



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



In the matter of:)
)
) ISCR Case No. 10-05257
)
Applicant for Security Clearance)

Appearances

For Government: Candace Le'i Garcia, Esq., Department Counsel
For Applicant: Daniel B. Smith, Esq.

August 11, 2011

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has mitigated foreign influence security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On December 1, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline B, foreign influence. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on January 25, 2011, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on March 2, 2011. The judge delayed scheduling the case because Applicant was in Iraq. The case was reassigned to me on June 7, 2011. DOHA issued a notice of hearing

on June 17, 2011, as amended on June 21, 2011. The hearing was convened as scheduled on July 14, 2011. DOHA received the hearing transcript (Tr.) on July 22, 2011.

Evidentiary Rulings

Evidence

The Government offered Exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified and submitted Exhibits (AE) A through J, which were admitted without objection.

Request for Administrative Notice

Department Counsel submitted written requests that I take administrative notice of certain facts about Sudan and Libya. Applicant did not object to either request, and they were approved. The requests and the attached documents were not admitted into evidence but were included in the record as Hearing Exhibits (HE) I and II. On my own motion, I have taken administrative notice that South Sudan became an independent nation on July 9, 2011. See U.S. Department of State Travel Warning for the Republic of South Sudan dated July 12, 2011. (HE III) The facts administratively noticed about Sudan are set out in HE I and summarized below.

Sudan

In 1953, the United Kingdom and Egypt concluded an agreement that provided for self-government for Sudan. After a transitional period, Sudan became independent in 1956. Since then, they have experienced years of civil war with efforts to bring about peace. The U.S. State Department describes the history of Sudan as follows:

Sudan has been at war with itself for more than three-quarters of its existence. Since independence, protracted conflict rooted in deep cultural and religious differences have slowed Sudan's economic and political development and forced massive internal displacement of its people. Northerners, who have traditionally controlled the country, have sought to unify it along the lines of Arabism and Islam despite the opposition of non-Muslims, southerners and marginalized peoples in the west and east.

In 2005, a Comprehensive Peace Agreement was signed, establishing a new Government of National Unity and the Interim Government of Southern Sudan. The interim period allowed for the implementation of the Comprehensive Peace Agreement and elections at all levels. The Republic of South Sudan separated from Sudan and became an independent nation on July 9, 2011.

A rebellion in Darfur resulted in the deaths of tens of thousands of persons there and has led to an estimated two million internally displaced persons in Sudan. The Sudanese Government is accused of being complicit in the bombing, murder, and rape

of innocent displaced persons from Darfur. The Sudanese President has demonstrated a continued refusal to honor his commitment to end the violence in Darfur.

Sudan is under a broad U.S. embargo with extensive trade restrictions on exports to Sudan. The United States considers Sudan a threat to national security and the foreign policy of the United States.

In 1993, the U.S. Secretary of State designated Sudan as a state sponsor of terrorism. Although Sudan pursues “counterterrorism operations directly involving threats to U.S. interests and personnel in Sudan,” the Sudanese government still openly supports HAMAS. Sudan remains on the state sponsor of terrorism list. However, following the Southern Sudan Referendum in January 2011, Secretary Clinton announced that the State Department was initiating the process of withdrawing Sudan’s state sponsor of terrorism designation, though Sudan must first meet all criteria spelled out in U.S. law.

Sudan’s human rights record is poor. There are numerous serious abuses, including extrajudicial and other unlawful killings by government forces, torture, beatings, rape, and other cruel and inhumane treatment by security forces. There are arbitrary arrests and detentions, executive interference with the judiciary and denial of due process, restrictions on citizens’ privacy, and restrictions on freedom of speech, press, assembly, religion, and movement.

The U.S. State Department continues to warn against all travel to Sudan. It also has indicated that terrorists are known to operate in Sudan and seek opportunities to carry out attacks against U.S. interests. In addition, anti-American sentiment is prevalent and Americans are warned to exercise the utmost caution in Sudan.

Findings of Fact

Applicant is a 46-year-old employee of a defense contractor. He is applying for a security clearance for the first time. He has an associate’s degree. He was married from 1999 to 2002. He married his current wife in 2002. He has two children, ages seven and four, and his wife is pregnant.¹

Applicant was born into a large family in Sudan. His family is from a tribe and an area of the Sudan that has been subjected to genocide and the human rights abuses described above. He has 15 siblings and half-siblings. One of his sisters was jailed because of her ethnicity. Applicant was expected to serve in the Sudanese military after college and fight the “holy war.” In order to avoid military service and the violence in Sudan, he fled to Egypt in 1998. He lived as a refugee until he was accepted for immigration to the United States in 1999. He became a U.S. citizen in 2008.²

¹ Tr. at 33-34, 43, 48-49, 68-69; GE 1-3; AE E, F.

² Tr. at 28-31, 61-62; Applicant’s response to SOR; GE 1-3; AE G.

Applicant's father and mother are Sudanese citizens and residents. His parents owned small businesses, but they have both closed their businesses. They live on a farm. They have been separated for a number of years, but still live in the same house in different rooms. Applicant is sponsoring his mother to immigrate to the United States. She will go to the U.S. Embassy in a neighboring country to obtain her visa.³

Applicant's brother fled Sudan to Libya in the early 1990s. He worked as a tradesman. He fled Libya when that country de-stabilized with violent clashes between demonstrators and government security forces. He is in a U.N.-sponsored refugee camp in Egypt on the Egyptian-Libyan border.⁴ Applicant has another brother who is in a refugee camp in Chad. These two brothers hope to immigrate to the United States.⁵

Applicant's remaining family, including his siblings, half siblings, and two stepmothers are Sudanese citizens and residents. None of his family members have any direct connection to the Sudanese government, security forces, insurgent groups, or terrorists.⁶

Applicant's wife was born in Sudan. Her family is from a different tribe and a different region of Sudan than Applicant's family. Neither family is from the region that became South Sudan. Applicant's wife's tribe has also been subjected to genocide and the human rights abuses described above. Applicant and his wife knew each other in school. Her sister immigrated to the United States before her and became a U.S. citizen. Her sister sponsored Applicant's wife to immigrate to the United States. Applicant and his wife reconnected in the United States, and they married in 2002. She became a U.S. citizen in 2008.⁷

Applicant's father-in-law is deceased. His wife's mother and six siblings are Sudanese citizens and residents. Applicant's brother-in-law worked for the police in Sudan until the early 2000s. He was forced to leave the police force because of his ethnicity. One of his sisters-in-law works for the Sudanese government in a position that is unrelated to the military, intelligence, or politics. Another sister-in-law worked for another section of the Sudanese government until 2006. This section was also unrelated to the military, intelligence, or politics.⁸

Applicant has a close friend who works for the local police in Sudan. This friend aided Applicant in his escape from Sudan. He is also the go-between when Applicant

³ Tr. at 39-40, 54-58; Applicant's response to SOR; GE 1-3.

⁴ The facts administratively noticed about Libya are set out in HE II.

⁵ Tr. at 26-29, 58-61; Applicant's response to SOR; GE 1-3.

⁶ Tr. at 30, 40, 58; Applicant's response to SOR; GE 1-3.

⁷ Tr. at 33, 48, 53-54, 66-67; Applicant's response to SOR; GE 1-3.

⁸ Tr. at 61-63, 66; Applicant's response to SOR; GE 1-3.

sends money to his family in Sudan. He receives the money and passes it to Applicant's family.⁹

Applicant contacts his family in Sudan about twice a month. His wife contacts her family about once a month. Applicant sends his family on average about \$400 to \$500 per month. He stated the money is used for food, medicine, and the costs of daily living. His wife occasionally sends money to her family in Sudan, but not as often. Applicant stated his wife's family is in a better situation than his family.¹⁰

Applicant does not own any foreign assets. He owns a company in the United States, and he has other U.S. assets. His wife works for a large U.S. corporation. He greatly appreciates the freedom, rights, privileges, and opportunities provided him by the United States. This country is his home. He has not returned to Sudan since 1998, and he has no intention to move back to Sudan. He stated that the Sudanese government considers their former citizens who support the U.S. and U.N. efforts to end the violence and genocide in Sudan to be "traitors."¹¹

Except for short visits back to the United States, Applicant has worked in Iraq as a linguist for defense contractors since May 2009. He did not tell his family in Sudan that he is working in Iraq. Applicant submitted numerous pieces of commendatory material from his time serving in Iraq. He served under hazardous conditions, and he was highly regarded by the U.S. military personnel with whom he served. Applicant is proud of the service he has provided to his adopted country. He stated that he is "willing to serve this country as long as [he is] alive." Applicant stated that he would report to security authorities any attempt to use his family against him.¹²

Several senior U.S. military members wrote letters praising Applicant's bravery during combat operations and his excellent performance of duties. In July 2010, one officer wrote:

I have had the pleasure of working daily with [Applicant] for the past eight months during a plethora of challenging operations across [Iraq]. . . . [Applicant's] attention to detail, awareness of ever-changing conditions and dedication to his duties were instrumental to the success of my team during this time. . . . In short, [Applicant] is very comfortable performing under the stressful and changing circumstances that are found in an active warzone.

[Applicant] served the United States [military] with bravery and distinction from early 2009 to July 2010. He has earned the respect of all the

⁹ Tr. at 38-39, 49-50; Applicant's response to SOR; GE 1-3.

¹⁰ Tr. at 26, 39, 51-52, 64-65; Applicant's response to SOR; GE 1-3.

¹¹ Tr. at 25, 29, 37, 44-46, 72-73.

¹² Tr. at 25, 32-37, 41-44, 67-73; Applicant's response to SOR; AE A-D, H-J.

personnel on my team, and has every confidence from the chain of command.¹³

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the

¹³ AE B.

applicant concerned.” See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

The security concern for foreign influence is set out in AG ¶ 7 as follows:

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 interest. 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/or is associated with a risk of terrorism.

The guideline notes several conditions that could raise security concerns under AG ¶ 7. The following are potentially applicable in this case:

- (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;
- (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual’s obligation to protect sensitive information or technology and the individual’s desire to help a foreign person, group, or country by providing that information; and
- (d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

Applicant and his wife have numerous family members and a close friend that are citizens and residents of Sudan. Two of Applicant’s brothers are Sudanese citizens in refugee camps in Egypt and Chad. Sudan has been plagued by civil war, genocide, and human rights violations, and it has sponsored terrorism. The presence of Applicant’s family members in Sudan, Egypt, and Chad creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion, both through him and through his wife. It also creates a potential conflict of interest. AG ¶¶ 7(a), 7(b), and 7(d) have been raised by the evidence.

SOR ¶ 1.I alleges that Applicant sends money to his family in Sudan. That is evidence of Applicant's ties of affection to his family. The security concerns raised by Applicant's family in Sudan are already alleged in other SOR allegations. There are no independent foreign influence security concerns raised by the money transfer. SOR ¶ 1.I is concluded for Applicant.

Conditions that could mitigate foreign influence security concerns are provided under AG ¶ 8. The following are potentially applicable:

(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.; and

(b) 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.

Applicant's and his wife's family and friend live in Sudan. Because of the nature of that government, its support of terrorism, and the atrocities it has helped perpetrate on its own people, I am unable to find AG ¶ 8(a) applicable.

Applicant has lived in the United States since 1999, and he has been a U.S. citizen since 2008. His wife is now also a U.S. citizen. His two children were born in the United States, and his wife is pregnant with their third child. Applicant owns a U.S. business, and his wife works for a large U.S. corporation. He has worked with U.S. forces in Iraq for most of the last two-plus years. A senior military officer wrote that Applicant served the United States military "in an active warzone" with "bravery and distinction." Applicant has not revealed to his family in Sudan that he was in Iraq. He stated that he would report to security authorities any attempt to use his family against him. The Appeal Board has stated that such statements, standing alone, are of limited value, unless there is record evidence that the applicant has acted in a similar manner in the past in comparable circumstances, or that the applicant has a previous track record of complying with security regulations and procedures in the context of dangerous, high-risk circumstances in which he made a significant contribution to the national security.¹⁴ In ISCR Case No. 05-03846 at 6 (App. Bd. Nov. 14, 2006), the Appeal Board discussed this issue:

As a general rule, Judges are not required to assign an applicant's prior history of complying with security procedures and regulations significant probative value for the purposes of refuting, mitigating, or extenuating the

¹⁴ ISCR Case 07-06030 at 3-4 (App. Bd. June 19, 2008).

security concerns raised by that applicant's more immediate disqualifying conduct or circumstances. See, e.g., ISCR Case No. 01-03357 at 4 (App. Bd. Dec. 13, 2005); ISCR Case No. 02-10113 at 5 (App. Bd. Mar. 25, 2005); ISCR Case No. 03-10955 at 2-3 (App. Bd. May 30, 2006). However, the Board has recognized an exception to that general rule in Guideline B cases, where the applicant has established by credible, independent evidence that his compliance with security procedures and regulations occurred in the context of dangerous, high-risk circumstances in which the applicant had made a significant contribution to the national security. See, e.g., ISCR Case No. 04-12363 at 2 (App. Bd. July 14, 2006). The presence of such circumstances can give credibility to an applicant's assertion that he can be relied upon to recognize, resist, and report a foreign power's attempts at coercion or exploitation.

I find Applicant provided evidence of his commitment in dangerous, high-risk circumstances during his combat services in Iraq, and he has such deep and longstanding relationships and loyalties in America that he can be expected to resolve any potential conflict of interest in favor of the United States. AG ¶ 8(b) is applicable.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered Applicant's service in Iraq. I also considered the totality of Applicant's family ties to Sudan, a country that has supported terrorism and has participated in genocide against its own people. The nature of a nation's government, its

relationship with the United States, and its human rights record are 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 country has an authoritarian government, a family member is associated with or dependent upon the government, the country is known to conduct intelligence operations against the United States, or the foreign country is associated with a risk of terrorism.

Applicant is a loyal U.S. citizen who has worked overseas under dangerous conditions in support of the national defense. He stated that he would report to security authorities any attempt to use his family against him. The Appeal Board has held that "generally, an applicant's statements, by themselves, as to what he would do in the face of threats by a foreign government or entity are entitled to little weight. On the other hand, an applicant's proven record of action in defense of the United States is very important and can lead to a favorable result for an applicant in a Guideline B case."¹⁵ The complicated state of affairs in Sudan places a significant burden of persuasion on Applicant to demonstrate that his foreign ties do not pose an unacceptable security risk. He has met that burden.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has mitigated foreign influence security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B: FOR APPLICANT

Subparagraphs 1.a-1.i: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge

¹⁵ ISCR Case 04-02511 at 4 (App. Bd. Mar. 20, 2007).