

DATE: March 20, 2007

In re:

SSN: -----

Applicant for Public Trust Position

P Case No. 04-12255

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a dual citizen of Yemen and the United States, possesses a Yemeni passport. He maintains his Yemeni citizenship to facilitate the paperwork associated with his ownership of the family residence in Yemen. Foreign preference concerns persist because of his ongoing exercise of dual citizenship. Foreign influence concerns are raised by the Yemeni residency and citizenship of his mother and siblings, and by Applicant's ownership of property in Yemen. The application for a position of trust is denied.

STATEMENT OF THE CASE

On February 17, 2005, Applicant submitted an application for a position of public trust. The Defense Office of Hearings and Appeals (DOHA) declined to grant the application under Department of Defense Directive 5220.6 (Directive), *Defense Industrial Personnel Security Clearance Review Program*, dated January 1992, as amended and modified ("Directive").⁽¹⁾ In a Statement of Reasons (SOR) dated October 5, 2006, DOHA proposed to deny or revoke access to an ADP sensitivity position for Applicant because of conduct alleged under Guideline C (Foreign Preference) and Guideline B (Foreign Influence) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR on October 20, 2006, and elected to have a decision on the written record without a hearing.

The government submitted a File of Relevant Material (FORM) on January 16, 2007, consisting of five exhibits (Items 1-5). On January 18, 2007, DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt.⁽²⁾ Applicant forwarded his rebuttal on February 14, 2007. Department Counsel had no objection to his response, and on February 22, 2007, the case was assigned to me to consider whether it was clearly consistent with the national interest to grant Applicant a position of trust.

RULINGS ON PROCEDURE

In the FORM, the government requested I take administrative notice of the following facts with respect to Yemen:

Yemen is a developing country located in the Middle East, which was established after the unification of the Yemen Arab Republic and the People's Democratic Republic of Yemen. Yemen is a republic with a history of economic hardship. Yemen has a poor record with respect to human rights including Government-acknowledged torture, poor prison conditions, arbitrary arrest, prolonged pretrial detention, a weak judiciary, and government corruption combined with a lack of transparency. Al-Qaeda and its affiliates are engaged in activity in Yemen and [the State Department] has warned all U.S. citizens to consider the high risk of travel to Yemen. The State Department issued a Travel Warning to avoid areas in Yemen frequented by both U.S. citizens and Yemeni expatriates. Yemeni members of Al-Qaeda and known affiliates of Al-Qaeda were imprisoned in Yemen for their roles in the 2000 bombing of the USS Cole. In 2002, an American company helicopter was attacked, and Americans were also killed in shootings and during an attack on a hospital. Recently, two persons were prosecuted for a plot to assassinate the American ambassador in Yemen. A number of persons in Yemen have also traveled to Iraq to fight against Coalition forces. Finally, Yemen has failed to take action to prevent terror financing within its borders, for example, Yemen did not freeze the assets of a well-known Yemeni sheikh who is associated with Al-Qaeda. Persons traveling to Yemen also may be asked for evidence of their character and the purpose for their visit. Yemen also may not recognize the U.S. citizenship of dual Yemen-U.S. citizens so that the U.S. consulate cannot provide aid to such persons. Lastly, Yemen sometimes restricts travel of U.S. citizens within Yemen.

After reviewing the source documents from the Department of State, ⁽³⁾ I agree to take administrative notice of the foregoing facts concerning Yemen and activities therein with the following caveats:

Yemen has a poor record with respect to human rights. While Yemen has a poor human rights record in the areas cited by Department Counsel, the U.S. State Department also reports that the Yemeni government generally respected human rights in some areas.

Al-Qaeda and its affiliates are engaged in activity in Yemen. Per the *Consular Information Sheet*, the Department of State is concerned that Al-Qaeda and its affiliates *may be actively engaged* in extremist-related activities.

Recently, two persons were prosecuted for a plot to assassinate the U.S. ambassador in Yemen. The prosecution is reported in the context of Yemen taking action against Al-Qaeda and local extremists, arresting several individuals suspected of having Al-Qaeda ties and prosecuting the perpetrators of numerous terrorist acts. Although the two individuals are named in the source document (*Country Reports on Terrorism for 2005*), it is not clear whether they are members of Al-Qaeda or are local extremists.

Yemen has failed to take action to prevent terror financing within its borders, for example, Yemen did not freeze the assets of a well-known Yemeni sheik who is associated with Al-Qaeda. While the Yemeni government failed to freeze the assets of a prominent sheik associated with Al-Qaeda, the source documentation does not support an inference that the Yemeni government takes no action to stem terror financing within its borders, although as reported in the *Country Report on Terrorism*, the Yemeni government's capacity for stemming terrorism financing remains limited.

Yemen also may not recognize the U.S. citizenship of dual Yemen-U.S. citizens so that the U.S. consulate cannot provide aid to such persons. While the State Department reports that the Government of Yemen may not recognize the U.S. citizenship of dual citizens of Yemen and the U.S., U.S. consular officials' ability to assist may be hindered (rather than prohibited) with respect to those persons who do not enter on a U.S. passport.

FINDINGS OF FACT

DOHA alleged under Guideline C, foreign preference, that Applicant exercised dual citizenship with the U.S. and Yemen (¶ 1.a), possessed a valid Yemeni passport (¶ 1.b), obtained it in August 2004 after he had acquired U.S. citizenship and a U.S. passport (¶ 1.c), and that he maintained his Yemeni citizenship to facilitate the paperwork for property in Yemen held jointly with his brother. Applicant's ownership of the home in Yemen (¶ 2.b) was also alleged under Guideline B, foreign influence. DOHA also alleged under Guideline B that Applicant's mother, two brothers, and one sister are resident citizens of Yemen (¶ 2.a) and Applicant traveled to Yemen from December 1999 to January 2000

(¶ 2.c). Applicant admitted the allegations when he answered the SOR (Item 3).

Applicant's admissions are incorporated as findings of fact. After a thorough review of the documents presented for my consideration, I make the following additional findings of fact.

Applicant was born in Saudi Arabia in August 1962. He acquired derivative Yemeni citizenship from his parents at birth. Since neither of his parents was a Saudi citizen, he was not eligible for Saudi citizenship. During his youth, Yemen underwent political instability, and the country was divided into two republics, North Yemen and South Yemen, with South Yemen establishing close ties with Communist countries despite years of British influence. It is not clear where in Yemen Applicant was raised along with his two brothers and one sister.

Before his 19th birthday, Applicant's father died and Applicant became the legal head of household. For better access to health and schools, the family decided to move from their village to a municipality where they built a small residence using their father's money. The home was registered in Applicant's name, although Applicant considers it to be owned by all family members.

Sometime after his 26th birthday, Applicant came to the U.S. From March 1989 to July 1993, Applicant pursued a master's degree in English literature at a public university in the U.S. He decided to remain in the U.S. after he earned his degree, and in February 1994 he married a U.S. native citizen. They have two children who were born in June 1997 and in December 2004.

In January 1996, Applicant started working as a reliability analysis coordinator in the U.S. In mid-June 1999, Applicant became a U.S. naturalized citizen, taking an oath to renounce all foreign allegiances, to support and defend the U.S. Constitution and its laws, and to bear arms or perform noncombatant service or civilian service on behalf of the U.S. if required. One month later, he acquired his U.S. passport, which was valid for ten years. He traveled on that passport to Yemen in December 1999, paying a fee for the visa required to enter Yemen on his U.S. passport. He stopped off in Saudi Arabia before returning to the U.S. in January 2000.

In September 2000, he began taking classes in accounting at a local vocational/technical school while continuing his employment. He was laid off in June 2001. The following month, he started his present job as a quality assurance auditor II for a TRICARE claims processor.

On June 17, 2003, Applicant completed a Questionnaire for Public Trust Positions (SF 85P). He indicated thereon that he has had dual citizenship with Yemen and the U.S. since his naturalization in the U.S., that his mother is a resident citizen of Yemen, and that his father is deceased. Applicant disclosed his foreign travel to Yemen and Saudi Arabia from December 1999 to January 2000. Applicant re-signed the SF 85P on February 17, 2005.

In 2004, Applicant's family in Yemen decided to put the house in Yemen up for sale. As the legal representative under whose name the house is registered, Applicant had to send a proxy authorizing a brother to act with regard to selling the house. Confirmation of Applicant's identity as a Yemeni citizen was required to execute the proxy. Feeling he had no choice, Applicant applied for renewal of his Yemeni passport at the Yemeni Embassy in the U.S., and on August 18, 2004, he was issued a passport by the Republic of Yemen that is valid until August 18, 2010.

On or about August 4, 2005, Applicant was interviewed by an authorized investigator for the Department of Defense.⁽⁴⁾ He admitted that he possessed a Yemeni passport, but indicated he would not renew the Yemeni passport. Applicant also expressed a willingness to renounce his Yemeni nationality (citizenship).

One year later, DOHA sent interrogatories to Applicant requesting copies of his Yemeni and U.S. passports. Applicant submitted copies of his Yemeni passport issued in August 2004 and of his U.S. passport issued in July 1999. The Yemeni passport contains entries in Arabic, including the names and addresses of relatives to contact in the Republic of Yemen when needed. There is no indication that Applicant had ever used that passport to travel abroad. In his August 12, 2006, response to DOHA's interrogatories, Applicant denied any intent to renew his foreign passport.

Other than the residence in Yemen, Applicant has no financial interests or investments in Yemen⁽⁵⁾. He does not

provide financial support for his relatives in Yemen, who earn sufficient incomes to support themselves. As of February 2007, Applicant's mother, two brothers, and one sister were resident citizens of Yemen. They have not asked him about his job in the U.S.

Applicant takes his oath of allegiance to the U.S. seriously. He owns a home in the U.S., which he bought in about May 2000, and gets together regularly with members of his spouse's family. Applicant believes that the U.S. presents the best future for his two children, who are U.S. citizens by birth. Applicant asserts his job performance reviews for the TRICARE claims processor have all been very good, although he provided no documentation of those reviews.

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). To be eligible for assignment to sensitive duties, an applicant must meet the security guidelines set forth in the Regulation. "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." Regulation ¶ C6.1.1.1.

DoD contractor personnel are afforded the right to the procedures contained in DoD Directive 5220.6 before any final unfavorable access determination may be made. Regulation ¶ C8.2.1. Appendix 8 of the Regulation sets forth the adjudicative guidelines, as well as the specific factors disqualifying and mitigating conditions for determining eligibility for access to classified information and assignment to sensitive duties. In evaluating the trustworthiness of an applicant, the administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person in light of the adjudicative process factors: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of participation; the presence or absence of rehabilitation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; and the likelihood of continuation or recurrence. Regulation AP8.

CONCLUSIONS

Guideline C--Foreign Preference

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. AG ¶ 9 Applicant has been a dual citizen of Yemen and the United States since his naturalization in the U.S. in June 1999. In active exercise of his foreign citizenship, Applicant applied for a Yemeni passport in 2004. That passport, issued on August 18, 2004, is valid to August 18, 2010, so his situation falls within disqualifying condition (DC) ¶ 10(a)(1) *exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: (1) possession of a current foreign passport.* Applicant's renewal of his foreign passport to facilitate the paperwork for the property he owns in Yemen is sufficient for DC ¶ 10(a)(5) *using foreign citizenship to protect financial or business interests in another country.* He acted to protect his and his family's ownership interests and rights, even if the ultimate goal was to sell the property.

Applicant has expressed a willingness to renounce his Yemeni citizenship and to not renew his foreign passport. Mitigating condition (MC) ¶ 11(b) *the individual has expressed a willingness to renounce dual citizenship* applies where there is credible resolve, but he has taken no action in accord with that intent. Nor has he attempted to destroy, surrender, or otherwise invalidate his Yemeni passport, which is required for consideration of MC ¶ 11(e) *the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated.* There is no mitigating factor for necessity. His retention of a valid Yemeni passport, more than two years after he would have needed it for the proxy and after he had been made aware that it was of concern to the Department of Defense, raises doubts about his resolve to renounce his foreign citizenship. As long as he retains a Yemeni passport, he is free to travel as a Yemeni citizen, making it difficult for the U.S. to track any foreign travel. Even if he does not use the Yemeni passport for

foreign travel, future acts in preference to his Yemeni citizenship cannot be ruled out as long as he has an ownership interest in the family home in Yemen, given his past exercise of dual citizenship in connection with that property.

Guideline B--Foreign Influence

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interests. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/is associated with a risk of terrorism. AG ¶ 6 Applicant's mother and three siblings are resident citizens of Yemen, a country with diplomatic relations with the U.S. and not hostile to the U.S., but one which has a poor human rights record in several areas and has a higher risk of terrorism within its borders, as demonstrated by the bombing of the USS Cole. Potentially disqualifying foreign influence concerns are raised under ¶ 7(a) *contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion*. Although the valuation of the property is not of record, this foreign asset falls within DC ¶ 7(e) *a substantial business, financial or property interest in a foreign country, or in any foreign-owned or foreign-operated business, which could subject the individual to heightened risk of foreign influence or exploitation*, as he has already proved himself willing to comply with Yemeni requirements. However, in the absence of any evidence that Applicant engaged in conduct that increased his vulnerability to exploitation, pressure, or coercion during his trip to Yemen in December 1999, his travel to Yemen does not merit application of DC 7(i).

The burden is on Applicant to demonstrate that he is unlikely to be placed in a position of having to choose between the interests of his relatives in Yemen and the interests of the U.S. (¶ 8(a) *the nature of the relationships with foreign persons, the country in which these 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.*). Little can be gleaned from the record about the occupational endeavors, associations, or activities of Applicant's relatives in Yemen. It is not clear whether any of his relatives in Yemen have a government connection. On his SF 85P Applicant listed an address for his mother, who was living in a major port city in Yemen. With respect to his family members in Yemen, Applicant has otherwise indicated only that all are "decent, law-abiding citizens with decent incomes to sustain them financially" and they do not ask him about his work (*see* Response to FORM).

The extent of his contacts with his Yemeni relatives is a factor to consider in assessing the risk of undue foreign influence. Applicant has returned to Yemen only once since he came to the U.S. in 1989, so he does not have regular in-person contact with his relatives, at least not in Yemen. Yet, without knowing the extent of his correspondence with his relatives in Yemen, it cannot be determined that his contact with them is so casual and infrequent that there is little likelihood it could create a risk for foreign influence or exploitation (*see* MC ¶ 8(c)). He has already shown himself willing to comply with Yemeni requirements concerning the property held in his name in Yemen. Under the circumstances, I am unable to apply MC (¶ 8(f) *the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual*).

Applicant has established significant ties to the U.S. since the mid-1990s. He married a U.S. native citizen in February 1994, been gainfully employed since at least January 1996 with the exception of June 2001 when he was laid off, became a U.S. citizen in June 1999, acquired his U.S. passport in July 1999, and bought his home in about May 2000. Despite these actions and his professed allegiance to the U.S., he chose to exercise his Yemeni citizenship to the benefit of himself and/or his family members in Yemen. He has not sufficiently mitigated the concerns raised by his retention of the Yemeni passport and his ties (family and property) to Yemen.

FORMAL FINDINGS

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

Paragraph 1. Guideline C: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Paragraph 2. Guideline B: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: Against Applicant

Subparagraph 2.c: 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 position of trust for Applicant. The application for a position of trust is denied.

Elizabeth M. Matchinski

Administrative Judge

1. By memorandum from the Deputy Under Secretary of Defense (Counterintelligence and Security) dated November 19, 2004, DOHA was authorized to utilize the procedures of DoD Directive 5220.6 to resolve contractor cases forwarded to it by the Defense Security Service (DSS) or the Office of Personnel anagement (OPM) for trustworthiness determination, including those involving ADP-I, ADP-II, and ADP-III positions. Applicant's trustworthiness is adjudicated under the revised adjudicative guidelines set forth in Appendix 8 of Department of Defense Regulation 5220.2-R, *Personnel Security Program*, dated January 1987, as amended and modified ("Regulation").
2. In its correspondence forwarding the SOR to Applicant, DOHA Columbus erroneously notified Applicant he would have 20 days in which to submit his written response to the documentary information supporting the SOR. (See Item 2) In the FORM, and in correspondence forwarding the FORM to Applicant, Applicant was properly notified that he had 30 days from receipt of the FORM to file any objections or information for consideration.
3. The source documents are the U.S. State Department's *Background Note: Yemen* dated January 2006, the *Consular Information Sheet* on Yemen dated July 24, 2006 (information current as of December 11, 2006), the *Travel Warning* dated December 11, 2006, the *Country Reports on Human Rights Practices-2005* on Yemen dated March 8, 2006, and sections of the *Country Reports on Terrorism 2005* released April 2006.
4. DOHA indicated in interrogatories (Item 5) that Applicant had presented a signed sworn statement to an authorized investigator for the Department of Defense on August 4, 2005, in which he stated he possessed a Yemeni passport. He likely provided the investigator with salient details about his siblings and home ownership in Yemen that provided the basis for SOR ¶¶ 1.d, 2.a, and 2.b. That statement is not before me for review.
5. When he answered the SOR, Applicant admitted ¶ 2.c, that he owns a home in Yemen with his brother. There is no evidence that the residence in Yemen has been sold.