

KEYWORD: Foreign Influence

DIGEST: Applicant's mother and three brothers are citizens of, or resident in, Libya. Applicant failed to mitigate foreign influence security concerns. Clearance is denied.

CASENO: 04-01631.h1

DATE: 10/05/2005

DATE: October 5, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-01631

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Edward W. Loughran, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant's mother and three brothers are citizens of, or resident in, Libya. Applicant failed to mitigate foreign influence security concerns. 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 18 November 2004, DOHA issued a Statement of Reasons<sup>(1)</sup> (SOR) detailing the basis for its decision-security concerns raised under Guideline B (Foreign Influence) of the Directive. Applicant answered the SOR in writing on 27 December 2004, and elected to have a hearing before an administrative judge. The case was assigned to me on 12 May 2005. On 29 June 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 14 July 2005.

### **FINDINGS OF FACT**

Applicant is a 54-year-old solar engineer who works for a defense contractor. He is a valued, respected, and trusted employee. He was granted a secret clearance in 1989, Ex. 1 at 7.

Applicant was born and raised in Libya by Libyan parents. His father held many positions in the Libyan government from 1950-69. He was Secretary of Agriculture, president of the Libyan bank, founder of the Libyan Olympic Committee, and Deputy Prime Minister. Ex. 2 at 1. Applicant's father was incarcerated for 60 days after the Libyan government was overthrown in 1969.

Applicant entered the U.S. in 1972, when he was 21 years old to pursue higher education. In 1977, he graduated from college with a bachelor of science degree in electrical engineering. He returned to Libya and was employed by a U.S. owned energy company. (2) In December 1978, he returned to the U.S. to marry a native born U.S. citizen he had met while getting his degree. Ex. 2 at 2. They married in February 1979. They have no children. He became a naturalized U.S. citizen in June 1982. Ex. 1 at 1.

Applicant's family was wealthy until the Socialist government took power in 1969. That government confiscated most of his family's assets. While he was employed in Libya, Applicant saved more than \$20,000. This money and an inheritance from his grandfather were also confiscated by the Libyan government.

Since his return to the U.S., Applicant has left the country on only three occasions. The first two trips were in 1980 when he traveled to Saudi Arabia for the U.S. defense contractor that employed him. In 1987, he and his wife spent two weeks in London and two weeks in Egypt. They stayed with his cousins in both London and Egypt. Ex. 2 at 2.

Applicant is the oldest of five brothers. Two of his brothers also attended college in the U.S., but returned to Libya and have resided there ever since. One of his brother's was drafted into the Libyan military against his wishes and will probably remain in the military until he retires. Ex. 2 at 3. One of his brothers died in Libya in 1994, shortly after their father died. Tr. 38-39. He left a wife and several children. Applicant's mother and one of his other brothers help support the deceased brother's family from Applicant's inheritance which amounts to \$50-60,000. Tr. 53. Another brother is an architect who is a citizen resident of Libya. Another brother is a mechanical engineer who is a citizen of Libya, but resides in Egypt, where his quadriplegic son is able to get better medical care. Another of Applicant's brothers became a U.S. citizen, but is now back living and working in Libya. He (the brother) is trying to reclaim the family wealth, which totals more than \$1 million, from the Libyan government. Tr. 48. Applicant contacts his mother by telephone approximately once every week. Tr. 51.

From 1980 until his father's death in 1994, Applicant's parents visited him in the U.S. almost annually for two to four months. Ex. 2 at 2. His mother continued to visit for a few years thereafter, but is now too infirm to travel. Tr. 37-38. One of his brothers visited for three or four months in 1985 to help care for their father who had undergone surgery in the U.S. Ex. 2 at 2.

One of Applicant's uncles was killed in the U.S. bombing of Libya in 1986. That uncle's son was paralyzed because of injuries suffered in the bombing. Applicant sponsored a different nephew into the U.S. to attend college. Although he initially lived with Applicant after his arrival in the U.S., he now lives in an apartment.

Applicant would like to be able to take his wife to visit his family and to see Libya, but he will not do so as long as the current regime is in power. Ex. 2 at 3. He asserts he cannot return to Libya because "he cannot approve of the treatment of the Libyan people and the direction the government is taking the country. Ex. 2 at 2.

The U.S. withdrew from diplomatic relations with Libya in 1973 to protest its support for revolutionary and terror groups. Ex. 4 at 4. While Libya has taken steps to cooperate in the war on terrorism, the Libyan government remains on the U.S. list of state sponsors of terrorism. Ex. 3 at 2. Nevertheless, the U.S. opened a two-person interest section at the Belgian Embassy in Libya in February 2004 and, later that year, President Bush ended economic sanctions against Libya.

## 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 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

In the SOR, DOHA alleged Applicant's mother is a citizen resident of Libya (¶ 1.a); in 1999, 2000, and 2002, he provided substantial financial support to his mother to support his sister-in-law and her children (¶ 1.b); his brother is a citizen resident of Libya (¶ 1.c); another brother is a citizen of Libya residing in Egypt (¶ 1.d); another brother who is a U.S. citizen, and his spouse, were residing in Libya (¶ 1.e); a nephew is a citizen of Libya, but resides with Applicant (¶ 1.f); and Applicant traveled to Egypt and Saudi Arabia in March 2002 to meet his mother and brother (¶ 1.g). Applicant

admitted, with explanation, each of the allegations, except that in ¶ 1b. 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 evidence and Applicant's admissions constitute evidence of potentially disqualifying conditions under Guideline B. Applicant has immediate family members who are citizens of, or residents in, Libya. DC E2.A2.1.2.1. Applicant's mother and at least two of his brothers are citizens of Libya. Applicant's mother and two of his brothers are resident in Libya. As the evidence established a potential disqualifying condition, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive E3.1.15.

The 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 applicant to choose between loyalty to the person involved and loyalty to the U.S. MC E2.A2.1.3.1. The phrase "agent of a foreign power" is a statutory term of art defined in 50 U.S.C. § 1801(b). It includes "any person other than a United States person, who acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States." 50 U.S.C. § 1801(b)(1)(B). Applicant failed to establish his brother, who is a career member of the military, does not fit within that definition. <sup>(3)</sup>

In assessing the vulnerability to exploitation of Applicant's associates, it is helpful to consider several factors. Even friendly nations can have profound disagreements with the U.S. over matters they view as important to their vital interests or national security. We know friendly nations have engaged in espionage against the U.S., especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at \*\*15-16 (App. Bd. Mar. 29, 2002). The nature of a nation's government, its relationship with the U.S., and its human rights record are all relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign power has an authoritarian government, a family member is associated with or dependent upon the government, or the country is known to conduct intelligence operations against the U.S.

The evidence clearly established Applicant is a loyal, trustworthy U.S. citizen. Nevertheless, he is in a position of vulnerability—he could be placed in the vulnerable position of having to choose between his loyalty to the U.S. and his loyalty to members of his family in Libya. Applicant insists he will report any foreign contacts and that he is not vulnerable to foreign coercion or influence. *See* MC E2.A2.1.3.4. But Applicant failed to meet his burden of establishing that his foreign family members are not in a position to be exploited by a foreign power. This mitigating condition "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).

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.

After carefully considering all of the evidence, I conclude Applicant did not mitigate the security concerns raised by his several family members who are citizens of or resident in Libya. I find against Applicant on ¶¶ 1.a-1.f. I find for Applicant on ¶ 1.g. Evidence Applicant traveled to Egypt and Saudi Arabia to visit some of his family does not establish a disqualifying condition, although it is evidence of the importance of his family to him.

### **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: 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. It appears Applicant had to return to Libya because his first two years of college were paid for by the Libyan government. Tr. 34.
3. I am mindful of the fact the Appeal Board has not discussed the applicability of 50 U.S.C. § 1801(b) to DOHA cases. In fact, the Appeal Board's interpretation of "agent of a foreign power" seems to be inconsistent with the statutory definition. *See* ISCR Case No. 02-24254, 2004 WL 2152747 (App. Bd. Jun. 29, 2004) (holding 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 MC 1). Although I am convinced 50 U.S.C. § 1801(b) defines "agent of a foreign power" for national security matters, including security clearance decisions, I am required to follow the Appeal Board's opinion. ISCR Case No. 03-16516 at 4 (App. Bd. Nov. 26, 2004). Nevertheless, it appears Applicant failed to establish his brother is not an agent of a foreign power under either definition.