



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS and APPEALS**



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-03922

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel

For Applicant: *Pro se*

04/15/2015

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense's (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. He has regular and frequent contact with his two brothers and three sisters who are citizens and residents of Afghanistan. The foreign influence security concerns are not mitigated. Clearance is denied.

History of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on October 31, 2014, the DoD issued an SOR detailing security concerns. DoD adjudicators could not

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

find that it is clearly consistent with the national interest to grant or continue Applicant's security clearance due to foreign influence security concerns.

On November 14, 2014, Applicant answered the Statement of Reasons (SOR) and elected to have the matter decided without a hearing. Defense Office of Hearings and Appeals (DOHA) Department Counsel submitted the Government's case in a File of Relevant Material (FORM), dated February 4, 2015. The FORM contained eight attachments (Item). On March 9, 2015, Applicant responded to the FORM. Department Counsel did not object to the response, which was admitted into the record. On April 8, 2015, I was assigned the case.

Procedural Rulings

Department Counsel requested administrative notice of facts concerning the Islamic Republic of Afghanistan (Afghanistan), and provided supporting documents to show detail and context for those facts. (Item 8) Applicant did not object or agree to the administrative notice request.

Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from government reports. See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). (Exhibits I to VI)

Findings of Fact

In Applicant's Answer to the SOR, he admitted his parents were citizens of Afghanistan residing in the United States, his two brothers are citizens and residents of Afghanistan, his three sisters are citizens and residents of Afghanistan, and he provides financial assistance to his family in Afghanistan. I incorporate Applicant's admissions to the SOR allegations. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is a 29-year-old linguist who has worked for a defense contractor since November 2009 and seeks to obtain a security clearance. Applicant called no witnesses and produced no work or character references. He provided a three-page response to the SOR and a three-page response to the FORM. No additional documents were received from Applicant.

In 1985, Applicant was born in Afghanistan. From January 2002 to March 2003, he was a high school student. From April 2003 through October 2007, he was an interpreter working with the U.S. Army in Afghanistan. (Item 7) He entered the United States under a special immigration program for individuals who had performed services

for the U.S. Armed Forces in Afghanistan. (Item 7) In November 2007, he became a naturalized U.S. citizen. From March 2010 to the present, his primary residence has been in Afghanistan. (Item 7) He visits the United States twice a year spending time at his sister's home and his brother's home, who are citizens and residents of the United States. (Item 7)

Applicant's father and mother are citizens of Afghanistan residing in the United States. His mother has never been employed outside the home. His father is currently unemployed. Previously, he was the owner of a pharmacy in Afghanistan. Twenty five years ago he left the Afghan Army where he had been a civil engineer and colonel. (Item 7)

Applicant has five siblings who are citizens and residents of Afghanistan. One brother is a civil engineer working for a private company and his other brother is in medical school. (Item 3) He and one of his brothers living in Afghanistan have a joint bank account in Afghanistan. His three sisters are doctors. One works for a public hospital, one works in a clinic, and the third sister is looking for work. (Item 3)

In the past, Applicant has provided his siblings in Afghanistan support of \$300 to \$700. In his November 2014 SOR response he states he uses "a nearby ATM machine and I give them cash an amount of \$300.00 monthly or sometimes a bit more. . ." (Item 3)

Applicant states:

I do admit that I have strong familial ties in a foreign country which is [sic] consists of regular contacts with financial support. I do understand that Afghanistan has a weak and corrupt government, convergence of terrorist groups gains momentum and dissolves periodically, Taliban and Haqqani Network is a big threat to development of the country, human rights violations exists, however, my family lives in Capital Kabul where there is much better security than that of the rest of the country. My siblings are educated people who understand their rights and there is no and in fact zero possibility that they could be coerced, exploited, pressured or manipulated. (FORM Answer)

Afghanistan

Afghanistan is a country in Southwestern Asia. It is approximately the size of Texas (249,935 square miles). Pakistan borders it on the east and the south. Iran borders it on the west and Russia to the north. It is a rugged and mountainous country, which has been fought over by powerful nations for centuries. In 2009, the population was about 28 million people, with about 3,000,000 Afghans living outside Afghanistan.

Afghanistan is presently an Islamic Republic with a democratically elected president. Afghanistan has had a turbulent political history, including an invasion by the

Soviet Union in 1979. After an accord was reached in 1989, and the Soviet Union withdrew from the country, fighting continued among the various ethnic, clan and religious militias. By the end of 1998, the Taliban rose to power and controlled 90% of the country, imposing aggressive and repressive policies.

In October 2001, U.S. forces and coalition partners led military operations in the country, forcing the Taliban out of power by November 2001. The new democratic government took power in 2004 after a popular election. Despite that election, terrorists, including al-Qaida and the Taliban, continue to assert power and intimidation within the country. Safety and security are key issues because these terrorist organizations target United States and Afghan interests by suicide operations, bombings, assassinations, car-jacking, assaults, or hostage taking. At this time, the risk of terrorist activities remains extremely high. The country's human rights record remains poor and violence is rampant. According to recent reports from the U.S. Department of State, insurgents continue to plan attacks and kidnappings of Americans and other Western nationals. Travel warnings are ongoing. No section of Afghanistan is safe or immune from violence.

After the fall of the Taliban, the U.S. supported the emergence of a broad-based government, representative of all Afghans, and actively encouraged a [United Nations] role in the national reconciliation process in Afghanistan. The U.S. has made a long-term commitment to help Afghanistan rebuild itself after years of war. The U.S. and others in the international community currently provide resources and expertise to Afghanistan in a variety of areas, including humanitarian relief and assistance, capacity-building, security needs, counter-narcotic programs, and infrastructure projects.

The United States is willing to support fully the ambitious agenda set out by the recently re-elected Afghan president, focusing on reintegration, economic development, improving relations with Afghanistan regional partners, and steadily increasing the security responsibilities of the Afghan security forces.² The United States has combat troops deployed to Afghanistan. This commitment to Afghanistan is balanced against the inherent dangers of the ongoing conflict in Afghanistan to citizens and residents of Afghanistan.

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 must be considered 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 overarching

² U.S. Department of State, *Afghanistan*, November 5, 2014.

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 interests of 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 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 Executive Order (EO) 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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guideline B (foreign influence).

Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

[I]f the individual has divided loyalties or foreign financial interests, [he or she] 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 ¶ 7 indicates two conditions that could raise a security concern and may be disqualifying 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; and

(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.

AG ¶¶ 7(a) and 7(b) apply. Applicant has five siblings who are citizens and residents of Afghanistan. He has frequent contact with them. He provides financial support to his family living in Afghanistan, and he cares about their welfare. He obtains money from the ATM machine and gives the cash to them. He acknowledges he has strong familial ties and regular contact with his siblings. He also acknowledges that the government of Afghanistan is weak and corrupt, that human rights violations exist in the country, and there are terrorist groups operating in the country.

The mere possession of close family ties with a family member living in Afghanistan is not, as a matter of law, disqualifying under Guideline B. However, if an applicant has a close relationship with even one relative, living in a foreign country, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See *generally* ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

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, even though well educated, are vulnerable to government coercion or inducement. 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 or the country is known to conduct intelligence collection operations against the United States. There is a significant, but not insurmountable, burden of persuasion on Applicant to demonstrate that his relationships with his family members living in Afghanistan do not pose a security risk. Applicant

should not be placed into a position where he might be forced to choose between loyalty to the United States and a desire to assist a family member living in Afghanistan.

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004). Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. See ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

While there is no evidence that intelligence operatives or terrorists from Afghanistan seek or have sought classified or economic information from or through Applicant or his family, nevertheless, it is not possible to rule out such a possibility in the future. International terrorist groups are known to conduct intelligence activities as effectively as capable state intelligence services, and Afghanistan has an enormous problem with terrorism. Applicant's relationship with family members living in Afghanistan creates a potential conflict of interest because this relationship is sufficiently close to raise a security concern about his desire to assist family members in Afghanistan by providing sensitive or classified information. The concern is not to put an individual in the unenviable position of choosing between family members and protecting security. Applicant's contacts with his family living in Afghanistan raises the issue of potential foreign pressure or attempted exploitation. AG ¶¶ 7(a) and 7(b) apply, and further inquiry is necessary about potential application of any mitigating conditions.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns including:

- (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.;
- (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;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(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.

AG ¶ 8(a) has limited applicability. Applicant's loyalty, connections, and financial support provided to his siblings are positive character traits. However, for security clearance purposes, those same connections to his family living in Afghanistan negate the possibility of mitigation under AG ¶ 8(a), and Applicant failed to fully meet his burden of showing there is "little likelihood that [his relationships with his relatives who are Afghanistan citizens] could create a risk for foreign influence or exploitation." His statement that they live in the capitol, which has better security than the rest of the country and that his siblings are educated people that are unlikely to be pressured, coerced, influence, manipulated, or exploited is insufficient for ¶ 8(a) to apply.

AG ¶ 8(b) partially applies. A key factor in the AG ¶ 8(b) analysis is Applicant has been working with the U.S. Army since 2003, when he graduated from high school. In 2007, he became a naturalized U.S. citizen. However, he has spent the majority of his life living outside the United States.

Because Applicant chose to have this matter handled administratively, I am unable to evaluate his demeanor, appearance, or credibility. From the record, I am unable to find Applicant was sincere, open, and honest. And based on the record as presented, I do not find he has "deep and longstanding relationships and loyalties in the U.S." I do note he has offered to continue to risk his life to support the United States' goals in Afghanistan. He has shown his patriotism, loyalty, and fidelity to the United States.

Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationships with his family living in Afghanistan, and indirectly, his family's relationships with other Afghan citizens living in Afghanistan. He frequently communicates with his family living in Afghanistan. There is no evidence, however, that terrorists, criminals, the Afghan Government, or those conducting espionage have approached or threatened Applicant or his family in Afghanistan to coerce Applicant or his family for classified or sensitive information.

While the Government does not have any burden to prove the presence of such evidence, if such record evidence were present, Applicant would have a heavier evidentiary burden to mitigate foreign influence security concerns. It is important to be mindful of the United States' huge investment of manpower and money in Afghanistan, and Applicant has supported U.S. goals and objectives in Afghanistan. Applicant and his siblings living in Afghanistan are potential targets of terrorists and the Taliban because of Applicant's own activities and support for the United States, and Applicant's potential access to classified information is likely to add some risk to Applicant and his family from lawless elements in Afghanistan.

AG ¶¶ 8(d) and 8(e) do not apply. The U.S. Government has not encouraged Applicant's involvement with his siblings living in Afghanistan. Applicant is not required to report his contacts with family members living in Afghanistan.

AG ¶ 8(f) has limited application. He maintains a small joint bank account with his brother in Afghanistan. This mitigating condition can only fully mitigate the disqualifying condition under AG ¶ 7(e), which provides, "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." The record is silent as to his assets in the United States. The size of the funds provided to his siblings in Afghanistan is small enough as to not pose a security concern.

In sum, Applicant's connections to siblings living in Afghanistan are very significant and greater than his connections to the United States. His parents reside in the United States and his brother and sister are U.S. citizens and residents. His parents and the brother and sister living in the United States do not pose security concerns. Even with his family members living in the United States, his connections to the United States taken together are insufficient to fully overcome the foreign influence security concerns under Guideline B.

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) 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 have incorporated my comments under Guideline B in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under this guideline, but some warrant additional comment.

There are substantial factors weighing towards the granting of a security clearance; however, those factors are insufficient to warrant the granting of a security clearance. There is no evidence that Applicant has engaged in criminal activity, abused alcohol or illegal drugs, or committed any security violations. Applicant is living and working in Afghanistan, serving with U.S. Armed Forces as a linguist and translator. He is willing to continue to risk his life as part of his duties on behalf of the U.S. combat forces in Afghanistan. He is fully aware of the risks to himself, and he is also aware that other family members in Afghanistan are at risk from terrorists and the Taliban.

The circumstances tending to support approval of a clearance for Applicant are less significant than the factors weighing towards denial of his clearance. There is no evidence he owns property in the United States. When he was naturalized as a U.S. citizen in 2007, he swore allegiance to the United States. He did not provide any documents as to his duty performance as a translator. There were no past evaluations, certificates, letters, or recommendations document as to his outstanding performance as a translator

There are substantial unmitigated security concerns arising from Applicant's siblings continued Afghan citizenship and residence in Afghanistan. Applicant and his siblings were born in Afghanistan. His Afghan connections are weighed against his connections to the United States. I find he frequently communicates with his siblings and has visited them while he and they were in Afghanistan. His family is at significantly greater risk due to Applicant's position as a linguist and he will receive access to more sensitive and classified information if his clearance is reinstated, further increasing the risk to his family.

A Guideline B decision concerning Afghanistan must take into consideration the geopolitical situation and dangers there.³ Afghanistan is a very dangerous place because of violence from the Taliban and terrorists. The Taliban and terrorists continue to threaten the Afghan Government, the interests of the United States, U.S. Armed Forces, and those who cooperate and assist the United States. Applicant recognizes his work with the U.S. Armed Forces will endanger his family living in Afghanistan, and will be personally dangerous. The United States and Afghan Governments are allies in the war on terrorism. The United States is committed to the establishment of a free and independent Afghan Government. Afghanistan and the United States have close relationships in diplomacy and trade.

³ See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the foreign influence security concerns. By failing to provide such information, and in relying on only a few pages of explanation in his SOR Answer and FORM Answer, the foreign influence security concerns remain. He has failed to carry his burden of mitigating the foreign influence security concerns.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude foreign influence concerns are not mitigated. Eligibility for access to classified information is denied.

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, Foreign Influence:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Subparagraphs 1.c and 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant

Conclusion

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 a security clearance. Eligibility for access to classified information is denied.

CLAUDE R. HEINY II
Administrative Judge