

DATE: November 8, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04172

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

James L. Banks, Jr., Esq.

SYNOPSIS

Applicant has successfully mitigated the foreign preference security concern based on his clear preference for the U.S. But he is unable to successfully mitigate the foreign influence security concern based on (1) his family ties to Iran, and (2) his travel to Iran in 1998 and 2001 using an Iranian passport to visit his family members. Clearance is denied.

STATEMENT OF THE CASE

On March 11, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline B for foreign influence and Guideline C for foreign preference. In his Answer to the SOR, dated April 5, 2004, Applicant admitted to the factual allegations in SOR subparagraphs 1.a, 1.b, 2.a, and 2.b; he also requested a hearing.

Department Counsel indicated he was ready to proceed on June 17, 2004, and the case was assigned to me June 28, 2004. A notice of hearing was issued July 2, 2004, scheduling the hearing for July 30, 2004. Applicant appeared with counsel and the hearing took place as scheduled. The record was left open for Applicant to submit proof he surrendered his Iranian passport. Counsel for Applicant submitted documentary evidence of the surrender on August 16, 2004, and those matters are marked and admitted into the record as Exhibit B. I received the transcript August 16, 2004.

FINDINGS OF FACT

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

Applicant is a 48-year-old married man who was born in Iran to Iranian parents in 1956. He became a naturalized U.S. citizen in 1988. He is employed as a senior principal engineer for a nonprofit scientific research and system engineering

company. He is seeking to retain a secret-level security clearance granted to him by the Defense Department in 1990. He has also held a Department of Energy Q-level security clearance. Applicant has had access to classified information during this time, and he has never been accused of or cited for mishandling or improperly safeguarding classified information.

Applicant was born, raised, and educated in Iran until 1974. The then 18-year-old Applicant entered the U.S. via a student visa to pursue higher education. He earned a B.S. in nuclear engineering from a state university in 1978. In June 1979, he returned to Iran to visit his mother and family. This trip took place after the fall of the Shah of Iran in February 1979. He stayed in Iran about two months before returning to the U.S. Applicant experienced no problems during his stay. Upon returning to the U.S., Applicant resumed his education earning a master's degree in mechanical engineering in 1983. Applicant is currently pursuing a Ph.D. degree in mechanical engineering on a part-time basis.

While studying for his master's degree, Applicant met a young woman whom he married in 1982. She was born in Canada, and she obtained U.S. citizenship in 1983. Sometime between 1984 and 1985, Applicant obtained resident alien status, commonly known as a green card, based on his marriage to a U.S. citizen. In early 1988, Applicant applied for U.S. citizenship, which was granted in September 1988. Applicant and his wife have two daughters, both native-born U.S. citizens, ages 17 and 15.

Applicant has family members who are citizens of and residents in Iran. Applicant describes his family as very pro-western, and that religion was never a big part of their family life. To illustrate his point, Applicant noted that he married a Catholic. Applicant's father was a farmer and he passed away in 1966. Applicant's mother worked many years as a professional educator in Iran. She is a citizen of Iran, but is a resident alien of the U.S. She lives with either Applicant and his family in the U.S. or with Applicant's sister who is also located in the U.S.

Applicant has one brother, two sisters, and two-half brothers. Applicant's sister in the U.S. obtained U.S. citizenship in 1999. The four other siblings live in Iran, and of the four, Applicant is closest to his sister. She earned a college degree in chemical engineering in the U.S. and returned to Iran. She is employed by the National Iranian Oil Company, which is part of Iranian Ministry of Petroleum. Over the past 25 years, Applicant has seen this sister four times, twice when she traveled to the U.S. in 1988 and 2003, and twice when he traveled to Iran in 1998 and 2001. On average, Applicant communicates with this sister a few times per year. Applicant's older brother in Iran is employed as an electrical technician for a private company. Applicant and his brother never got along and have a distant relationship. Over the past 25 years, Applicant's only contact with his brother was during his two trips to Iran. Applicant has virtually no relationship or contact with his two half-brothers. The half-brothers are the product of Applicant's father's first marriage, they are approximately 60 and 63 years old, and they are retired. Applicant has almost no contact with these men due to family friction. Applicant provides no financial support to any of his four siblings in Iran.

Since obtaining U.S. citizenship in 1988, Applicant has traveled twice to Iran for family visits. The trips took place during March 1998 and May - June 2001, and he used an Iranian passport for this travel. The passport was issued in February 1998 in Washington, D.C., with an expiration date of February 2003. The passport identified Applicant as a resident of the U.S. He used the Iranian passport to enter and depart Iran during his two trips. As he held a security clearance when he made the two trips to Iran, Applicant reported his travel plans to his company security officer. He was briefed before he made each trip, and he was debriefed upon his return. He experienced no problems or difficulties with Iranian officials or authorities during these two trips. In August 2004, Applicant delivered his expired Iranian passport to the Iranian Interests Section, located in the Embassy of Pakistan in Washington, D.C.

Applicant considers himself a U.S. citizen only, but recognizes that in the eyes of the Iranian government he is considered an Iranian citizen. To that end, he is willing to renounce his Iranian citizenship based on his birth in Iran.

Applicant has zero financial interests in Iran, but he does have financial interests in the U.S. His annual salary is in the six-figure range, he and his spouse own a rather expensive home, and he has accumulated money in various accounts (e.g., retirement account).

As requested by Department Counsel and without objections, I took administrative notice of the certain facts concerning Iran as specified by Department Counsel in Exhibits 5, 6, 7, 8, and 9.

Two specific areas are highlighted as follows:

- The February 11, 1979, fall of the Shah of Iran, a key U.S. ally, opened a long rift in U.S.-Iranian relations. On November 4, 1979, radical students seized the U.S. Embassy in Tehran and held its diplomats hostage until minutes after President Reagan's inauguration on January 20, 1981. The United States broke relations with Iran on April 7, 1980, and the two countries have had no official dialogue since. Iran maintains an interests section in the Embassy of Pakistan. The U.S. protecting power in Iran is Switzerland. The U.S. Government prohibits most trade with Iran. The U.S. Government has special concerns about four areas of Iranian behavior: (1) its efforts to acquire weapons of mass destruction; (2) its support for and involvement in terrorism; (3) its support for violent opposition to the Middle East peace process; and (4) its dismal human rights records (Exhibit 5, at pp. 6-7).

As requested by Applicant and without objections, I took administrative notice of certain facts concerning Iran as specified by Applicant's Counsel in Exhibit A, a U.S. State Department Consular Information Sheet for Iran. In particular, the State Department advises that (1) U.S.-Iranian nationals are considered Iranian nationals by Iranian authorities, (2) such persons have been denied permission to depart Iran documented as U.S. citizens, and (3) such persons are advised to use an Iranian passport to enter and depart the country.

POLICIES

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

In August 2000, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASDC3I), issued a policy memorandum--the so-called Money Memorandum, because it is signed by Assistant Secretary Arthur L. Money--clarifying the application of the foreign preference security guideline for cases involving possession and/or use of a foreign passport. In pertinent part, the Money Memorandum "requires that any clearance be denied or revoked unless the applicant surrenders the foreign passport or obtains approval for its use from the appropriate agency of the United States Government."

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ There is no presumption in favor of granting or continuing access to classified information.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁵⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽⁸⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

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

CONCLUSIONS

1. Guideline C-Foreign Preference

Under Guideline C, a security concern may exist when a person acts in such a way as to indicate a preference for a foreign country over the U.S. In particular, the exercise of dual citizenship raises a security concern because the active exercise of foreign citizenship may indicate a preference for that foreign country over the U.S. Of course, dual citizenship by itself is not automatically a security concern. Absent the exercise of dual citizenship or indicia of some affirmative action demonstrating foreign preference, mere possession of foreign citizenship by virtue of birth does not fall within the scope of Guideline C.

Here, based on the record evidence as a whole, the government has established its case under Guideline C. By his affirmative actions, Applicant exercised dual citizenship by obtaining, possessing, and using an Iranian passport after obtaining U.S. citizenship. By doing so, Applicant demonstrated a preference for Iran. Under these circumstances, DC 1⁽¹¹⁾ and DC 2⁽¹²⁾ apply against Applicant. But given he surrendered the Iranian passport, he has complied with the Money memorandum, which requires a clearance be denied or revoked based on possession of a foreign passport, regardless of whether it has expired.⁽¹³⁾

Turning to the mitigating conditions under Guideline C, MC 1⁽¹⁴⁾ applies because his dual citizenship is based on his birth in a foreign country.⁽¹⁵⁾ MC 2⁽¹⁶⁾ does not apply because the disqualifying behavior at issue took place during 1998 through 2003 when Applicant obtained, used, and, until recently, possessed the foreign passport. MC 3⁽¹⁷⁾ does not apply, because the State Department guidance in Exhibit A cited by Applicant is information for the public-at-large as opposed to persons who have been granted the privilege of a security clearance. And there is no indication in the record that Applicant's possession and use of the Iranian passport was specifically sanctioned by the United States. Finally, MC 4⁽¹⁸⁾ applies because Applicant is willing to renounce his Iranian citizenship.

Applicant has lived, nearly continuously, in the U.S. for the last 30 years. He became a U.S. citizen in 1988. It's plain his family and professional lives are firmly rooted in the U.S. And the fact Applicant surrendered the Iranian passport and is willing to renounce his Iranian citizenship are clear, logical, and convincing reasons to have no concern for where his true preference lies. Given these circumstances, Applicant has successfully mitigated the security concern, and Guideline C is decided for Applicant.

2. Guideline B-Foreign Influence

Under Guideline B for foreign influence, a security concern may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. In addition, common sense suggests that the stronger the ties of affection or obligation, the more vulnerable a person is to being manipulated if the relative, cohabitant, or close associate is brought under control or used as a hostage by a foreign intelligence or security service.

Here, based on the record as a whole, the government has established its case under Guideline B. Applicant has family ties to Iran, as evidenced by his sister and brother who are citizens of and residents in Iran. The strength of the ties is further demonstrated by Applicant's two trips to Iran for family visits. These circumstances raise a security concern under DC 1.⁽¹⁹⁾ Given the distant relationship and little contact he has with his two half-brothers, however, Applicant has rebutted the government's case by showing he does not have close ties of affection or obligation to his two half-brothers. In addition, DC 3⁽²⁰⁾ applies against Applicant, because Applicant's sister in Iran works for the National Iranian Oil Company, and so, she is connected via her employment with the Iranian government.

I have reviewed the mitigating conditions under Guideline B and conclude none apply. The only MC deserving serious consideration is MC 1,⁽²¹⁾ but it does not apply. It appears that none of the family members are agents of the Iranian government or any other foreign power.⁽²²⁾ But that does not end the analysis, as Applicant must

show his sister and brother in Iran are not in position to be exploited by the Iranian government.

In deciding if an applicant has met the second prong of MC 1, it is proper to consider how the foreign country at issue is governed. The focus is not the country or its people, but its rulers and the nature of the government they impose. This approach recognizes it is nonsensical to treat North Korea as if it were Norway. Here, we know Iran is hostile to the U.S. and is ruled by a government with a dismal record of human rights. We also know Iran is making efforts to acquire weapons of mass destruction, and it engages in state-sponsored terrorism. Given these circumstances--which are beyond Applicant's control--the presence of Applicant's brother and sister in Iran places them at risk of being brought under control or used as a hostage by an Iranian intelligence or security service. Unfortunately, Applicant's brother and sister are in a position where there is a potential for them to be exploited in a way that could force Applicant to choose between loyalty to his sister and brother and the interests of the U.S. And this potential risk was increased by Applicant's trips to Iran in 1998 and 2001 with an Iranian passport, which identified him as a U.S. resident. By doing so, Applicant increased the potential that either he or his siblings could be targeted by Iranian authorities. In particular, his sister's employment with the National Iranian Oil Company makes this potential risk a real possibility. Accordingly, Applicant is unable to successfully mitigate the security concern, and Guideline B is decided against him.

To conclude, Applicant has failed to meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I have considered the record evidence as a whole, the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline B: Against the Applicant

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

SOR ¶ 2-Guideline C: For the Applicant

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

DECISION

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

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

5. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
10. *Egan*, 484 U.S. at 528, 531.
11. E2.A3.1.2.1. The exercise of dual citizenship.
12. E2.A3.1.2.2. Possession and/or use of a foreign passport.
13. ISCR Case No. 01-24306 (September 30, 2003) at p. 5 (Keeping a foreign passport until it expires does not satisfy the surrender requirement set forth in the oney Memorandum).
14. E2.A3.1.3.1. Dual citizenship is based solely on parents' citizenship or birth in a foreign country.
15. ISCR Case No. 99-0452 (March 21, 2000) at pp. 2-3 (Modifying its earlier rulings, the DOHA Appeal Board, in an expansive reading of MC 1, concluded the literal language of MC 1 allows it to be applied even when an applicant exercises foreign citizenship after becoming a U.S. citizen).
16. E2.A3.1.3.2. Indications of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship.
17. E2.A3.1.3.3. Activity is sanctioned by the United States.
18. E2.A3.1.4. Individual has expressed a willingness to renounce dual citizenship.
19. 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 or present in, a foreign country.
20. E2.A2.1.2.3. Relatives, cohabitants, or associates who are connected with any foreign government.
21. E2.A2.1.3.1. A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States.
22. *See* 50 U.S.C. § 1801(b).