

DATE: December 31, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23979

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq. Department Counsel

FOR APPLICANT

Roger L. Meyer, Esq.

SYNOPSIS

Applicant is a 56 year old employee of a defense contractor. He was born in Sudan in 1947, and he first came to the United States in 1975. He became a naturalized United States citizen in 1986. Applicant's immediate family members, including his father, parents-in law, and his seven siblings are citizens of and reside in Sudan. 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 May 7, 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, or denied. The SOR was based on foreign influence (guideline B) concerns because of the foreign residency and/or citizenship of close family members (father, parents-in law, brothers, and sisters).

Applicant filed a signed and sworn, notarized response, dated June 12, 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 assigned to this Administrative Judge on August 11, 2003, to conduct a hearing. A Notice of Hearing was issued to the parties on August 22, 2003, and the hearing was held on September 9, 2003, and September 10, 2003.

At the hearing, Department Counsel offered three documentary exhibits (Government Exhibits 1 through 3), and no witnesses were called. Applicant, through counsel, offered one documentary exhibit (Applicant Exhibit A) and offered

the testimony of three other witnesses 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 the majority of Applicant's immediate family members reside in and are citizens of Sudan, and they may be subject to duress. The SOR contains seven allegations, i.e. through i.g., under Guideline B (Foreign Influence). In his response to the SOR, Applicant denies i.e. and admits all the other allegations. The admitted 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 56 year old employee of a defense contractor. He was born in Sudan in 1947. He first came to the United States in 1975 for less than one year to work here on an interim basis. In 1977 he returned to the United States to enter a masters program, and he received his degree in civil engineering from a United States university in 1979. He became a naturalized United States citizen in 1986.

His wife, whom he married in 1983, was born in Sudan and is now a United States citizen. They have three children, who were born in the United States.

Applicant is a principal of a consulting engineering company which is a defense contractor. Applicant has been extremely successful in his business and has a significant financial net worth in the United States (Tr at 88).

Applicant's father is a citizen of and resides in Sudan. He has weekly telephonic contact with his father. Applicant has traveled to Sudan every year since 1994 to visit his father, and he gives him a few hundred dollars during each visit (Tr at 96, 97). Applicant testified that his father is retired.

Applicant's father-in-law and mother-in-law are also citizens of and reside in Sudan. He testified that neither of them have worked for the government of Sudan. Applicant has seven siblings, who are citizens of and reside in Sudan. Applicant also has one brother who resides in Saudi Arabia, and one who is a citizen of and resides in the United Kingdom. He testified that none of his brothers or sisters work for the government of Sudan. Applicant e-mails his brother in the United Kingdom and a niece in the Sudan each approximately five or six times a year (Tr at 94, 95).

In addition to Applicant, three witnesses testified on behalf of Applicant. All three witnesses have known applicant for a significant length of time and were aware of Applicant's background and the concern of the Government regarding Applicant's potential foreign influence problems with Sudan. They all strongly recommended him for a position of trust without any reservations.

Applicant introduced a lease agreement between himself and the Government of the United States (Exhibit A) which establishes that Applicant has leased the apartment, which he owns in Egypt, to the United States Government for the period August 15, 2003, to August 14, 2008.

I have taken official notice of Exhibit 2, "Issue Briefing of Congress," dated January 23, 2003, and prepared by the Congressional Research Service, which was offered into evidence by Department Counsel and stipulated to by Applicant's Counsel. The report states, "Sudan is considered a rogue state by the United States because of its support of international terrorism, although in recent years it has taken some measures to improve its record." The report continues that while there has been some recent, limited cooperation by Sudan, a number of terrorist groups continue to use Sudan as safe haven. "In November 2001, President Bush renewed U.S. bilateral sanctions on Sudan and the State Department kept Sudan on the terrorism list."

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."

CONCLUSIONS

Based on the evidence of record, the Government has established a reason to deny Applicant a security clearance because of foreign influence. Applicant's immediate family members, his father, his parents-in-law and his seven siblings are citizens of and reside in Sudan. 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). As Applicant's immediate family members are citizens of and reside in Sudan, a country which is undisputedly hostile to the Government of the United States, and which fosters terrorism, 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 substantial burden.

Based on the current status of Sudan, the extremely close ties that Applicant has, primarily with his father but also with his siblings, which have manifested themselves in weekly telephone calls and yearly visits to visit his father and the rest of the family in Sudan, Disqualifying Condition E2.A2.1.2.1. applies. Because of these factors, 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.

At the hearing Applicant testified to a hypothetical question that he would not betray the United States if his family was threatened (Tr. at 100-102). 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 although his answer was credible. ISCR Case No. 02-26826 (November 12, 2003). Applicant's apartment in Egypt is now leased by the United States Government until August 2008. It does not have negative security concern.

Applicant has failed to mitigate the security concerns discussed in the SOR, thereby failing to demonstrate that it is clearly consistent with national security to grant him the clearance. Guideline B is found against Applicant.

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.: Against Applicant

Subparagraph 1.g.: 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