



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 09-04476
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: Dana D. Jacobson, Esq.

August 16, 2010

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance to work in the defense industry. The evidence shows Applicant has connections or ties to Yemen, a country where the current security environment has deteriorated and where terrorist organizations are present. The evidence also shows Applicant has a depth of loyalty to the United States, so that he can be expected to resolve any conflict in favor of the U.S. interest. He demonstrated the depth of his commitment to the United States by working as an Arabic linguist for more than three years supporting the U.S. armed forces in Iraq. Accordingly, as explained in further detail below, this case is decided for Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on March 26, 2010, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guideline known as Guideline B for foreign influence. The SOR also recommended that the case be submitted to an administrative judge to decide whether to deny or revoke Applicant's security clearance.

Applicant answered the SOR in a timely fashion and requested a hearing. The case was assigned to me June 23, 2010. The hearing took place July 9, 2010, as scheduled. The hearing transcript (Tr.) was received July 19, 2010.

Rulings on Procedure

At hearing, the SOR was changed in two respects. First, Department Counsel withdrew the allegation in SOR ¶ 1.c.² Second, the allegation in SOR ¶ 1.h was amended to conform with the admitted evidence.³

Findings of Fact

The SOR alleges that Applicant may be subject to foreign influence due to his ties or connections to Yemen. Applicant admits, with explanations, the vast majority of the SOR allegations. In addition, the following facts are established by substantial evidence.

Applicant is a 48-year-old employee of a federal contractor. A native of Yemen, he has worked as an Arabic linguist since March 2006. He has lived and worked in Iraq for about three and one-half years on behalf of the U.S. armed forces.⁴ As a result, he served in harm's way under fire on numerous occasions. He is married to a U.S. citizen and has three children, also U.S. citizens, all of whom live in the United States where the children attend public schools.

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Tr. 15–16.

³ Tr. 131–132.

⁴ Tr. 116–130; Exhibits A–D.

Applicant was born in Yemen in 1962.⁵ He earned a bachelor's degree from a Yemeni university in 1984. He immigrated to the United States on a student visa in 1984 to study English at a language school. He later earned an MBA in 1988. He became a U.S. citizen in 1992. He lived in the United States until late 1996 when he returned to Yemen, using his U.S. passport, to care for his sick mother. His mother passed away in 1997. He remained in Yemen to care for his father who was also sick. His father passed away in 1998. He returned to the United States in 1998 for a brief period and then went back to Yemen to close a computer training business he had owned and operated. In 1999, he returned to the United States where he has since resided except when working in Iraq in support of the U.S. armed forces.

Applicant had a store front computer business in Yemen during the 1990s, when he was there caring for his sick parents. Through this business, Applicant had contact with Yemeni governmental agencies when he submitted bids and provided services. The direct contact was usually done by sales representatives who worked for Applicant. During this period, he also served as part-time advisor or consultant to a bank in Yemen. He has not maintained contact with any of these individuals or organizations since his departure from Yemen.

Applicant's parents divorced when he was about 17 years old. Applicant, along with two brothers, elected to remain with his mother. Another brother and sister elected to remain with their father. Applicant's father remarried and had additional children. Applicant has no real relationship with his half-siblings. He has not had a good relationship with his stepmother, and he last saw her in the 1990s.

Applicant has three brothers and one sister, all of whom are citizens of Yemen. Two brothers immigrated to the United States in 2008 with Applicant's assistance. Both brothers are lawfully residing in the United States. One brother is accompanied by his wife, Applicant's sister-in-law, who is also a Yemeni citizen. The other brother's spouse along with their children are in Yemen awaiting permission to come to the United States.

Applicant's third brother lives in Yemen where he is employed as a high-school administrator. He has a wife and children as well. Applicant is not close to this brother, and he last saw him in the 1990s.

Applicant's sister lives in Yemen. She is married with children. Applicant is not close to his sister, and he last law her in 1990s.

In addition to his family ties to Yemen, Applicant has two other matters that were alleged in the SOR as potential concerns. First, Applicant is a distant relative to a high-ranking military official in Yemen. Applicant discovered his relative's military position by chance when he was working in Iraq. Applicant was about eight years old the last time he saw this person. Second, Applicant is acquainted with the half-brother of a very high-

⁵ Exhibit E (many of the facts are based on this document).

level official in the Yemeni government. Applicant grew up in the same neighborhood as the half-brother. Applicant's last contact with this individual was in about 2000.

Administrative notice was taken of certain facts concerning Yemen and the current security environment there.⁶ In brief, Yemen faces a number of security, political, economic, and humanitarian challenges, including the activity of Yemen-based al-Qa'ida in the Arabian Peninsula. A recent example of the security threat is the involvement of al-Qa'ida in the Arabian Peninsula in the Christmas Day 2009 attempted bombing of an international passenger flight from Amsterdam to Detroit. In light of this event, the President publicly announced a moratorium on transferring Yemeni detainees held at Guantanamo back to Yemen.

Law and Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.⁷ As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁸ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁹ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁰

⁶ Appellate Exhibit I and Exhibits 4–9.

⁷ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

⁸ 484 U.S. at 531.

⁹ Directive, ¶ 3.2.

¹⁰ Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹¹ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹² An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹³ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁴ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.¹⁵ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹⁶

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant facts and circumstances, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.¹⁷ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

Under Guideline B for foreign influence,¹⁸ security concerns may arise due to foreign contacts and interests "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 interest."¹⁹ Of course, the mere possession of close family ties with a person in a foreign country is not—as a matter of law—disqualifying under

¹¹ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹² Directive, Enclosure 3, ¶ E3.1.14.

¹³ Directive, Enclosure 3, ¶ E3.1.15.

¹⁴ Directive, Enclosure 3, ¶ E3.1.15.

¹⁵ *Egan*, 484 U.S. at 531.

¹⁶ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁷ Executive Order 10865, § 7.

¹⁸ AG ¶¶ 6, 7, and 8 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁹ AG ¶ 6.

Guideline B. But if only one relative resides in a foreign country and an applicant has contact with that relative, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.²⁰

The most pertinent disqualifying and mitigating conditions in Applicant's case are the following three conditions (the first is disqualifying and the next two are mitigating):

Contact with a foreign family member, business, or professional associate, friend, or other person who is a citizen of or a resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;²¹

There is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;²² and

Contact or communications with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.²³

The disqualifying condition applies due to Applicant's ties to family members who are citizens of or residents in Yemen. He comes from a large family, many of whom live in Yemen, although it is apparent that his relationship with those in Yemen is distant. These circumstances create the potential for a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

In mitigation, the evidence supports a conclusion that Applicant has a depth of loyalty to the United States, so that he can be expected to resolve any conflict in favor of the U.S. interest. He demonstrated the depth of his commitment to the United States by working for more than three years supporting the U.S. armed forces in Iraq.²⁴ His work was not minor or trivial, as he performed important duty as an Arabic linguist. In addition, his ties to individuals who may be connected to high-level officials in Yemen

²⁰ See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

²¹ AG ¶ 7(a).

²² AG ¶ 8(b).

²³ AG ¶ 8(c).

²⁴ See ISCR Case No. 07-00034 at 2 (App. Bd. Feb. 5, 2008) ("an applicant's proven record of action in defense of the U.S. is very important and can lead to a favorable result for an applicant in a Guideline B case.") (citation omitted).

are not a serious concern. The evidence shows these ties are distant, and Applicant has not had any contact with these persons in years. His ties or connections to these persons are causal and infrequent and they are not of current security concern.

This is not a case of “divided loyalties”²⁵ with an applicant who has one foot in the United States and one foot in his native country. On the contrary, the evidence shows Applicant has both feet in the United States and that he has substantial contacts and ties to the United States. His presence in Yemen in the 1990s is best understood as a son doing his duty caring for his sick parents. Furthermore, his work on behalf of the United States in Iraq is persuasive evidence of his strong ties to the United States. This circumstance deserves great weight. Taken together, the totality of facts and circumstances support a conclusion that Applicant can be expected to resolve any potential foreign influence or pressure by either coercive or non-coercive means in favor of the U.S. interest.

In addition, given that the United States is producing relatively few Arabic speakers, Applicant’s skill set cannot be ignored in the post-9/11 world. It is enhanced by his understanding of the region and cultural nuances that may be lost on a foreign Arabic speaker. This circumstance does not dictate the outcome of the case, but it does receive some consideration under the whole-person concept.

To conclude, based on the evidence as a whole, both favorable and unfavorable, Applicant presented sufficient evidence to explain, extenuate, or mitigate the foreign influence security concerns. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline B:	For Applicant
Subparagraphs 1.a, 1.b, 1.d—1.j:	For Applicant
Subparagraph 1.c:	Withdrawn

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge

²⁵ AG ¶ 6.