

KEYWORD: Foreign Influence

DIGEST: Applicant's father, a citizen and resident of the U.S., is a lawyer who has provided legal services to the Saudi Arabian embassy since 1985, pursuant to an annual, renewable, "at will" contract. Applicant's sister is a citizen of Sudan, a permanent resident of the U.S., and a U.S. government employee who intends to become a U.S. citizen. Applicant visited her extended family in Sudan for one month in 2001 but has had no further contact with them. The security concern based on foreign influence is mitigated. Clearance is granted.

CASENO: 03-22861.h1

DATE: 10/31/2005

DATE: October 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22861

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

Kathryn MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's father, a citizen and resident of the U.S., is a lawyer who has provided legal services to the Saudi Arabian embassy since 1985, pursuant to an annual, renewable, "at will" contract. Applicant's sister is a citizen of Sudan, a permanent resident of the U.S., and a U.S. government employee who intends to become a U.S. citizen. Applicant visited her extended family in Sudan for one month in 2001 but has had no further contact with them. The security concern based on foreign influence is mitigated. Clearance is granted.

STATEMENT OF THE CASE

On December 7, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny Applicant a security clearance. This action was taken 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 (Directive). The SOR alleges security concerns under Guideline B (Foreign Influence). It alleges Applicant traveled to Sudan in 2000 to visit extended family members (§ 1.a.), her father works for the Saudi Arabian Embassy as an international lawyer (§ 1.b.), and her sister is a citizen of Sudan who resides in the U.S. (§ 1.c.).

Applicant answered the SOR in writing on February 7, 2005, admitted the allegations, offered explanations, and requested a hearing. The case was assigned to me on July 5, 2005. On July 22, 2005, DOHA issued a Notice of Hearing setting the case for September 2, 2005. The case was heard as scheduled, and DOHA received the transcript (Tr.) on September 16, 2005.

FINDINGS OF FACT

Applicant's admissions in her answer to the SOR and at the hearing are incorporated into my findings of fact. I also make the following findings:

Applicant is a 26-year-old employee of a defense contractor, working at a military medical research center. Her parents were born in Sudan, and they are both naturalized U.S. citizens. Applicant came to the U.S. as a 6-month-old infant, attended grade school, high school and college in the U.S. and was raised as an American. She was naturalized as a U.S. citizen in September 1999 along with her parents. She does not speak Arabic, has no contact with or interests in Sudan, and has had no contact with her extended family in Sudan except for the one visit in 2001.

Applicant's father is a lawyer, licensed to practice in the U.S. as a foreign legal consultant. He obtained a law degree from Cairo University in 1976. He came to the U.S. from a suburb of Khartoum, Sudan, in 1979 for postgraduate studies, obtained master's degrees in comparative law and corporation law in the U.S., and became a U.S. citizen in 1999.⁽¹⁾ He has worked as a contractor for the Commercial Economic Attache's Office in the Saudi Arabian Embassy since 1985. He has a one-year contract with the embassy that has been renewed each year until the present. He works "at will," and either he or the embassy may terminate the contract at any time. He translates U.S. laws into Arabic, advises the embassy on U.S. trade and customs laws, and he acts as a mediator of disputes between U.S. and Saudi companies. He is not a diplomat, has no contact with the diplomatic staff, and takes no part in policymaking or diplomatic activities of the embassy. He has no interaction with the Saudi Minister of Commerce and does not travel to Saudi Arabia.⁽²⁾

Applicant's father also has a private law practice. Some of his clients are American but most are foreigners. They include citizens of Sudan, Egypt, Morocco, Eritrea, and Senegal.⁽³⁾

Applicant has five siblings. Three are native-born U.S. citizens. Applicant and one sibling became U.S. citizens at the same time their parents were naturalized. Applicant's oldest sister was more than 21 years of age and could not be naturalized as a family member. She is a permanent U.S. resident, working as a temporary employee of the U.S. Government. She is married to a Sudanese refugee, but they are estranged and living apart. Applicant's father believes they may be divorced or separated. She has applied for U.S. citizenship, and expects to be naturalized in March 2006.⁽⁴⁾

Applicant and her family visited Sudan for about one month in 2001, to visit her father's brother, sister, aunt, uncle, and cousins. They used their U.S. passports.⁽⁵⁾ Applicant's father has little contact with his family in Sudan. He writes a letter to his brother about once a year and talks to his sister every one or two years. His brother was a clerk in the

Sudanese Ministry of Telecommunications but is now retired; his sister is a housewife.⁽⁶⁾

A department head in the U.S. government agency supported by Applicant's employer regards her as an "exceptional employee."⁽⁷⁾ Applicant's immediate supervisor for two years, a U.S. citizen holding a security clearance, testified she has been a dedicated and responsible employee.⁽⁸⁾ Applicant's college roommate, now working as U.S. Government employee with a security clearance, has known Applicant since high school. She testified Applicant is a very loyal U.S. citizen, and a "very kind, diligent, hardworking individual."⁽⁹⁾ A friend and neighbor, also a U.S. Government employee with a security clearance, testified she has known Applicant since her high school days and regards her as very dedicated and responsible.⁽¹⁰⁾

Sudan is governed by a military dictatorship with a progovernment parliament. It has been racked by civil war, with an estimated two million Sudanese killed and four million internally displaced. Sudan has been identified by the U.S. State Department as a state sponsor of terrorism since 1993.⁽¹¹⁾ None of Applicant's extended family members were affected by the civil unrest in Sudan.⁽¹²⁾

Saudi Arabia is a monarchy with a council of ministers and a consultative council. Despite economic ties and close cooperation between the U.S. and Saudi Arabia on security issues, the U.S. has expressed concern about human rights conditions in Saudi Arabia. Several terrorist groups operate from within Saudi Arabia and receive funding from benefactors in Saudi Arabia. Relations between Saudi Arabia and the U.S. were strained after the terrorist attacks on September 11, 2001. Currently, Saudi Arabia is an important partner of the U.S. in the global war on terrorism, providing assistance in the military, diplomatic, and financial areas.⁽¹³⁾

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

A security risk may exist when an applicant's immediate family, or 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. Directive ¶ E2.A2.1.1. A disqualifying condition (DC 1) may arise when "[a]n immediate family member [spouse, father, mother, sons, daughters, brothers, sisters], or a person to whom the individual has close ties of affection or obligation, is a citizen of,

or resident or present in, a foreign country." Directive ¶ E2.A2.1.2.1.

Applicant is not bound by affection, influence, or obligation to her extended family in Sudan. She visited her aunt and uncle once in 2001, cannot communicate with them because of the language barrier, and has no other contact with them. However, her sister is a citizen of Sudan. Thus, DC 1 is established by her sister's citizenship.

A disqualifying condition (DC 3) may arise if an individual has relatives "who are connected with any foreign government." Directive ¶ E2.A2.1.2.3. Applicant's father's contract with the Saudi Arabian embassy establishes DC 3.

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members . . . 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 ¶ E2A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to chose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004). Since the Government produced substantial evidence to establish DC 1 and DC 3, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003).

Guideline B is not limited to countries hostile to the United States. "The 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). The distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of a nation's government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the

government, or the country is known to conduct intelligence operations against the U.S.

Although Applicant's father is "connected" with Saudi Arabia, he meets the first prong of MC 1 because he is not an agent of a foreign power. In 50 U.S.C. § 1801(b), "agent of a foreign power" is defined as:

(1) any person other than a United States person, who -

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) [international terrorist groups] of this section;

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United State indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities;
or

(2) any person who -

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefore, for or on behalf of a foreign power;

(D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while

in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or

(E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C), or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

Applicant's father does not fall within § 1801(b)(1) because he is not "a person other than a United States person." He does not fall within § 1801(b)(2) because he is not engaged in clandestine intelligence activity, sabotage or international terrorism, nor has he used a false or fraudulent identity or aided, abetted, or conspired with any person to violate §§ 1801(b)(2)(A)-(E).

The Appeal Board appears to have adopted a definition of "agent of a foreign power" that is broader than the statutory definition, equating it to any employee of a foreign government. In ISCR Case No. 02-24254, 2004 WL 2152747 at **4-5 (App. Bd. Jun.29, 2004), the Appeal Board held, "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." The Appeal Board did not mention 50 U.S.C. § 1801(b) in its decision and has not discussed the applicability of the statutory definition in any of its earlier decisions. Even under this apparently broader definition, however, Applicant's father is not an agent of a foreign power because he is an independent contractor, not an employee of the Saudi Arabian government.

Applicant's father also satisfies the second prong of MC 1. He is a citizen and resident of the U.S., not subject to the authority of the Saudi government. He is not involved in diplomacy or policymaking. He is an American lawyer providing legal services to a client. He is an independent contractor, free to leave at will, and not subject to the control of Saudi diplomats. He has a private law practice and is not wholly dependent on the Saudi government for his livelihood. He is not subject to any more foreign influence than any other American lawyer providing legal services to a foreign government.

Applicant's sister clearly is not an agent of a foreign power. To the contrary, she is an employee of the U.S. Government. She is estranged from her Sudanese spouse. She soon will be a U.S. citizen. She is not subject to any greater foreign influence than she would be if she already were a U.S. citizen.

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." Applicant's travel to Sudan in 2001 has no security significance other than as evidence regarding her attachment to her extended family. Applicant's contact with her extended family in Sudan began and ended with her one-time visit in 2001. During that visit, her contact was limited by the language barrier. MC 3 is established for her extended family.

After weighing the disqualifying and mitigating conditions, considering the totality of Applicant's family ties as well as each individual family tie, and evaluating all the evidence on the context of the whole person, I conclude Applicant has mitigated the security concern based on foreign influence.

FORMAL FINDINGS

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

Paragraph 1. Guideline B (Foreign Influence): FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

DECISION

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

LeRoy F. Foreman

Administrative Judge

1. Tr. 63, 82; Applicant's Exhibit A, p. 6.
2. Tr. 58-59, 65-74.
3. Tr. 59, 74-76.
4. Tr. 77-81, 112..
5. Tr. 64.
6. Tr. 83-85.
7. Applicant's Exhibit L.
8. Tr. 95-96.
9. Tr. 100.
10. Tr. 106-07.
11. At Department Counsel's request, I took administrative notice of the facts concerning Sudan's government, internal strife, and sponsorship of terrorism, based on Hearing Exhibits (HX) I through VII. These documents are incorrectly identified in the transcript as government exhibits.
12. Tr. 89.
13. At Department Counsel's request, I took administrative notice of the facts concerning the government of Saudi Arabia and terrorist activities supported and operating from within Saudi Arabia. *See* HX VIII through XIII.