



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



In the matter of:)
)
) ISCR Case No. 07-06896
)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn E. Hoffman, Esquire, Department Counsel
For Applicant: *Pro Se*

May 14, 2008

Decision

HEINY, Claude R., Administrative Judge:

Applicant’s father was a Tunisian citizen. Applicant was born in the U.S. and from age 7 to 19 lived in Tunisia. Since 1991, he has lived in the United States. Applicant’s father, mother-in-law, and father-in-law are citizens and residents of Tunisia. His mother also resides in Tunisia. Applicant maintains a Tunisian passport, which he chooses not to surrender.

After a thorough review of the case file, pleadings, exhibits, and evidence, I conclude Applicant has rebutted or mitigated the government’s security concerns under Guideline B, foreign influence. However, Applicant maintains his Tunisian passport and has failed to rebut or mitigate the government’s security concern under Guideline C, foreign preference. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Applicant contests the Defense Department’s intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order

and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) on August 15, 2007, detailing security concerns under Foreign Preference and Foreign Influence.

On August 23, 2007, Applicant answered the SOR, and requested a hearing before an administrative judge. On December 14, 2007, I was assigned the case. On March 12, 2008, DOHA issued a notice of hearing scheduling the hearing held on March 26, 2008. The government offered Exhibits (Ex.) 1 through 3, which were admitted into evidence. Applicant testified on his own behalf. The record was kept open to allow Applicant to submit additional matters which were received on March 31, 2008. Department Counsel did not object to the material and it was admitted into evidence as Exs. A through E. On April 11, 2008, the transcript (Tr.) was received.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Tunisia. The request and the attached documents were not admitted into evidence, but were included in the record as Hearing Exhibits (HEx.) I–III. More recent versions of the same documents were admitted as HEx. IV–VI. A travel alert (HEx. VII) was also submitted for administrative notice. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his Answer to the SOR, Applicant admits all the allegations in the SOR. Applicant is a 35-year-old software engineer who has worked for a defense contractor since August 1996, and is seeking to maintain a secret security clearance, which he has had for 11 years. Applicant has excellent technical and problem solving skills. He provided a quality product on each project assigned. His job performance has been excellent. (Ex. B)

In 1972, Applicant was born in Kansas. His mother was born and raised in the U.S. She met Applicant's father when he was a student. They married and stayed in the U.S. until Applicant was 7 years old. Applicant's brother was born during this time. This brother is an electrician who lives in the same city as Applicant. (Tr. 61) From age 7 to 19, Applicant lived in Tunisia, where another brother was born. This brother is a salesman who also lives in the same city as Applicant. (Tr. 62) When Applicant lived in Tunisia, he returned to the U.S. every other year, spending a month to six weeks visiting

¹ Executive Order 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 revised adjudicative guidelines (AG) approved by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

his grandparents during the summer. (Tr. 27) His mother's father was an accountant and his mother's mother did not work outside the home. (Tr. 66)

Applicant's father worked in human resources for an oil company, taught English at a university, and was involved in agriculture. (Tr. 63) He is now retired and raises bees. (Tr. 63) Applicant does not know where his father is. (Tr. 50) Since his parents divorced in 2003, Applicant has maintained no contact with his father. (Tr. 51) His mother, who has lived in Tunisia more than 30 years, chose to remain in Tunisia following the divorce. (Tr. 23) She has mentioned returning to the U.S. permanently. (Tr. 50) Applicant's mother visited him from Christmas time until February. (Tr. 50) Applicant's two brothers, grandmother, uncles and everyone on his mother's side of the family live in the same state he does. (Tr. 35)

At age 19, Applicant returned to the U.S. to attend school. He visited Tunisia during the summers or during Christmas breaks at school. (Tr. 40) He traveled to Tunisia during July and August 1998, December 1999 and January 2000, July and August 2001, December 2001 and January 2002, and July and August 2004.

Applicant has a Tunisian passport issued in October 2003, which will expire in October 2008. He last used this passport on his 2004 trip to Tunisia. He used his U.S. passport for travel to Tunisia. (Tr. 38) He uses his U.S. passport for all travel except when visiting Tunisia. (Tr. 41) Upon leaving Tunisia he will show both his U.S. and Tunisian passports. (Tr. 41) In June 2007, when Applicant completed written interrogatories (Ex. 2), he stated he had no intention of giving up his Tunisian passport. He maintains his Tunisian passport for ease of travel when visiting Tunisia. Applicant plans on visiting his relatives in Tunisia every three years. (Tr. 21)

In May 1996, Applicant obtained his bachelors degree in electrical engineering from a U.S. state university. In December 2001, Applicant married a woman born in Tunisia who became a naturalized U.S. citizen in May 2006. They have two children, ages one and five, both born in the U.S. His wife is an accountant. They own a home worth approximately \$170,000 on which is owed \$117,000. (Ex. 3, Ex. C, Ex. D)

Applicant has approximately \$11,500 in a credit union saving account, \$7,500 in his checking account, and \$9,000 in share certificates. (Ex. E) He has \$100,000 in his company 401(k) retirement plan. (Tr. 30) Applicant and his wife have \$9,000 in a savings account in Tunisia. (Tr. 31) It is a special account for housing purchases. (Tr. 32) He no longer adds to that account because he has reached the maximum amount allowable for that account.

Applicant's father-in-law is a Tunisian citizen who is a retired civil engineer. Applicant's mother-in-law is a Tunisian citizen who is retired from the banking industry. (Ex. 3) Applicant talks with them weekly. Applicant has two brothers-in-law, one of whom is a computer engineer. The other is a college student. (Tr. 66) One brother-in-law lives in Canada and the other is about to move there. (Tr. 47) Within the last six months, his parents-in-law stayed with Applicant and his family for three months before

visiting Canada. Upon their return from Canada, they stayed with Applicant and his family for another four months, leaving two weeks before the hearing. (Tr. 47)

Applicant has never voted in a foreign election. (Tr. 22, 42) He owns no foreign property. (Tr.29) Applicant has no loyalty to the Tunisian government (Tr. 58)

Tunisia

I take administrative notice of the following facts. Tunisia is a republic with a strong presidential system dominated by a single political party. There are eight legal opposition parties. Progress toward full democracy has been slow. The current president has stood unopposed for re-election several times. In 1974 he was made "President for Life" by a constitutional amendment. (HExs. II and V) Tunisia has a long-time policy of seeking good relations with the West, including the United States, while playing an active role in Arab and African regional bodies. (HExs. II and V)

The Department of States warns Tunisia has open borders with Libya and Algeria. During late 2002 and early 2003, a number of tourists were kidnapped in the Sahara desert. In April 2002, tourists were also attacked by terrorists and in January 2007, another terrorist attack on tourists was disrupted. (HExs. I and IV) In light of the reported kidnappings of two western tourists in the Tunisian-Algerian southern desert region, the Department of State advises U.S. citizens to exercise extreme caution if traveling in this area. (HEx. VII)

The Tunisian government continues to commit serious human rights abuses which include infringement on citizens' privacy rights, severe restriction on freedom of speech and the press, and restriction on the freedom of assembly and association. (HExs. III and VI) There are frequent reports of widespread torture and abuse of prisoners, especially political prisoners. Tunisian security forces arbitrarily arrest and detain individuals. (HExs. III and VI)

American citizens of Tunisian origin are expected to enter and exit Tunisia on their Tunisian passports. If a Tunisian-American enters on a U.S. passport, they will still have to present a Tunisian passport to exit the country. (HExs. I and IV)

Policies

When evaluating an Applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching

adjudicative goal is a fair, impartial and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Foreign Preference

Foreign preference is a security concern because, when an individual acts in such a way as to indicate a preference for a foreign country over the United States, he or she may be prone to provide information or make decisions that are harmful to the interests of the United States. AG ¶ 9. Additionally, the possession or use of a foreign passport is a condition that could raise a security concern and may be disqualifying. AG ¶ 10(a) (1) Applicant has a Tunisian passport, which he used when visiting Tunisia. He has no intention of giving up his Tunisian passport. (Ex. 2) I find AG 10(a) (1) applies.

Applicant used his Tunisian passport in compliance with requirements stated in the *Consular Information Sheet: Tunisia*, U.S. Department of State Bureau of Consular Affairs, dated October 3, 2007 and February 5, 2008. (HEXs. I and IV) By Tunisian law, American citizens of Tunisian origin are expected to enter and exit Tunisia on their Tunisian passports. If a Tunisian-American enters on a U.S. passport, they will still have to present a Tunisian passport to exit the country. AG ¶ 11(d) states it may be a mitigating condition if “use of a foreign passport is approved by the cognizant security authority.” Compliance with advisements set forth in the *Consular Information Sheet: Tunisia* is not equivalent to approval by a cognizant security authority. AG ¶ 11(d) does not apply nor, as discussed below, do any of the other mitigating conditions under this guideline.

AG ¶ 11(e) sets forth conditions that could mitigate security concerns if the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated. Surrendering his passport to his company’s security officer and obtain it when he intends to travel to Tunisia might meet the requirements set forth in AG ¶ 11(d). The passport would have been surrendered to a “cognizant security authority,” and would be beyond Applicant’s control to the same extent as if one of the named events had occurred.

The government has a number of concerns when an individual possesses a foreign passport. First, the government’s knowledge of that individual’s travel once they leave the U.S. would be severely limited. Second, the government would have no way of preventing that individual from leaving the country. In an appropriate case, an individual with a U.S. passport could have that passport cancelled or revoked to prevent flight from the U.S. When a person possesses a foreign passport, the government’s ability to prevent flight from the U.S. is greatly reduced.

If the Tunisian passport was under the control of the company’s security officer and Applicant had to retrieve it before traveling to Tunisia, there would be a greater degree of control over Applicant’s travel. It is not certain that it would result in mitigating the security concern, but would be considered in making the determination as to whether a security concern existed. The entire matter is speculative because Applicant maintains control of his Tunisian passport and has not surrendered it to his company’s security officer or other cognizant security authority.

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 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. AG ¶ 6

The terrorists in Tunisia are not government supported terrorists. Tunisia is not known to target U.S. citizens to obtain protected information. Applicant does not have divided loyalties or foreign financial interests. The \$9,000 Tunisian account Applicant and his wife have is de minimus when compared to Applicant's U.S. assets.

I have considered the foreign influence disqualifying conditions, which are listed under AG ¶ 7. I find AG ¶ 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," and AG ¶ 7(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," apply.

Applicant's father, mother-in-law, and father-in-law are citizens and residents of Tunisia and are all retired. His mother is a dual U.S. and Tunisian citizen living in Tunisia. Normally, an individual's relationship with their father is a close relationship. However, in this case, Applicant is not close to his father. Since his parent's 2003 divorce, Applicant has had no contact with his father and is unsure of his father's location. Applicant talks to his in-laws weekly, but is not overly close to them.

Applicant's mother was born and raised in the U.S. She married a Tunisian, moved there, and has lived there more than 30 years. Her parents and siblings reside in the same state Applicant does. Applicant's two brothers also live in the U.S. in the same city where Applicant lives.

AG ¶ 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.," and AG ¶ 8(b) "there is no conflict of interest, either because the individual's sense of loyalty or obligations 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," apply to Applicant's parents and in-laws.

Applicant was born in the U.S. and lived here until age seven. From age 7 until 19 he lived in Tunisia, but returned to the U.S. every two or three years to visit his mother's relatives. At age 19, he returned to the U.S. to attend school and has remained. His wife was born in Tunisia but is a naturalized U.S. citizen. Both of his children were born in the U.S. Applicant owns a home in the U.S. Because of these things there is little likelihood Applicant has a conflict of interest. If there was a conflict his longstanding loyalty to the U.S. makes it likely the conflict would be resolved in favor of the U.S.

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 the 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) 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 also considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant was born in the U.S., left the country at age seven, and returned in 1991, at age 19 to attend college, and has remained since. His wife, children, brothers, and his mother's family all reside in the U.S. He is an established, highly regarded engineer, with considerable U.S. ties and assets.

I considered the totality of Applicant's family ties to Tunisia and the heavy burden an Applicant carries when he has family members in a foreign country. None of his relatives are connected to any foreign government. Applicant was sincere, open, and honest at the hearing. It is unlikely his parents or in-laws will be subjected to coercion or duress from terrorist groups or the Tunisian government. His relatives are not a security concern.

However, Applicant maintains his Tunisian passport so he can travel to Tunisia. This is a security concern that has not been mitigated. Even with Applicant's deep and longstanding relationships and loyalties to the U.S., including his uncompromising commitment to his country, wife, and children, the possession of the foreign passport remains of security concern.

Due to possession of the foreign passport, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the foreign influence security concerns, but not the foreign preference 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 C: AGAINST APPLICANT

 Subparagraph 1.a: For Applicant
 Subparagraph 1.b: Against Applicant
 Subparagraph 1.c: Against 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
 Subparagraph 2.f: For Applicant

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge