

DATE: March 28, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-26387

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

Philip D. Cave, Esq.

SYNOPSIS

Applicant's mother and sisters are citizen residents of Iraq. Although he refuted the allegations of personal and criminal conduct, he was unable to demonstrate the members of his immediate family in Iraq are not in a position to be exploited by a foreign power in a way that could force him to choose between loyalty to his family and loyalty to the U.S. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 13 May 2004, DOHA issued a Statement of Reasons ⁽⁴⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 27 May and 20 July 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 3 January 2005. On 1 March 2005, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 10 March 2005.

FINDINGS OF FACT

Applicant is a 52-year-old senior scientist for a defense contractor. He is of Kurdish descent and was born and raised in Iraq. He is well respected by his colleagues and supervisors as an honest, reliable, and trustworthy man of courage. Applicant publishes articles in his field in scientific journals that are read internationally. Tr. 86.

During his college years in Iraq, Applicant was sought out for membership in the Ba'ath Party. He refused to join. After his graduation from college in Iraq in 1974, Applicant was conscripted into the Iraqi military for one year. After some brief military training, he and other college graduates were farmed out to other institutions. Applicant was sent to a research institute and was assigned to work on small projects dealing with optics and crystal growth. Tr. 48-50. Applicant was again pressured to join the Ba'ath Party, but he did not. Toward the end of his military service, Applicant

received a government scholarship to study in the U.S. Tr. 51-52.

While he was in school in the U.S. in the late 1970s, some Iraqi students there tried to convince Applicant to become a Ba'ath Party member. He refused to do so. Each summer, Applicant returned to Iraq. In the summer of 1978, he was ordered to visit Iraq's atomic energy commission. There, he was told he should focus his studies on laser physics isotope separation. When Applicant returned to the U.S. that fall, he severed all ties with the Iraqi government and gave up his scholarship. Nevertheless, Applicant completed the requirements and was awarded a Ph. D.

In September 1980, Applicant married a native-born U.S. citizen. Ex. 1 at 4. The couple moved to Jordan so Applicant could teach school. Tr. 58. In 1983, while teaching in Jordan, Applicant was alerted to a plot to kidnap him back to Iraq. Tr. 81-82. Applicant and his wife returned to the U.S. They have been married almost 25 years and have three sons, all born in the U.S. His sons have never visited the Middle East.

Applicant became a U.S. citizen in July 1986. Shortly thereafter, he applied for a security clearance, but it was denied. The Department of Defense Security Program at the time denied security clearances to recently-naturalized citizens from 29 countries, including Iraq. A federal court issued a preliminary injunction against enforcement of that part of the security program. ⁽²⁾ Based on that decision, Applicant was granted a secret clearance in late 1988 or early 1989. Answer, Atch 2. Applicant possessed the clearance until 1997 with no adverse incidents. His clearance was terminated when he left the company to assist his wife in her jewelry business. Answer, Atch 2; Tr. 61.

After he left the defense contractor, Applicant started up an animation business. Applicant took the venture to Jordan because costs were cheaper and he wanted to use the animation venture to transmit American values to the Middle East. He lived in Amman, Jordan, from February 1999 to March 2000. Ex. 3 at 3. While there, his mother and two of his sisters traveled from Iraq to be with him. They lived together and the two sisters worked for his animation venture. Ex. 3 at 6. Applicant eventually closed the venture in March 2000 and returned to the U.S.

Applicant's two brothers were arrested by Iraqi authorities in 1980 and were never heard from again. Since the U.S. invasion of Iraq in 2003, Applicant's family has learned that both boys were executed by the Saddam Hussein regime.

Applicant's father died in 2003. His mother and several sisters are citizen residents of Iraq. One of his sisters performed clerical work for the Iraqi government but was fired because she refused to join the Ba'ath Party. Tr. 74. Applicant has a sister who is an Iraqi citizen who lives in Syria and works as an animation artist. Another sister is a German citizen. Still another is a dentist who is married to a pathologist. They lived in the United Arab Emirates, but have since become permanent residents of Canada. Ex. 3 at 7-8; Tr. 44.

Applicant has for sometime sent money to his family in Iraq. For a time he did so through a company that was eventually closed by the U.S. Government for "usury abuse and sending money to questionable places." Tr. 86-87. He sent \$3,500 to his mother to help find out what happened to his two brothers. Applicant sends money to his family every four months, usually ranging from \$500-\$1,000. On one occasion, he sent money to his sister's boss in Syria that was then hand-carried to Applicant's family in Iraq.

Applicant's security clearance (SCA) was submitted on 7 December 2001. In it, Applicant failed to note his service in the Iraqi military or his business venture in Jordan. He had listed his Iraqi military service in his 1987 request for a clearance.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to

grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline B-Foreign Influence

In the SOR, DOHA alleged Applicant's parents, sisters, uncle and cousin are resident citizens of Iraq (¶ 1.a); his sister and brother-in-law were employed by Saddam Hussein's government (¶ 1.b); he maintains contact with his relatives in Iraq (¶ 1.c); one of his sisters resides in Syria (¶ 1.d); another sister resides in the United Arab Emirates (¶ 1.e); during his Iraqi military service he worked at a research institute on laser physics and crystal growth (¶ 1.f); he accepted educational benefits from the Iraqi government (¶ 1.g); his two brothers were arrested by the Saddam Hussein regime in 1980 (¶ 1.h); he served as a professor in Jordan from 1981-83 (¶ 1.i); he started his own business and worked and lived in Jordan from February 1999-March 2000 after he became a naturalized U.S. citizen (¶ 1.j); he transferred \$10,000 to a citizen of Iraq (¶ 1.k); he sent \$3,500 to Iraq in 1998 so his mother could bribe government officials to release information on his two missing brothers (¶ 1.l); since 1993 he has provided \$500 a month to family members in Iraq, at times through a company that was shut down by the U.S. Government (¶ 1.m); he provides \$500-\$1,000 a month to Iraq through Syria (¶ 1.n). Applicant admitted each of the allegations. A security risk may exist when an applicant's immediate family, or other persons to whom he may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Directive ¶ E2.A2.1.1.

The Government's established through Applicant's admissions that he has immediate family members who are citizen residents of a foreign country-Iraq. DC E2.A2.1.2.1. While 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).

These security concerns raised by Applicant's foreign associates may be mitigated when it is determined they are not agents of a foreign power and 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 loyalty to the U.S. C E2.A2.1.3.1. Applicant's foreign associates are not "agents of a foreign power." *See* 50 U.S.C. § 1801(b). But they are in a position to be exploited in a nation racked by terrorism.⁽³⁾

Applicant was unable to demonstrate that members of his immediate family-his mother and sisters-are not in a position to be exploited by a foreign power⁽⁴⁾

Applicant asserts that his contacts with foreign associates are casual and infrequent. *See* MC E2.A2.1.3.3. Although his contacts may be infrequent, they are not casual. Applicant cares deeply for his family in Iraq as evidenced by his efforts to financially support them for many years. Unfortunately, the fact that he is a dutiful son who cares for his mother and his sisters in Iraq puts him in a position of vulnerability to exploitation.

Applicant appears to be a loyal U.S. citizen. But determining suitability for a security clearance requires a predictive judgment-it is an attempt to determine who might pose a security risk at some future time, based on certain established

guidelines. As noted above, the decision to deny an individual a security clearance is not a judgment of an applicant's loyalty. Exec. Or. 10865 § 7. It is merely a determination the applicant has not met the strict guidelines set out by the President and the Secretary of Defense.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant transferred money to his relatives in Iraq through his sister in Syria (¶ 2.a); and he falsified his SCA by failing to list his military service in Iraq (¶ 2.b) and his business venture in Jordan (¶ 2.c). Applicant admitted the allegation in ¶ 2.a, but denied the remaining allegations. Answer. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government established that Applicant transferred money to his relatives through his sister in Syria and failed to accurately reflect in his SCA his military service in Iraq and his business venture in Jordan. I could find nothing sinister or reflective of bad judgment in Applicant's decision to send money to his family through his sister in Syria. While such conduct demonstrates the strength of his commitment to his family in Iraq, it is not disqualifying under Guideline E. And although Applicant failed to list his Iraqi military service and his business venture in Jordan in his SCA, I found his explanation for the failures to be credible. Applicant did not purposefully falsify his SCA. I find for Applicant on ¶ 2.

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant violated 18 U.S.C. § 1001 by failing to list his Iraqi military service and business venture in Jordan in his SCA (¶ 3.a). Applicant denied the allegation. Answer. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *See Egan*, 484 U.S. at 527. I conclude Applicant did not knowingly and willfully make false statements on his SCA. I find for Applicant on ¶ 3.

FORMAL FINDINGS

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

Paragraph 1. Guideline B: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: Against Applicant

Subparagraph 1.g: Against Applicant

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: Against Applicant

Subparagraph 1.j: Against Applicant

Subparagraph 1.k: Against Applicant

Subparagraph 1.l: Against Applicant

Subparagraph 1.m: Against Applicant

Subparagraph 1.n Against Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Paragraph 3. Guideline J: FOR APPLICANT

Subparagraph 3.a: For Applicant

DECISION

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

James A. Young

Administrative Judge

1. As required by Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).

2. *Huynh v. Carlucci*, 679 F. Supp. (D.D.C. 1988). This case was decided two weeks before *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

3. MC E2.A2. "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).

4. The term "foreign power" includes "group[s] engaged in international terrorism" and "foreign-based political organization[s] not substantially composed of United States persons." 18 U.S.C. § 1801(a)(4) and (5).