his family in Saudi Arabia. (Ex. 1 at 11.) Because Applicant decided to travel on short notice-leaving no time to obtain a visa for Saudi Arabia-he traveled on his Saudi Arabian passport. (Tr. at 39.)

Applicant's second trip to Saudi Arabia since becoming a U.S. citizen occurred in January 2000, when Applicant's father passed away. (Tr. at 40.) The Saudi tradition is to bury the deceased within 24 hours, leaving Applicant insufficient time to apply for a visa. (Tr. at 41, 43.) He used his Saudi Arabian passport in order to attend the funeral. (Tr. at 41.)

Applicant understood that U.S. law does not prohibit a citizen from using a foreign passport. He was not aware of the potential significance such use might have until he applied for a security clearance in March 2002. (Tr. at 41.) In October 2003, Applicant renounced his Saudi Arabian citizenship and returned his (expired) passport. (Ex. C; Tr. at 41, 46.)

Applicant has no property, bank accounts, or assets in Saudi Arabia. (Tr. at 36.) He does not anticipate inheriting any property there. (*Id.*) Applicant has a well-paying job and substantial assets in the United States. (Tr. at 69.) He has voted in federal, state, and local elections in the United States. (Tr. at 45.)

Saudi Arabia is a monarchy based upon Islamic law. (Ex. I at 1.) The Saudi government does not recognize dual nationality and will confiscate the U.S. passport of a Saudi national who has become a U.S. citizen. (*Id.* at 2.) The United States and Saudi Arabia enjoy good relations. (Ex. II at 7.) Mutual concern about regional security, oil exports, and sustainable development have resulted in close economic and security ties. (*Id.*) The United States remains concerned about human rights conditions in Saudi Arabia, including abuse of prisoners, restrictions on speech, press, assembly, and association, discrimination against women and minorities, and suppression of worker's rights. (*Id.* at 8.) The U.S. is also concerned about terrorists in Saudi Arabia targeting American travelers. (Exs. III, IV, V at 6-7, VI at 4-5.)

POLICIES

The President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988)). In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the potentially disqualifying and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline B, Foreign Influence: A security risk may exist when an individual's immediate family, including cohabitants, or other persons to whom he 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.

Guideline C, Foreign Preference: 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.A2.1.1; ¶ E2.A3.1.1.) Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." (Directive, ¶ E2.2.1.) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. (*Id.*) An administrative judge should consider the following factors: (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. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that may disqualify the applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, ¶ E3.1.15.) An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).) "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, ¶ E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. 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. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

LEGAL PRECEDENT

It is helpful to review the legal precedents relevant to Guideline B cases established by the Appeal Board. As noted above, Guideline B of the Directive addresses potential security concerns arising when applicants may be subject to foreign influence.

Guideline B, Foreign Influence: A security risk *may* exist when an individual's immediate family, including cohabitants, or other persons to whom he 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, *emphasis added*.) It is important to note that the Directive does not establish a per se rule for the guideline; for example, the mere fact that family members or friends are citizens or residents of a foreign country is not automatically disqualifying. The Appeal Board has acknowledged many times that the:

mere possession of family ties with persons in a foreign country is not, as a matter of law, automatically disqualifying . . . [It] does raise a prima facie security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant.

(ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 at **33-34 (App. Bd. Feb. 8, 2001).)

In order for many diverse adjudicators, counsel, and administrative judges to apply this guideline uniformly and consistently, the Directive sets out various conditions illustrating the sort of matters that may raise security concerns and those that might alleviate such concerns. The Directive refers to these as potentially "disqualifying" or "mitigating"

conditions. An administrative judge must consider these conditions as part of a "whole person" concept in determining whether a security concern exists and whether an applicant has mitigated or extenuated those concerns.

Mitigating Condition 1

Under Guideline B, Mitigating Condition 1 (Directive, ¶ E2.A2.1.3.1) provides that it is potentially mitigating where the "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 involved and the United States." Notwithstanding the facially disjunctive language, applicants must establish both: (1) that the individuals in question are not "agents of a foreign power," and (2) that they are not in a position to be exploited by a foreign power in a way that could force the applicant to choose between the person(s) involved and the United States. (ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004).)

"Agent of a Foreign Power"

The Appeal Board has greatly reduced the applicability of this potentially mitigating condition by adopting an expansive definition of the phrase "agent of a foreign power." The federal statute dealing with national security and access to classified information, 50 U.S.C. § 438(6), includes a definition for the term "agent of a foreign power." For the purposes of the statute, Congress adopted the definitions of the phrases "foreign power" and "agent of a foreign power" from 50 U.S.C. § 1801(a) and (b), respectively. 50 U.S.C. § 1801(b) defines "agent of a foreign power" to include anyone who acts as an officer or employee of a foreign power in the United States, engages in international terrorism, or engages in clandestine intelligence activities in the U.S. contrary to the interests of the U.S. or involving a violation of the criminal statutes of the United States. The definition was added to 50 U.S.C. § 438 by the Intelligence Authorization Act for Fiscal Year 1995, Public Law 103-359, October 14, 1994. The term was subsequently included in the Directive through Change 4, dated April 20, 1999.

The Appeal Board, however, does not apply the statutory definition of "agent of a foreign power." Instead, it adopted a much broader definition of its own invention. The Appeal Board seems to have taken the definition of "foreign power" from 50 U.S.C. § 1801(a), but then uses a general definition for the term "agent," so that the phrase has the widest possible scope, to include anyone who has any connection to any government within a foreign country.

Following this expansive construction, the Appeal Board has held that, "An employee of a foreign government need not be employed at a high level or in a position involving intelligence, military, or other national security duties to be an

agent of a foreign power for purposes of Foreign Influence Mitigating Condition 1." (ISCR Case No. 02-24254, 2004 WL 2152747 (App. Bd. Jun. 29, 2004).) The Appeal Board applies its definition very broadly. (See ISCR Case No. 03-10954 at 3 (App. Bd. Mar. 8, 2006) (attorney/consultant to an entity controlled by a foreign ministry is an "agent of a foreign power"); ISCR Case No. 03-19101 at 6 (App. Bd. Jan. 21, 2006) (part-time secretary for the Ministry of Religion is an "agent of a foreign power"); 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"); ISCR Case No. 03-04090 at 5 (App. Bd. Mar. 3, 2005) (employee of the Israeli government is an "agent of a foreign power"); ISCR Case No. 02-29143 at 3 (App. Bd. Jan. 12, 2005) (a member of a foreign military is an "agent of a foreign power").) The effect of the Appeal Board's broad application of this term is to greatly increase the numbers of applicants who are automatically excluded from the provisions of Mitigating Condition 1.

Very recently, the Appeal Board explained its refusal to use the statutory definition of the term. In ISCR Case No. 03-10954 at 4 (App. Bd. Mar. 8, 2006), the Board opined that the definition of "agent of a foreign power" in 50 U.S.C. § 1801(b) did not apply because it is part of the Foreign Intelligence Surveillance Act (FISA) and that statute had a narrower scope than the security concerns in the Directive. However, the Appeal Board did not explain why the definition would not apply where it was specifically incorporated by reference in 50 U.S.C. § 438, the federal statute directly concerning the grant of access to classified information.

The Appeal Board's position is inconsistent with a reasonable interpretation of the Directive. Had the drafters intended to exclude all relatives and associates who were "connected to a foreign government," they would have employed such terminology; indeed, that very language was used in Disqualifying Condition 3 of Guideline B. Moreover, for the drafters to use that language as the basis for Disqualifying Condition 3 and then repeat it as an exception to Mitigating Condition 1 is not logical. The only reasonable and rational interpretation is that the phrase "agent of a foreign power" is a term of art defined by 50 U.S.C. § 438(6), the statute dealing with access to classified information. The Appeal Board's decision not to use the statutory definition of the term greatly restricts the applicability of Mitigating Condition 1 for applicants.

"In Position to be Exploited"

As noted above, the second prong of Mitigating Condition 1 (Directive, ¶ E2.A2.1.3.1) 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 language "in a position to be exploited" is subject to interpretation. As discussed below, the reasonable and rational interpretation consistent with the intent of the Directive is that the language requires a judge to consider all the circumstances, assess the likelihood of improper exploitation, and determine whether it presents an unreasonable security concern.

The Appeal Board applies Mitigating Condition 1 very narrowly, however. The Appeal Board interprets the 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) ("MC1 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.") The Appeal Board does not permit an administrative judge to engage in a balancing test to assess the extent of any security risk in a case. Rather, the Appeal Board requires an applicant to prove that the presence of family members in a foreign country does not create even the possibility of pressure or coercion in the future. (ISCR Case No. 03-02382 at 5 (App. Bd. Feb 15, 2005).) In determining the applicability of this potentially mitigating condition, the Appeal Board does not consider whether an applicant is likely to be improperly influenced by a foreign relative, holding that "Foreign Influence Mitigating Condition 1 hinges not on what choice Applicant might make if he is forced to choose between his loyalty to his family and the United States, but rather hinges on the concept that Applicant should not be placed in a position where he is forced to make such a choice." (ISCR Case No. 03-15205 at 3-4 (App. Bd. Jan. 21, 2005); *see also* ISCR Case No. 03-24933 at 8 (App. Bd. Jul. 28, 2005).)

Because the Appeal Board has set an absolute standard, it refuses to allow an administrative judge to consider any evidence that does not conclusively establish the impossibility of a future attempt at influence. Even though ¶¶ E2.2.1, E2.2.2, and E2.2.3 of the Directive specifically require an administrative judge to consider all the facts and circumstances when evaluating each individual case, the Appeal Board nonetheless holds it is error for a judge to do so when considering the applicability of Mitigating Condition 1. For example, the Appeal Board finds it legal error to consider any of the following facts because they are not "dispositive": a foreign relative's fragile health (ISCR Case No. 02-29403 at 4 (App. Bd. Dec. 14, 2004)); a foreign relative's advanced age (ISCR Case No. 02-00305 at 7 (App. Bd. Feb. 12, 2003)); a foreign relative's financial independence (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the number of family members in a foreign country (ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2005)); the fact that foreign relatives spend part of each year in the U.S. (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the lack of any connection between the foreign relative and the foreign government in question (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the absence of any attempt at exploitation in the past (ISCR Case No. 03-15205 at 4 (App. Bd. Jan. 21, 2005)); the lack of a relative's financial dependency upon an applicant (ISCR Case No. 03-15205 at 4 (App. Bd. Jan 21, 2005)); a foreign country's friendly relationship with the U.S., its stable, democratic government, or its extensive foreign military agreements with the U.S. (ISCR Case No. 02-22461 at 5-6 (App. Bd. Oct. 27, 2005)).

While the Appeal Board refuses to consider any facts tending to mitigate security concerns under Mitigating Condition 1, it absolutely requires judges to consider factors that might increase security concerns. For example, while the Appeal Board holds it is error for an administrative judge to consider a foreign country's friendly relationship with the U.S., it also holds that it is error for a judge to fail to consider a hostile relationship between the U.S. and a foreign country. (ISCR Case No. 02-13595 at 4 (App. Bd. May 10, 2005).) Similarly, the Appeal Board holds that a foreign state's favorable human rights record is irrelevant, but that "a country's poor human rights record and its differences with the United States on important security issues such as terrorism are factors" that a judge must consider. (ISCR Case No. 04-05317 at 5 (App. Bd. June 3, 2005).)

The general rules of statutory construction apply to administrative regulations. (*M. Kraus & Bros. v. U.S.*, 327 U.S. 614, 621 (1946); 2 Am. Jur. 2d *Administrative Law* § 245 (2006).) However, ordinary rules of regulatory construction do not support the Appeal Board's interpretation of the language in question.

The primary rule of regulatory construction is to determine the intent of the drafters and to give it effect. To that end, judges must interpret a regulation consistent with the purpose and policy within the overall regulatory plan. (*Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454-55 (1989); *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.),

aff'd, 326 U.S. 404 (1945).) The Directive does not establish per se rules prohibiting the issuance of security clearances in specific situations. To the contrary, it requires administrative judges to balance various factors—some potentially disqualifying, and some potentially mitigating—to determine whether an individual is a security concern. To that end, ¶ 6.3 of the Directive provides general guidance:

6.3. Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

6.3.1. Nature a seriousness of the conduct and surrounding circumstances.

6.3.2. Frequency and recency of the conduct.

6.3.3. Age of the applicant.

6.3.4. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.

6.3.5. Absence or presence of rehabilitation.

6.3.6. Probability that the circumstances or conduct will continue or recur in the future.

The Appeal Board's narrow interpretation creates a requirement of proof impossible to achieve and effectively eliminates the possibility that Mitigating Condition 1 could ever apply. Also, the Appeal Board's rulings exclude from consideration all evidence that could tend to mitigate or extenuate the potential security concern. Clearly, the Appeal Board's inflexible interpretation of the language would "compel an odd result." (*Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989).) This is inconsistent with the regulatory policy established in the Directive, and effectively denies due process to applicants.

Another rule of regulatory construction is that judges should not interpret language in such a way that renders it meaningless or leads to an absurd result. (*United States v. Turkette*, 452 U.S. 576, 580 (1981).) Of course, the issue of the applicability of Mitigating Condition 1 only arises when an applicant has immediate family members or close acquaintances who are citizens or residents of a foreign country. The Appeal Board presumes that the fact of such foreign citizenship or residency creates a vulnerability to possible influence. Under such circumstances, it is impossible for an applicant to affirmatively prove that no attempt at exploitation or influence could ever occur in the future. It is not logical that the drafters of the Directive would implement a mitigating condition that could never apply.

It is helpful to consider the historical antecedents for this provision to shed light on the drafter's intent. The version of Mitigating Condition 1 set out in DoD Directive 5220.6 promulgated in January 1992, couched this mitigating condition in these terms. "Conditions that could mitigate security concerns include: (1) a determination that the immediate family

member(s) , cohabitant, or associate(s) in question would not constitute an unacceptable security risk." Clearly, the earlier version of MC1 did not establish a per se rule-rather it required the administrative judge to weigh all factors and determine whether the risk was "unacceptable."

Significantly, this earlier version of Mitigating Condition 1 is still in effect for security clearance cases for military members and civilian employees of DoD that are processed under DoD Regulation 5200.2-R. It is anomalous to apply a per se rule in some cases and a rule of reasonableness in others, where the implementing regulations require a uniform process.

It is also helpful to review a later-enacted version of the same guideline to determine the drafter's original intent. (*Branch v. Smith*, 538 U.S. 254, 281 (2003) (citing *United States v. Freeman*, 44 U.S. 556 (1845).) On December 29, 2005, the President approved the following new language to replace Mitigating Condition 1:

8. Conditions that could mitigate security concerns include: (a) the nature of the relationships with foreign persons, the country in which the persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.

Notably, the new language requires an administrative judge to weigh numerous factors and assess the likelihood that an individual will be placed in a position of conflict. Unlike the Appeal Board's present interpretation, the new language does not require an applicant to affirmatively prove that an attempt at influence is impossible, nor does it bar consideration of evidence that might mitigate or extenuate security concerns. Most importantly, when one considers the previous version of this rule, the general policy of the Directive, and this recent language, it is apparent that the drafters did not intend the present language to be interpreted as a per se rule as the Appeal Board now applies it.

Terrorism

The Appeal Board also construes Mitigating Condition 1 to make it inapplicable any time there is a history of terrorist acts within the foreign country in question. Obviously, this greatly decreases the chance that any applicant could obtain the benefit of Mitigating Condition 1.

As noted above, Mitigating Condition 1 applies where a judge determines the applicant's relatives and associates in a foreign country 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(s) involved and the United States." While the definition of "foreign power" from

50 U.S.C. § 438(6) (incorporating the definition from 50 U.S.C. § 1801(a)) includes terrorist groups, it also includes foreign governments, foreign-based political organizations, and foreign non-governmental organizations.

Mitigating Condition 1 does not, by its express terms, exclude from consideration applicants with relatives or associates in countries where terrorism has occurred, any more than it excludes person from countries where there are foreign governments, foreign political organizations, or foreign non-governmental organizations. Rather, it focuses on a very specific type of threat-the risk of a foreign power exploiting an applicant's foreign relatives in such a way as to cause an applicant to act adversely to the interests of the United States.

The Appeal Board holds Mitigating Condition 1 does not apply where there is a history of terrorist activity-of any kind-in the foreign country in question. (ISCR Case No. 03-22643, 2005 DOHA Lexis 159 (App. Bd. Jun. 24, 2005); ISCR Case No. 02-22461 at 5 (App. Bd. Oct. 22, 2005).) The Appeal Board justifies this as "a matter of common sense" arising from "the war on terrorism." (ISCR Case No. 01-26893, 2002 DOHA LEXIS 505, 22-23 n.2 (App. Bd. Oct. 16, 2002).) To appreciate the extent to which the Appeal Board will consider the risk of terrorist acts, it is helpful to review the opinion in ISCR Case No. 02-29403 at 5 (App. Bd. Dec. 14, 2004). There the Appeal Board declared "it is possible to envision several ways in which terrorists could pose a threat to classified information," and then went on to theorize extensively about what unspecified terrorists might do in hypothetical situations. While such things are possible, they do not fall within the limited language contained in Mitigating Condition 1 of the Directive. The fact that the U.S. is presently engaged in a war on terrorism is a matter to be considered along with all relevant facts; however, it does not amend Mitigating Condition 1 in the Directive.

"Heavy Reliance"

Under the Directive, ¶ E3.1.32.3, the Appeal Board's authority is limited to issues of law-it does not have the authority to conduct a *de novo* review of the case. To reverse the decision of an administrative judge, the Appeal Board must find a "legal" error. Frequently in cases under Guideline B, the Appeal Board finds legal error by concluding an administrative judge relied too heavily on a particular factor.

As noted above, the Appeal Board decided that evidence that a foreign country is hostile to the U.S. is so significant that it is legal error for an administrative judge to fail to consider it. At the same time, however, the Appeal Board holds that the fact that a foreign country has friendly relations with the U.S., or that it has long been a U.S. ally, is irrelevant. Moreover, when an administrative judge notes the history of friendly relations as part of the required discussion of all the facts, the Appeal Board infers "heavy reliance" by the administrative judge upon that fact and holds it was legal error.

For example, in ISCR Case No. 02-22461, 2005 WL 1381919 (Jan. 2, 2005), the administrative judge considered the security risk arising from an applicant's relatives in Taiwan. The judge wrote that "The following information about

Taiwan . . . is significant," and discussed the evidence the government counsel submitted for administrative notice. Later, while discussing the applicability of potentially mitigating conditions, the judge noted Taiwan's friendly relationship with the U.S. The judge went on to discuss at length specific facts unique to Applicant's situation making him a good candidate for a clearance, and eventually found in his favor. On appeal, the Appeal Board reasoned that the judge erred in relying too heavily on the finding that Taiwan was friendly. (ISCR Case No. 02-22461 at 6 (App. Bd. Oct. 27, 2005).)

The Appeal Board often employs this analysis to reverse decisions granting clearances under Guideline B. (*See* ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005); ISCR Case No. 02-23860, 2005 DOHA LEXIS 43 (App. Bd. Jun. 30, 2005); ISCR Case No. 03-23806, 2005 DOHA LEXIS 162 (App. Bd. Apr. 28, 2005); ISCR Case No. 02-02892, 2004 DOHA LEXIS 621 (App. Bd. Jun. 28, 2004); ISCR Case No. 02-11570, 2004 DOHA LEXIS 653 (App. Bd. May 19, 2004); ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 (App. Bd. Mar. 29, 2002).) Indeed, in the original decision in this case, I noted it was "helpful to consider several factors, including the character of the foreign country," and discussed various aspects of Saudi Arabia's government. (ISCR Case No. 02-21927 at 7 (Jan. 18, 2005).) The Appeal Board concluded this demonstrated inappropriate "heavy reliance" on the fact that Saudi Arabia is an ally of the U.S. (ISCR Case No. 02-21927 at 5 (App. Bd. Dec. 30, 2005).)

Shifting Burden of Proof/Persuasion

The Appeal Board frequently finds "legal error" by deciding that an administrative judge improperly shifted the burden of proof/persuasion to the government to disprove the application of Mitigating Condition 1. (The Appeal Board uses the terms "burden of proof" and "burden of persuasion" interchangeably; a discussion of the merits of that practice is beyond the scope of this discussion.) A careful examination of the cases in question reveals the Appeal Board's rationale for finding error is insufficient to justify reversing the decision of an administrative judge.

According to the Directive, ¶ E3.1.14, the department counsel is responsible for presenting evidence to establish controverted facts alleged in the Statement of Reasons. The Appeal Board interprets this as imposing on department counsel the burden of proving by substantial evidence that a disqualifying condition applies. (ISCR Case No. 02-30587, 2005 DOHA LEXIS 73 (App. Bd. Jun. 15, 2005).) Thereafter, an Applicant has the burden of persuasion as to obtaining a favorable security clearance. (Directive, ¶ E3.1.15.)

In cases arising under Guideline B, Foreign Influence, the Appeal Board holds an applicant must affirmatively prove that no one would in the future attempt to exploit them through their foreign relatives or associates. (As discussed above, this imposes the impossible burden of affirmatively proving that an event will not occur in the future.) In order for an applicant to persuade an administrative judge that he or she is not "in a position to be exploited by a foreign power," he or she often must rely on evidence that a foreign country has not engaged in exploitive behavior in the past, including the absence of any evidence of improper conduct. However, any time an administrative judge comments on the absence of evidence, the Appeal Board concludes the administrative judge improperly shifted the burden of proof to the government to disprove a mitigating condition. (ISCR Case No. 03-15485 (App. Bd. Jun. 2, 2005); ISCR Case No. 03-02382 (App. Bd. Feb. 15, 2005); ISCR Case No. 01-20908 (App. Bd. Nov. 26, 2003).)

The Appeal Board's rulings appear to be based upon the premise that "when a party has the burden of proof on a particular point, the absence of any evidence on that point requires a Judge to find or conclude that point against the party that has the burden of proof." (ISCR Case No. 99-0597, 2000 DOHA LEXIS 229 (App. Bd. Dec. 13, 2000).) However, the concept that the "absence of evidence" must always be deemed a failure of proof by the proponent is contrary to prevailing federal practice. Indeed, the concept that the absence of evidence can be used to prove a negative proposition is so well ingrained in the law that it is included among the statutory exceptions to the hearsay rule in Federal Rule of Evidence 803(7) (absence of entry in records of a regularly conducted activity) and Rule 803(10) (absence of public record or entry).

An applicant attempting to prove the applicability of Mitigating Condition 1 has the burden of proving a negative, i.e., that a foreign power is not likely to engage in exploitive conduct in the future, or has not done so in the past. Proving a negative can be difficult, of course. The law recognizes that the burden of proving a negative can be satisfied by proof which renders probable the existence of the negative fact. (*See Majestic Sec. Corp. v. Commissioner*, 120 F.2d 12, 14 (8th Cir. 1941) ("A negative proposition may appropriately be established by proof of an affirmative opposite."); *CareFirst of Md., Inc. v. First Care, P.C.*, 434 F.3d 263, 269 (4th Cir. 2006) ("the absence of any evidence of actual confusion over a substantial period of time - here, approximately nine years - creates a strong inference that there is no likelihood of confusion."); *Aetna Casualty & Surety Co. v. General Electric Co.*, 758 F.2d 319, 325 (8th Cir. 1985) (citing 22 C. J. *Evidence* § 15 (1940) "Whenever the establishment of an affirmative case requires proof of a material negative allegation, the party who makes such allegation has the burden of proving it, especially where the most appropriate mode of proof is by establishing the affirmative opposite of the allegation."); *Leonard v. St. Joseph Lead Co.*, 75 F.2d 390, 397 (8th Cir. 1935) ("A negative in its very nature usually is susceptible of no more than approximate proof, and generally is sufficiently proved by proving some affirmative fact or state of facts inconsistent with the affirmative of the proposition to be negated."); *Ake v. GMC*, 942 F. Supp. 869, 874 (D.N.Y. 1996) ("A lack of evidence of prior accidents is never conclusive proof that the defendant exercised due care, but it is a factor that the fact-finder could consider.").

Normally in cases presented under Guideline B, numerous documents are introduced as evidence of the nature of any security risk posed by the foreign country. Typically these discuss in some detail any history of a friendly or hostile relationship between the foreign power and the United States, the foreign country's human rights practices, and any reports of the history of intelligence-gathering activities by the foreign power. These documents constitute evidence of an "affirmative opposite" tending to establish the negative proposition. For example, evidence that the U.S. and a foreign government have security alliances is some evidence suggesting the foreign government would not act adversely to U.S. security interests. Similarly, where a document reflects the extent of any intelligence collecting activity, but does not include any indication that the foreign power has engaged in the kind of exploitive behavior which forms the basis for concern in Mitigating Condition 1, the absence of evidence is some proof, though not conclusive, that such exploitive behavior has not occurred.

Of course, the important point is that this "absence of evidence" is competent evidence upon which an applicant may rely in attempting to prove his or her case, and which an administrative judge is required to consider when weighing all the evidence. The simple fact that an administrative judge does so does not constitute an improper "shifting of the burden of proof."

A close examination of the cases where the Appeal Board has found "burden shifting" is revealing. For example, in ISCR Case No. 02-22461 (Jan. 5, 2005), the administrative judge carefully set out the proper burdens of proof for the government and the applicant, and found the government had presented evidence raising security concerns under the applicable guideline. The administrative judge then specifically reiterated that, "Once the government meets its burden of proving controverted facts, the burden shifts to an applicant . . ." (*Id.* at 6.) While discussing all the evidence bearing on the relationship between the foreign country in question and the United States, the administrative judge noted, "further, there is no indication that Taiwan has ever attempted to exploit any resident of Taiwan for the purpose of compromising a security clearance holder within the United States." (*Id.* at 7.) The administrative judge issued a favorable clearance decision and the government appealed. The Appeal Board concluded the administrative judge improperly shifted the burden of proof to the government to disprove the existence of a mitigating condition. (ISCR Case No. 02-22461 at 4 (App. Bd. Oct. 27, 2005).) However, a review of the original opinion reveals the administrative judge did not improperly shift the burden of proof; rather, he was commenting on the state of all the evidence, and making a permissible comment on what the evidence did or did not show. (*Compare* ISCR Case No. 02-31154 at 5-6) (Jan. 27, 2005) *with* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005) (finding "burden shifting"); *and* ISCR Case No. 03-16848 at 3-5 (Jan. 24, 2005) *with* ISCR Case No. 03-16848 at 8 (Aug. 30, 2005) (finding burden shifting).) The Appeal Board's rulings on this issue effectively deny applicants the opportunity to present favorable evidence under Mitigating Condition 1, thereby denying the due process afforded under Executive Order 10865 and Department of Defense Directive 5220.6.

Rebuttable Presumptions

The Appeal Board has also made it more difficult for an applicant to obtain a favorable decision in cases brought under Guideline B through its application of a "rebuttable presumption," long recognized by the courts as a "troublesome evidentiary device." (*Ulster County Court v. Allen*, 442 U.S. 140, 157 (1979).) The Appeal Board created "a rebuttable presumption that an applicant has ties of affection for, or obligation to, his spouse's immediate family members." (ISCR Case No. 01-03120 at 4 (App. Bd. Feb. 20, 2002).) As applied to these administrative cases, the Appeal Board's presumption is not rationally based and exceeds the scope of its authority.

A rebuttable presumption requires the fact-finder to find the presumed element unless the applicant persuades him or her that such a finding is unwarranted. (*Francis v. Franklin*, 471 U.S. 307, 314 (1985).) Under Rule 301 of the Federal Rules of Evidence (which serve as a guide for administrative hearings under the Directive, ¶ E3.1.19) "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption." In other words, a presumption places upon the opposing party the burden of establishing the non-existence of the presumed fact.

In order for a presumption to meet basic requirements of due process, there must be a "rational connection between the fact proved and the ultimate fact presumed." (*Tot v. United States*, 319 U.S. 463, 467 (1943).) A presumption is "'irrational' or 'arbitrary,' and hence, unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." (*Leary v. United States*, 395 U.S. 6, 36 (1969); *Barnes v. United States*, 412 U.S. 837, 841-43 (1973).)

It is important to keep in mind that the presumption only arises in the narrow circumstance where an Applicant, a U.S. citizen, is married and his or her spouse has immediate family members who are citizens or residents of a foreign country. In such cases, the immediate family members normally reside in a foreign country; often the applicant has never met them or has only met them a few times, and cannot speak their language. Comparing the proved fact (the applicant's spouse's immediate family members are citizens or residents of a foreign country) and the presumed fact (the applicant has close ties of affection or obligation to them), it is readily apparent they do not coincide. Considering the normal circumstances for cases under Guideline B, there is no rational basis for the presumption that an applicant has ties of affection or obligation to his spouse's immediate family members.

The presumption fashioned by the Appeal Board also has the effect of re-writing and expanding the scope of Disqualifying Condition 1 under Guideline B. As currently written, the Directive, ¶ E2.A2.1.2.1, lists as a condition that could raise a security concern: "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." Paragraph E2.A2.1.3.1 of the Directive defines immediate family members" as "spouse, father, mother, sons, daughters, brothers, sisters." As written, Disqualifying Condition 1 is raised-essentially automatically-where there is evidence that immediate family members are citizens or residents of a foreign country. For Disqualifying Condition 1 to apply to anyone else, it must be also shown that the applicant has close ties of affection or obligation to them. By applying the presumption, the Appeal Board has effectively re-written Disqualifying Condition 1, expanding it to automatically apply where an applicant's spouse has immediate family members who are foreign citizens or residents. Of course, had the drafters of the Directive intended that application, they could have written DC 1 that way. However, the drafters did not do so, and it is beyond the authority of the Appeal Board to expand the scope of DC 1 through a rebuttable presumption.

Result

Comparing the balanced provisions of the Executive Order and the Directive against the absolute standards applied by the Appeal Board in Guideline B cases, it appears the Appeal Board's rulings are not consistent with the Directive. Where the Appeal Board's rulings are inconsistent with the policy and terms of the Directive, it creates enormous difficulties for administrative judges, who are torn between their responsibility to properly apply the Directive and the requirement in remand cases to correct the errors identified by the Appeal Board. (Directive, ¶ E3.1.35.) In such circumstances, the recommended practice is to follow the decision of the higher body, leaving to superior courts the prerogative of overruling incorrect decisions. (*Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 484 (1989).) Of course, federal courts have the authority to compel agencies to follow their own regulations. (*Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 892-93 (1960); *Hill v. Department of the Air Force*, 844 F.2d 1407, 1412 (10th Cir. 1988).) Until a higher court intervenes, we are bound by the Appeal Board's holdings.

CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Guideline C, Foreign Preference

In my original opinion, I found the evidence sufficient to raise potential security concerns under Guideline C, Foreign Preference. However, after considering all the available evidence and the "whole person" concept, I concluded Applicant mitigated all the security concerns arising under Guideline C, and found in his favor. The Appeal Board found no error in the analysis. For the reasons stated in my previous decision, I conclude Applicant mitigated the security concerns arising under Guideline C of the Directive.

Guideline B, Foreign Influence

Paragraph E2.A2.1.2.1 of the Directive provides that it may be a disqualifying condition if "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." Paragraph E2.A2.1.3.1 defines "immediate family members" to include a spouse, father, mother, sons, daughters, brothers, and sisters. Applicant has a mother, three brothers, and two sisters who are citizens and residents of Saudi Arabia. Applicant maintains regular contact with his mother and siblings. These circumstances are sufficient to raise possible security concerns.

Under ¶ E2.A2.1.2.3 of the Directive, it may be disqualifying where "[r]elatives . . . are connected with any foreign government." Two of Applicant's brothers are pilots for the national airline and Applicant's sisters are retirees from the national school system. I find the evidence raises this potentially disqualifying condition.

Under the Directive, these potentially disqualifying conditions may be mitigated, either through the application of specific mitigating conditions or the "whole person" concept described above. When the Government produces evidence raising potentially disqualifying conditions, an Applicant has the burden to produce evidence to rebut, explain, extenuate, or mitigate the conditions. (Directive, ¶ E3.1.15.) The government never has the burden of disproving a mitigating condition. (ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).)

Paragraph E2.A2.1.3.1 of the Directive provides that it is potentially mitigating where the "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 involved and the United States." As noted above, applicants must establish: (1) that the individuals in question are not "agents of a foreign power," and (2) that they are not in a position to be exploited by a foreign power in a way that could force the applicant to choose between the person(s) involved and the United States. (ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004).)

In my original decision, I concluded none of Applicant's relatives met the definition of "agent of a foreign power" under 50 U.S.C. § 1801(b). Department counsel did not raise that finding as error on appeal, and the Appeal Board concluded the finding was not at issue on appeal.

The second prong of the test is whether the relatives in question are "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.) The federal statute, 50 U.S.C. § 1801(a), defines "foreign power" to include: a foreign government; a faction of a foreign nation; an entity openly acknowledged by a foreign government to be controlled by that foreign government; a group engaged in international terrorism; a foreign-based political organization; or an entity directed and controlled by a foreign government.

In my original decision, I weighed Applicant's connection to his family in Saudi Arabia against his strong ties to the United States and determined that Applicant's connections to relatives in Saudi Arabia did not create a significant security risk; therefore I found that this mitigating condition applied in Applicant's favor. The Appeal Board found error with that conclusion on the grounds that "Applicant has presented no evidence to show that his sense of family obligation to his relatives in Saudi Arabia, and hence his vulnerability, are diminished by his ties to the United States." (ISCR Case No. 02-21927 at 5 (App. Bd. Dec. 30, 2005).) As noted above, the Appeal Board holds it is irrelevant whether an applicant is likely to be improperly influenced by a foreign relative or associate. Applying that standard, this potentially mitigating condition does not apply.

The "Whole Person" Concept.

Contrary to the assertions of Department Counsel, the "whole person" concept-not the potentially disqualifying or mitigating conditions-is the heart of the analysis of whether an applicant is eligible for a security clearance. (Directive, ¶ E2.2.3.) Indeed, the Appeal Board has repeatedly held that an administrative judge may find in favor of an applicant where no specific mitigating conditions apply. (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).)

In assessing whether an applicant is vulnerable to exploitation through relatives or associates in a foreign country, it is

necessary to consider all relevant factors. As noted above, ¶¶ E2.2.1, E2.2.2, and E2.2.3 of the Directive specifically require each administrative judge to consider all the facts and circumstances, including the "whole person" concept, when evaluating each individual case. To ignore such evidence would establish a virtual per se rule against granting clearances to any person with ties to persons in a foreign country, contrary to the clear terms of the Directive. "Although the position of an applicant's foreign family members is significant and may preclude the favorable application of Foreign Influence Mitigating Condition 1, the totality of an applicant's conduct and circumstances (including the realistic potential for exploitation) may still warrant a favorable application of the relevant general factors." (ISCR Case No. 03-17620 at 4 (App. Bd. Apr. 17, 2006) (footnotes omitted); *accord* ISCR Case No. 03-23259 at 3 (App. Bd. May 10, 2006).)

One of the "whole person" factors which must be considered is "the potential for pressure, coercion, exploitation, or duress." (Directive, ¶ E2.2.1.8.) In that regard, an important factor for consideration is the character of any foreign power in question, including the government and entities controlled by the government, within the relevant foreign country. This factor is not determinative; it is merely one of many factors which must be considered. Of course, nothing in Guideline B suggests it is limited to countries that are hostile to the United States. (*See* ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002); ISCR Case No. 00-0489 at 12 (App. Bd. Jan. 10, 2002).) The Appeal Board repeatedly warns against "reliance on overly simplistic distinctions between 'friendly' nations and 'hostile' nations when adjudicating cases under Guideline B." (ISCR Case No. 00-0317 at 6 (App. Bd. Mar. 29, 2002)). It is well understood that "[t]he United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." (ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).) Distinctions between friendly and unfriendly governments must be made with extreme caution. Relations between nations can shift, sometimes dramatically and unexpectedly. Moreover, even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, friendly nations have engaged in espionage against the United States, especially in economic, scientific, military, and technical fields. (ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).) Nevertheless, the relationship between a foreign government and the U.S. may be relevant in determining whether a foreign government or an entity it controls is likely to attempt to exploit a resident or citizen to against the U.S. through the applicant. The nature of the foreign government might also relate to the question of whether the foreign government or an entity it controls would risk jeopardizing its relationship with the U.S. by exploiting or threatening its private citizens in order to force a U.S. citizen to betray this country. A friendly relationship is not determinative, but it may make it less likely that a foreign government would attempt to exploit a U.S. citizen through relatives or associates in that foreign country.

The government of Saudi Arabia is a monarchy, and the government is based upon Islamic law. (Ex. I at 1.) Saudi Arabia has a history of good relations with the U.S., including extensive economic ties and cooperation on issues of regional security. (Ex. II at 7.) Saudi Arabia is an important ally in the war on terrorism. (*Id.*) These factors are not determinative, but suggest it is less likely that Saudi Arabia would attempt to exploit its residents or citizens to act adversely to the interests of the United States in the future. On the other hand, there are "foreign powers," including terrorists, operating within Saudi Arabia whose interests are clearly adverse to those of the United States. (Ex. III; Ex. V.) These terrorists pose a threat to the personal safety of residents of Saudi Arabia. The available evidence reveals a history of terrorist groups threatening to injure or kill U.S. citizens and residents of Saudi Arabia; at the same time, it shows no history of foreign powers in Saudi Arabia exploiting citizens or residents in such a way as to cause or attempt to cause their relatives in the U.S. holding a security clearance to act adversely to U.S. interests. This evidence is not dispositive, but tends to suggest that the specific risk addressed by this mitigating condition is minimal.

In this regard it is helpful to consider Applicant's relatives' vulnerability to exploitation by foreign powers in Saudi Arabia. Applicant's father is deceased. His mother is about 70 years old, and a retired homemaker who lives with one of Applicant's brothers. She has no connection to the government. This reduces her vulnerability to the government in Saudi Arabia. Applicant's brothers and sisters are residents of Saudi Arabia and work for organizations controlled by the government.

It is also important to note that the mitigating condition in ¶ E2.A2.1.3.1 of the Directive focuses on whether a relative or associate of an applicant is in a position to be exploited by a foreign power in such a way as to have an applicant act adversely to the interests of the United States. It does not apply where a relative or associate may be vulnerable to criminal offenses or even acts of terrorism, unless they could cause an applicant to act against U.S. interests. Considering all the available evidence, I find Applicant's relatives are no more vulnerable to terrorist groups in Saudi Arabia than any other resident.

Applicant is a mature individual with an impressive history of service to this country, including years of work on projects for the U.S. government following a trustworthiness determination. (Directive, ¶ E2.2.1.4.) He used his Saudi passport to travel to Saudi Arabia on two occasions after becoming a U.S. citizen, but his motivation was to assist his wife during her U.S. government-sponsored tour and to attend his father's funeral, rather than any preference for Saudi Arabia. (Directive, ¶ E2.2.1.7.) Applicant has strong ties to this country. He has lived and worked here more than half his life, and considers himself an American in every way. His wife is a U.S. citizen. All of Applicant's substantial personal assets are in this country. He has no financial interests in another country. His professional experience and standing within his professional community are with firms in the United States. As discussed above, Applicant's vulnerability to exploitation through his relatives in Saudi Arabia is low. Because of Applicant's deep and long-standing relationships and loyalties in the U.S., he can be expected to resolve any conflict of interest in favor of the United States. I find the potential for pressure, coercion, exploitation, or duress does not constitute a security risk. (Directive, ¶ E2.2.1.8.)

I considered carefully the "whole person" concept, keeping in mind that any doubt as to whether access to classified information is clearly consistent with national security must be resolved in favor of the national security. I conclude Applicant has mitigated any potential security concerns arising from Applicant's family ties to Saudi Arabia.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline C: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Paragraph 2, Guideline B: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: 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.

Michael J. Breslin

Administrative Judge