DATE: August 31, 2006

In re:

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

Applicant for Security Clearance

ISCR Case No. 03-11420

ECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Philip D. Cave, Esq.

SYNOPSIS

Applicant was born in Sudan. He left in 1974 to attend a university in Kuwait. He came to the United States in 1983 to pursue higher education, and obtained a Ph.D. in Chemistry. Between 1989 and 1990, Applicant was a leader of political organizations in the United States whose purpose was to oppose the repressive, authoritarian government that took over Sudan. Applicant became a U.S. citizen in 2000. He has seven siblings and two step-children who are citizens and residents of Sudan. Considering the poor relations between the U.S. and Sudan, Sudan's record of human rights abuses, and Applicant's public opposition to the Sudanese government, Applicant has failed to mitigate security concerns arising from having relatives who are citizens and residents of Sudan. Clearance is denied.

STATEMENT OF THE CASE

On September 5, 2003, 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 Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (the "Directive"). On March 15, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under Guideline B, Foreign Influence, and Guideline C, Foreign Preference, of the Directive.

Applicant answered the SOR in writing on April 5, 2004. Applicant elected to have a hearing before an administrative judge. I was assigned the case on October 14, 2004. With the concurrence of the parties, I conducted the hearing on November 18, 2004. The government introduced six exhibits. Applicant presented 11 exhibits and testified on his own behalf. I left the record open for one week for Applicant to provide a signed copy of Exhibit I, which was received and admitted on November 22, 2004. I issued a decision on March 14, 2005, denying a security clearance.

Applicant appealed. The Appeal Board found error in the manner in which a change/correction was made to the record, and remanded the case with instructions that the parties be informed of the changes and allowed the opportunity to

object. (ISCR Case No. 03-11420 at 5 (App. Bd. October 5, 2005). I provided a copy of the record, with the proposed changes, to each party and offered each the opportunity to object. Both parties indicated they had no objection to the proposed changes. therefore I ordered the changes to be incorporated in the record.

FINDINGS OF FACT

Applicant denied the allegations in ¶¶ 1.a, 1.c, 1.d, 1.f, 1.g, and 2.a of the SOR. He admitted the factual allegations in ¶¶ 1.b and 1.e of the SOR, with explanations. 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:

At the time of the hearing, Applicant was 50 years old. (Ex.1 at 1; Tr. at 23.) He was born in Sudan. (*Id.*) Applicant left Sudan in 1974 at age 18 after receiving a scholarship to a university in Kuwait. (Answer to SOR, dated April 5, 2004*,* at 4.) He finished his undergraduate studies in Kuwait in 1978, but stayed at the university for four more years teaching chemistry. (*Id.* at 4-5.) Applicant denies any continuing contact with citizens of Kuwait since that time. (Tr. at 22.)

Applicant came to the United States in 1983 to pursue higher education. (*Id.* at 5.) He received a doctoral degree (Ph.D.) in Chemistry from a prestigious university in the U.S. in 1989. (Ex. 2 at 18; Tr. at 22, 26.)

Between 1989 and 1994, Applicant worked as a laboratory supervisor for a U.S. university. (Ex. 1 at 3.) Eventually the university lost the contract and funding for the project for which Applicant was employed. (Tr. at 21.)

From 1994 to 2000, Applicant served as an academic advisor for the Saudi Arabian Cultural Mission. (Ex. 1 at 2.) Applicant had no contact with diplomats. (Tr. at 21.) His supervisor was Saudi, but Applicant's contact with him was minimal. (Tr. at 22.) The position required Applicant to follow the academic progress of Saudi students studying in U.S. colleges and universities and report their progress to the sponsoring universities in Saudi Arabia. (Answer to SOR, *supra*, at 3.) He contacted the students only by telephone, therefore he did not develop personal relationships with them. (*Id.* at 3-4; Tr. at 21.) Applicant became friends with two co-workers at the cultural mission. The friends were originally from Eritrea and Sudan, but are now citizens and 25-year residents of the U.S. (Answer to SOR, *supra*, at 4; Ex. F.)

Applicant became a citizen of the United States in June 2000. (Ex. 1 at 1.) From 2000 to 2002, Applicant taught school in the United States. (Ex. 1 at 1.) He was an instructor for regular-level and honors-level chemistry classes. (Ex. J.)

In about July 2001, Applicant took a personal trip to Sudan for about one month. (Ex. 1 at 6.) He traveled on his U.S. passport. (Ex. D.) He stayed with his eldest sister and visited his family members. (Tr. at 56.)

In about December 2002, Applicant began working as a linguist for a defense contractor. He served as a translator for a U.S. military service at a base in Saudi Arabia from about 2002 to 2003. (Ex. 1 at 2; Tr. at 50.) During that time he held an interim security clearance. The government withdrew the interim clearance at the initiation of this action. (Tr. at 24.) Applicant presently works for a government language institute. (*Id.*) The defense contractor is interested in re-hiring Applicant if his security clearance is approved. (Ex. G.)

Applicant got married for the first time in January 1982 and was divorced in July 2003. (Ex. 1 at 3.) His former spouse is a citizen of the United Kingdom and resides in the United States. (*Id.*) Applicant has two children from his first marriage. (Ex. 1 at 5; Answer to SOR, *supra,* at 3.) His daughter was born in Kuwait and immigrated to the U.S. when she was about 40 days old. (Tr. at 20.) She is now 22 years old and a naturalized citizen and resident of the United States. (*Id.*; Ex. C.) Applicant's son is 17 years old; he is a native-born citizen and resident of the United States. (Ex. B.)

Applicant got married for the second time about two years ago. (Tr. at 36.) His wife was born in Sudan. (Tr. at 37.) At the time of the initiation of this action, Applicant's wife lived in Egypt. (Tr. at 20.) Presently, she lives in the U.S. (Tr. at 20.) She received permanent resident status in January 2004 (Ex. A), and is in the process of applying for U.S. citizenship. (Tr. at 20.) His wife's parents are citizens and residents of Sudan. (Tr. at 37.) Both are retired; neither worked for the Sudanese government. (Tr. at 37-38.) Applicant's wife has seven siblings who are citizens and residents of Sudan; she contacts them about five or six times a year. (Tr. at 40.) She also has two children from a previous relationship, ages 18 and 19, who lived in Sudan; at the time of the hearing, Applicant was in the process of applying for them to come to the United States. (Tr. at 40-41.)

Applicant has seven siblings. His four sisters are citizens and residents of Sudan, and work in the home. (Ex. 2 at 3.) Applicant contacts his eldest sister three or four times a years. (Tr. at 29.) He does not contact his other sisters because they do not have telephones. (Tr. at 32.) Applicant's three brothers are also citizens and residents of Sudan. One brother runs a cafeteria, one serves as a translator for a newspaper, and one manages a spare parts store. (Ex. 3 at 3.) Applicant maintains none of his siblings are associated with the government or affiliated with a group adverse to the interests of the United States. (Answer to SOR, *supra*, at 3.) Applicant has little contact with his sisters and brothers. (*Id.* at 2; Tr. at 20.) He has only been back to Sudan once since 1974, as an American citizen. (Tr. at 23; Ex. D.)

The Republic of Sudan has struggled with many governmental changes, civil war, and factionalism since its independence in 1956. (Ex. 3 at 1.) In 1989, the National Islamic Front (NIF) executed a coup d'etat and overthrew the democratic government. (Ex. 3 at 2, 5; Answer to SOR, *supra,* at 1.) The new government is a miliary dictatorship imposing Islamic law. (Ex. 3 at 1-2, 5.) The coup re-ignited the civil war that had continued for decades in Sudan. (Ex. 3 at 5.) After the coup, the U.S. suspended development assistance to Sudan. (Ex. 3 at 10.) In 1993, the U.S. listed Sudan as a state sponsoring terrorism. (*Id.*) In 1997, the U.S. imposed economic, trade, and financial sanctions against Sudan, and in 1998 the U.S. launched retaliatory cruise missile strikes against the capital, Khartoum. (*Id.* at 11.) Relations between Sudan and the U.S. have improved only slightly within recent years. (*Id.*) The U.S. State Department reports Sudan has an extremely poor record on human rights practices. (Ex. 4 at 2.)

Following the coup d'etat in 1989, Applicant became involved with the Sudanese National Democratic Alliance (NDA) and the Sudanese Democratic Unionist Party (DUP). (Tr. at 26.) The NDA is a coalition of political parties in Sudan whose goal is to restore democracy, end the civil war, and achieve peace in Sudan. (Answer to SOR, *supra*, at 1.) The DUP is the major political party in the NDA. (Tr. at 27; Ex. 5.) Applicant served in the second highest position within the DUP organization in the United States between about 1989 and 1990. (Tr. at 49.) Applicant volunteered his services in drafting letters and memoranda to the State Department, the White House, and human rights organizations, aimed at informing policy-makers of the repressive nature of the Sudan regime and its threat to regional security and the interests of the United States. (Answer to SOR, *supra*, at 2; Tr. at 45-46.) He also attended meetings of the NDA and the DUP, including a meeting in 1999. (Tr. at 28; Ex. 6 at 8.)

Applicant testified that he stopped associating with the NDA about 5 or 6 years before the hearing in this case, because of his work, school, and family commitments. (Tr. at 27.) He also stopped because he became an American citizen in 2000. (Tr. at 27, 28.) Although he has no intention of returning to Sudan even if there were a regime change, Applicant maintains an academic interest in the situation in Sudan. (Tr. at 63-64.) He occasionally attends hearings as a spectator and sends letters to members of Congress about conditions in Sudan. (Tr. at 64.)

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 standards and procedures for safeguarding classified information within the executive branch. Specific guidelines and procedures are included in the Directive. To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. 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 disqualify or 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 DOHA 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 chose 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. (*See also* Exec. Ord. 12968, § 1.1 (f) (August 2, 1995).

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. (S*ee* 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 consider's 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. In ISCR Case No. 02-21927 at 7 (Jan. 18, 2005), the administrative judge noted it was "helpful to consider several factors, including the character of the foreign country," and discussed various aspects of Saudi Arabia's government. 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).) (*See also* 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).)

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 negatived."); *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 Presumption

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 B, Foreign Influence

The Directive, ¶ E2.A2.1.1, states the security concern raised under Guideline B, Foreign Influence, as follows:

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.

Paragraph E2.A2.1.2.1 of the Directive provides that it may be disqualifying 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's seven brothers and sisters are citizens and residents of Sudan. Applicant's wife is a citizen of Sudan, although she lives in the United States. Also, Applicant has ties of affection or obligation to his step-children, who are citizens and residents of Sudan. Thus, the evidence is sufficient to raise this potentially disqualifying condition.

Under ¶ E2.A2.1.2.2 of the Directive, it may be disqualifying where an applicant is, "[s]haring living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists." Applicant's wife lives with him in the United States. Her children and parents are citizens and residents of Sudan. I find this potentially disqualifying condition applies.

Under the Directive, these potentially disqualifying conditions can be mitigated under certain conditions. 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." Directive, ¶ E2.A2.1.3.1.

None of Applicant's relatives are members of the military forces or the government of Sudan. The evidence indicates none of them is an "agent of a foreign power" as defined by 50 U.S.C.A. § 1801(b). Furthermore, none of the family members qualify as "agents of a foreign power" under the more expansive definition employed by the Appeal Board.

In assessing whether an applicant is vulnerable to exploitation through relatives or associates in a foreign country, it is helpful to consider several factors, including the character of the government of the relevant foreign country. Sudan is ruled by an authoritarian government committed to establishing an Islamic state. The country has been embroiled in civil war for most of the time since 1955. The coup d'etat in 1989 and the government's support of terrorists have severely strained the relationship between the United States and Sudan resulting in U.S. sanctions against that country. Sudan has a dismal record of protecting human rights. Under the circumstances, it is possible that a "foreign power" in Sudan would attempt to exploit or pressure Applicant's relatives to force Applicant to act adversely to the interests of the United States.

It is important to consider the vulnerability to duress of Applicant's relatives and associates in Sudan. Applicant's brothers, sisters, and step-children live and work in Sudan, along with their families. It does not appear that some or all of Applicant's relatives in Sudan have the economic means to leave the country at will. As noted above, the government engages in human rights violations, including arbitrary and unlawful abductions, torture, disappearance, or forced dislocation of residents. Under these circumstances, Applicant's relatives in Sudan are potentially vulnerable to duress or adverse influence. I also note that, although Applicant's wife is a citizen of Sudan, she is a permanent resident of the United States. Under the circumstances, she is not directly vulnerable to duress from a foreign power in Sudan, but is indirectly vulnerable because her children reside in Sudan.

Another significant factor is Applicant's vulnerability to pressure or duress applied indirectly through his ties with relatives and associates. On one hand, Applicant is a U.S. citizen by choice, and has lived in this country most of his adult life. He has had limited contact with his relatives in Sudan, having visited only once since he left in 1974**.** He maintains regular contact only with his eldest sister. All Applicant's assets are in this country. He successfully held an interim clearance for about one year. He is an ardent supporter of democracy and has expended considerable effort to promote in Sudan interests shared by the government of the U.S. On the other hand, all of Applicant's siblings and their families live in Sudan, as well as his two step-children. Although the fact that he worked for the U.S. government may not be widely known, his involvement with the NDA and DUC is published on a publicly available web site. Ex. 6. Considering Applicant's numerous relatives in Sudan, the strained relations between Sudan and the U.S., Sudan's record

of human rights abuses, and Applicant's public involvement with organizations opposing the government of Sudan, I find Applicant is vulnerable to pressure or duress from a foreign power in Sudan. I conclude the mitigating condition set out in ¶ E2.A2.1.3.1 of the Directive does not apply.

Under ¶ E2.A2.1.3.3 of the Directive, it may also be mitigating where "[c]ontact and correspondence with foreign citizens are casual and infrequent." Applicant does not stay in close or continuing contact with his six of his seven siblings in Sudan, therefore this mitigating condition applies to the security concerns arising from those relationships. At the same time, Applicant has regular contact with his eldest sister in Sudan. This potentially mitigating condition does not apply to that relationship.

Guideline C, Foreign Preference

The security concern under Guideline C, Foreign Preference, is that "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.A3.1.1.)

The Directive sets out various circumstances that may show a foreign preference and raise security concerns. Under E2.A3.1.2.9 of the Directive, it is potentially disqualifying where an applicant is "[p]erforming or attempting to perform duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States." Paragraph 2.a of the SOR alleges as a potentially disqualifying condition that Applicant was employed as an academic advisor at the Saudi Cultural Mission from about July 1994 until August 2000. Applicant admits working for the cultural mission from 1994 until 2000, but denies that it indicates a preference for a foreign government. (Answer to SOR, *supra*, at 4.)

Applicant worked for the Saudi Cultural Mission in the United States. His position required him to track the academic progress of Saudi students attending universities in the U.S. and report back to their sponsoring universities. Applicant's duties served the interests of the Saudi government by helping to assure the students were successful in their studies. Of course, the purpose of having governmental programs for Saudi students to attend U.S. universities is to provide a cross-cultural experience that benefits both the Saudi and U.S. governments. Applicant's work benefitted similar interests of both the Saudi and U.S. governments at the same time. Therefore, I find that under the unique circumstances of this case, Applicant's service was not "in preference to the interests of the United States." The evidence does not support the disqualifying condition set out in ¶ E2.A3.1.3.1 of the Directive.

The "Whole Person" Concept

I considered carefully all the potentially disqualifying and mitigating conditions in this case in light of 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. Applicant is a mature, highly-educated individual, with a record of service to the U.S. (Directive, ¶ E2.2.1.4.) The record reveals no basis t question his loyalty or dedication to the U.S. However, as noted above, the issue is not limited to Applicant's personal loyalty, but includes concerns about his vulnerability, through his family, to exploitation or duress by a foreign power. The Appeal Board holds that an applicant with family members living in a country hostile to the U.S. has a heavy burden to show those family ties do not generate a security risk. (ISCR Case No. 03-09053 at 4 (App. Bd. Mar. 29, 2006). I conclude Applicant has not mitigated the potential security concerns arising from his personal ties to relatives in Sudan.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline B: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: For Applicant

Paragraph 2, Guideline C: FOR APPLICANT

Subparagraph 2.a: For Applicant

DECISION

In light of all of 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 J. Breslin

Administrative Judge