

DATE: November 23, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-05317

## **ECISION OF ADMINISTRATIVE JUDGE**

**THOMAS M. CREAN**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Braden M. Murphy, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is a computer software engineer for a defense contractor. He came to the United States from Libya in 1974 as a 17-year-old to attend college. After receiving his degree, he stayed in the United States to work. He became a naturalized United States citizen in 1991, received a United States passport shortly thereafter and had it renewed in March 2001. He only visited Libya twice since becoming a United States citizen in 1991. He had a Libyan passport which he renewed in March 2001 to visit his sick mother in Tunisia and Libya. His Libyan passport expired in 2003 and he does not know where it is. He has infrequent contact with his mother and three of his four brothers in Libya. Security concerns of dual citizenship and foreign influence have been mitigated. Clearance is granted.

### **STATEMENT OF THE CASE**

On August 3, 2004, The Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb 20, 1990), 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). Applicant acknowledged receipt of the SOR on August 6, 2004. The SOR alleges security concerns under Guideline B (Foreign Influence) and Guideline C (Foreign Preference) of the Directive.

Applicant answered the SOR in writing on August 9, 2004. He admitted the allegations under Guideline B. He admitted the allegations under Guideline C except for the allegation of dual citizenship. He requested a hearing before an administrative judge. The request for a hearing was received by the Defense Office of Hearing and Appeals (DOHA) on August 12, 2004. Department Counsel was prepared to proceed with the case on October 14, 2004 and the case was assigned to me on October 20, 2004. A notice of hearing was issued on October 21, 2004. The hearing was held on November 8, 2004, in Arlington, Virginia. Eight government exhibits and the testimony of the Applicant were received during the hearing. The transcript was received on November 17, 2004.

## FINDINGS OF FACT

Applicant is 47 years old and employed as a computer software engineer for a defense contractor for the last seven years. He immigrated to the United States from Libya in 1974 at age 17 to attend college. He received his undergraduate degree in nuclear engineering from a university in the United States. He stayed in the United States after receiving his degree and became a naturalized United States citizen on June 17, 1991. He is married and has two small children. His wife and children are United States citizens and reside with him in a house he owns in the United States. He has no foreign investments and all of his investments are in the United States.

He received a United States passport shortly after becoming a citizen and the passport was renewed on March 28, 2001. He had a Libyan passport when he emigrated in 1974. It expired and he renewed it through the Libyan mission at the United Nations on March 2, 2001. This passport expired on March 3, 2003 and was in Applicant's possession as of April 26, 2004. (Government Exhibit 4). He is unable to locate the passport now. (TR, Page 33). If found, Applicant is willing to return the passport to Libyan authorities. (Government Exhibit 3).

His trips to Libya are infrequent and mostly to visit his sick mother. Applicant used his Libyan passport on at least three occasions after becoming a United States citizen. He used the Libyan passport on a pleasure trip to Libya in approximately 1995. He used the Libyan passport to visit his sick mother who was being operated on in Tunisia in 2001 because he thought he would have to accompany her back to Libya. He again used his Libyan passport to visit his sick mother in Libya in 2002. During this time, there was a ban on United States citizens traveling to Libya. Applicant used his Libyan passport as the only means of traveling to and entering Libya.

Applicant's mother and three of his brothers live in Libya. A fourth brother lives in Canada. Applicant has some nieces and nephews in Libya but they are all under the age of ten. He is not familiar with them since he has lived in the United States for over 30 years. His mother and brothers do not work for the Libyan government. He has telephone contact with his mother monthly and he rarely talks to his brothers.

The United States relationship with Libya has recently changed and is still evolving. The latest guidance from the United States Department of State on Libya is dated October 2004 (*See* Government Exhibits 5). The President of the United States terminated the national emergency with Libya and ended economic sanctions on September 20, 2004. Diplomatic missions and relations between the United States and Libya were reestablished in June and July 2004. There is no longer a travel ban against United States citizens traveling to 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 has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1 (b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6

"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: (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 applicant'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 of recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

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 that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* 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). "[S]ecurity clearance determination should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

## CONCLUSIONS

Under Guideline C (Foreign Preference), a security concern exists when an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he may be prone to provide information or make decisions that are harmful to the interests of the United States. Directive ¶ E2.A3.1.1. Under Guideline B (Foreign Influence) a security concern exists when an individual's immediate family, including co-habitants, and other persons to whom he may be bound by affection, influence, or obligations are not citizens of the United States and 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.

Applicant's use and possession of a Libyan passport brings this matter under Foreign Preference Disqualifying Conditions (FP DC) Directive ¶ E2.A3.1.2.1. (*the exercise of dual citizenship*) and Directive ¶ E2.A3.1.2.2. (*possession and/or use of foreign passport*). Applicant's possession and use of a Libyan passport after becoming a United States citizen and obtaining a United States passport is an exercise of dual citizenship and does create a security concern. Applicant's possession of a foreign passport is controlled by a memorandum from The Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, dated August 16, 2000, (Money Memorandum). This memorandum directs that any security clearance be denied or revoked for an individual with a foreign passport unless the Applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government. Applicant's Libyan passport has expired and he does not know where it is. The passport has ceased to exist and it can no longer be used for the purposes for which it was initially created. For all intents and purposes, he does not possess a foreign passport. Applicant has only visited Libyan twice to visit his sick mother since becoming a United States citizen over 14 years ago. He also had one trip to Tunisia using his Libyan passport again to visit his sick mother. The only way for him to enter Libyan at the time was to use his Libyan passport. I conclude that under the circumstances this is not an exercise of dual citizenship and the security concerns under Guideline C are mitigated.

Applicant's relatives in Libya brings his matter under Foreign Influence Disqualifying Conditions (FI DC) Directive ¶ E2.A2.1.1.1. (*an immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country*). Immediate family members are *spouse, father, mother, sons, daughters, brothers, and sisters*. Directive ¶ E2.A2.1.3.1. Applicant's mother and brothers are immediate family members and reside in Libya. The conditions that may mitigate this disqualifying condition are (FI MC) Directive ¶

E2.A2.1.3.1. (*the immediate family members 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 persons involved or the United States*); and Directive ¶ E2.A2.1.3.3 (*contact and correspondence with foreign citizens are casual and infrequent*). Applicant's mother is in her 70s and not well. His brothers are professionals but do not work for the Libyan government. Applicant's contacts with his family in Libya are casual and infrequent. Applicant talks to his mother monthly but with his brothers only every few months. Applicant has mitigated the disqualifying condition because the immediate family members in Libya are not agents of the Libyan government or in a position to be exploited by Libya so as to force Applicant to choose between loyalty to the United States and the immediate family members and his contact with them is casual and infrequent. I conclude Applicant has mitigated the disqualifying condition under Guideline B.

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is eligible for access to classified information.

### **FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegation set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1 Guideline C FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2 Guideline B FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For Applicant

Subparagraph 2.e.: For Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Thomas M. Crean

Administrative Judge