DATE: May 23, 2005

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-08049

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Alexander J. Brittin, Esq.

SYNOPSIS

Applicant 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 his close family ties to Iran, a country hostile to the U.S. Clearance is denied.

STATEMENT OF THE CASE

On May 25, 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 June 14, 2004, Applicant requested a hearing on this matter. In response to the specific factual allegations in the SOR, his responses were mixed.

Department Counsel indicated he was ready to proceed on August 31, 2004, and the case was assigned to me September 7, 2004. A notice of hearing was issued September 16, 2004, scheduling the hearing for October 21, 2004. Applicant appeared with counsel and the hearing took place as scheduled. DOHA received the transcript November 2, 2004. Issuing a decision in this case was delayed due to a heavy caseload.

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 44-year-old married man who was born in Iran to Iranian parents in 1960. He became a naturalized U.S. citizen in 1990. He is employed as a senior engineer for a large research and engineering company. He is seeking to obtain a security clearance for his employment.

Applicant lived in Iran until 1982. On March 20, 1982, Applicant decided to flee Iran, as he could no longer tolerate lack of freedom. At the time, Applicant had been a university student in optometry school, but the universities had been closed for two years or so and he was trying to making a living as a musician in an orchestra. He believed he would be "purged" by the government due to his secular background.

Applicant fled Iran by way of Pakistan, and he eventually made his way to Greece joining a brother who was living there. He stayed in Greece for about 18 months. Unable to remain permanently in Greece, Applicant applied for and received refugee status with the U.S., and he immigrated to the U.S. in 1984.

Shortly after arriving in the U.S., Applicant resumed his education by enrolling at a state technical institute in January 1985. He was a student there one year before enrolling at a state university in January 1986. He was a student there for about two years before enrolling at another state university in January 1988. Applicant finished his studies in May 1991 receiving a bachelor of science degree in nuclear engineering.

Applicant started working for his current employer as a nuclear engineer in August 1991. Between 1992 and 1997, Applicant held a security clearance issued by another department of the federal government. He held this clearance, without incident, until it lapsed sometime in 1997 when he no longer needed it for his employment.

Applicant is married to his third wife, as his first two marriages ended in divorce. His wife is a native of Iran and is a lawful resident alien of the U.S. She is not yet eligible to apply for U.S. citizenship. Applicant has no children.

Applicant comes from a large family, which he depicted in a family tree (Exhibit I), and many of his immediate family members remain in Iran. His parents live in Esfahan, Iran, they are both retired and in poor health. His father, born 1916, retired after many years of service to the Iranian National Oil Company, and he is currently suffering some sort of dementia. His mother, born 1930, has been a homemaker, wife, and mother. She lost 100% of her hearing two years ago.

Applicant's eldest sister, born 1943, is a homemaker in Tehran, Iran. She is a wife and mother to five children all living in Iran. Applicant has been in contact with her perhaps three to four times over the last ten years.

Applicant's sister, born 1945, has worked as an English teacher. She is a mother of four children, two of whom are in Iran, one in Canada, and one in the U.S. She is in the process of immigrating to the U.S. via one of her daughters who is a U.S. citizen (Exhibit J).

Applicant's eldest brother, born 1947, immigrated to the U.S. in 1984 or 1985, and he is now a U.S. citizen. Applicant has little contact with this brother due to a family dispute.

Applicant's brother (a twin), born 1951, immigrated to Australia. He is married and has two children, all of whom reside in Australia. Applicant has visited this brother twice.

Applicant's brother (a twin), born 1951, is a plastic surgeon who has a clinic in Tehran, Iran, but has moved his family to Canada where they plan to reside.

Applicant's youngest sister, born 1956, is a homemaker in Esfahan, Iran. She is married and the mother of three children, all of whom live in Iran. The last time Applicant spoke to this sister is about two years ago.

Applicant's younger brother, born 1967, is a psychiatrist living and working in Esfahan, Iran. He is married and has two children, all of whom live in Iran. Of all his immediate family members in Iran, Applicant stays in contact with this brother the most frequent. Applicant speaks to his brother about once a month to monitor his parents' condition, as he can no longer speak to either parent.

Since escaping Iran in 1982, Applicant returned to Iran once in September 2000. Applicant made the trip after receiving substantial pressure from his mother to visit. Applicant had resisted the plea before, but it became increasingly difficult for him to do so given that U.S.-Iranian relations were warming at the time (Exhibit F). Applicant finally decided to make the trip when he received word that his then-86-year-old father has broken his hip and the family was concerned

he would not recover.

To make the trip, Applicant had to obtain an Iranian passport, which is a legal requirement for all native-born Iranians. This was the first time he had possessed an Iranian passport since he left all that type of paperwork behind when he fled Iran. Applicant traveled to Iran, visited his various family members over a period of two to three weeks, and departed. He used the Iranian passport only to enter and depart Iran. He experienced no problems or difficulties with Iranian officials during this trip as he had received permission to depart the country when the passport was issued. He satisfied his outstanding military service obligation to Iran by paying a small fine. Applicant has not traveled to Iran again and has no plans to do so in the future.

Concerning the Iranian passport, Applicant remained in possession of it until September 9, 2004. As set forth in Exhibit D, Applicant directed his counsel to return and surrender the Iranian passport to the Iranian Interest Section located in the Pakistani Embassy in Washington, D.C. His counsel acted as directed returning and surrendering the Iranian passport. The details of that event (Exhibit E). Applicant directed his counsel to do this task, as he did not want to interact with Iranian officials.

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 and would do so if Iranian law allowed it.

Neither Applicant nor his wife has any financial or business interests in Iran or any other foreign country. Applicant's professional and financial interests are all located in the U.S.

Applicant presented a wealth of strong character evidence supporting his application for a security clearance. Besides calling three character witnesses during the hearing, he also presented 17 letters of support (Exhibit A). In general, but uniformly, these persons describe Applicant as a skilled and highly-valued employee, a good citizen, and an ideal candidate for a security clearance.

Administrative or official notice was taken of the certain facts concerning Iran as described in Appellate Exhibit I 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 record of human rights.

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 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 emorandum, which requires a clearance be denied or revoked based on possession of a foreign passport.

Turning to the mitigating conditions under Guideline C, MC 1(13) applies because his dual citizenship is based on his birth in a foreign country.(14) MC 2(15) does not apply because the disqualifying behavior discussed above took place after he became a U.S. citizen. MC 3(16) does not apply because there is no indication that Applicant's actions were sanctioned by the United States. Finally, MC 4(17) applies because Applicant is willing to renounce his Iranian citizenship.

Applicant has lived in the U.S. for the last 21 years, nearly all of his adult life. He completed his college education in the U.S., and has worked in his field of expertise in the U.S. It's plain his life is 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, 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 established its case under Guideline B. Applicant has close family ties to Iran, as evidenced by his parents and siblings who are citizens of and residents in Iran. The strength of the ties is also demonstrated by Applicant's trip to Iran in September 2000 to visit his family and his parents in particular. These circumstances raise a security concern under DC 1.[(18)] The remaining DC do not apply based on the facts and circumstances here.

Some of the matters in SOR paragraph 2 for foreign influence are no longer current. Applicant's wife is now a lawful resident alien of the U.S.; accordingly, subparagraph 2.c is decided for Applicant. Given their failed health, Applicant can no longer speak on the telephone to his parents in Iran; accordingly, subparagraph 2.d is decided for Applicant. Likewise, Applicant no longer maintains weekly email contact with his siblings in Iran; accordingly, subparagraph 2.e is decided for Applicant.

I have reviewed the mitigating conditions under Guideline B and conclude that only MC 5[(19)] applies. Applicant receives some credit under MC 5 because neither Applicant nor his wife has any business or financial interests in Iran. The remaining MC do not apply based on the facts and circumstances here. In particular, I gave consideration to MC 1, [(20)] but it does not apply. It appears that none of the family members are agents of the Iranian government or any other foreign power.[(21)] But that does not end the analysis, as Applicant must show his family members 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 is a state sponsor of terrorism. Given these circumstances--which are clearly beyond his control--Applicant's family members in Iran are at risk of being brought under control or used as a hostage by an Iranian intelligence or security service. Unfortunately, his family members are in a position where there is a potential for them to be exploited in a way that could force him to choose between loyalty to his family members and the interests of the U.S. Accordingly, Applicant is unable to successfully mitigate the security concern, and Guideline B is decided against him.

Although I have decided this guideline against Applicant, this decision should not be construed as an indictment of Applicant's loyalty and patriotism to the U.S., as those matters are not at issue. Instead, the clearly-consistent standard requires I resolve any doubt against Applicant, and his close family ties to Iran, a country hostile to the U.S., creates such doubt. 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

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

SOR ¶ 1-Guideline C: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

SOR ¶ 2-Guideline B: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: Against 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. E2.A3.1.3.1. Dual citizenship is based solely on parents' citizenship or birth in a foreign country.

14. 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).

15. E2.A3.1.3.2. Indications of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship.

16. E2.A3.1.3.3. Activity is sanctioned by the United States.

17. E2.A3.1.3.4. Individual has expressed a willingness to renounce dual citizenship.

18. 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.

19. E2.A2.1.3.5. "Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities."

20. 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.

21. *See* 50 U.S.C. § 1801(b).