



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



In the matter of:)
)
) ISCR Case No. 17-03650
)
Applicant for Security Clearance)

Appearances

For Government: Moira Modzelewski, Esq., Department Counsel
For Applicant: *Pro se*

01/31/2019

Decision

MURPHY, Braden M., Administrative Judge:

Applicant mitigated the security concerns under Guideline B, foreign influence, due largely to his long service with U.S. forces overseas. Applicant's eligibility for a security clearance is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on November 16, 2016 in connection with his employment in the defense industry. On November 8, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B for foreign influence. The DOD CAF acted under Executive Order (EO) 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 National Security Adjudicative Guidelines (AG) implemented on June 8, 2017.

Applicant answered the SOR on December 3, 2017, and requested a hearing. The case was assigned to me on June 27, 2018. The hearing was initially scheduled for September 20, 2018, but that hearing date was cancelled on August 7, 2018 because of Applicant's travel issues. On October 10, 2018, a hearing notice was issued rescheduling the hearing for December 17, 2018.

The hearing convened as scheduled. Department Counsel offered Applicant's SCA as Government Exhibit (GE) 1, and it was admitted without objection. The Government's request for Administrative Notice (AN) was marked as AN I. Applicant and one witness testified. He offered Applicant's Exhibits (AE) A – H, which were admitted without objection.¹

I left the record open until January 22, 2019 to provide Applicant the opportunity to submit additional evidence, which he did, on January 15, 2019. His three post-hearing documents, all letters of recommendation, are marked collectively as AE I, and admitted without objection. The record closed on January 15, 2019, when Applicant indicated he had no further documents to submit. The transcript (Tr.) was received on January 2, 2019.

Request for Administrative Notice

I took administrative notice of facts concerning Afghanistan. Department Counsel provided supporting documents that verify, detail, and provide context for certain requested facts. The specific facts noticed are included in the Findings of Fact.

Administrative or official notice is the appropriate type of notice used for administrative proceedings.² Usually administrative notice in ISCR proceedings is accorded to facts that are either well known or from U.S. Government reports.³

Findings of Fact

In his Answer to the SOR, Applicant admitted SOR ¶¶ 1.a – 1.d, and partially admitted and partially denied SOR ¶ 1.e, all with explanations.⁴ His admissions and other statements are incorporated into the findings of fact. After a thorough and careful review of the pleadings and evidence submitted, I make the following additional findings of fact.

¹ AE A and AE B were attached to Applicant's Answer.

² 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) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986).

³ See Stein, *Administrative Law*, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice).

⁴ Applicant "denied" SOR ¶ 1.e, but only because the relative has since been promoted from the military rank referenced in the allegation. (Answer; Tr. 12)

Applicant is 34 years old. He was born in Afghanistan in 1984. He graduated from high school in Afghanistan in 2004. He worked for defense contractors with U.S. military forces in Afghanistan from 2005 until he came to the United States under the special immigrant visa program in 2009, and became a permanent resident of the U.S. soon thereafter. He became a U.S. citizen in October 2016, and holds a U.S. passport. His Afghan passport expired in 2015. He is no longer a citizen of Afghanistan. (Tr. 32-33, 62-64; GE 1)

Since he came to the U.S., Applicant has largely worked in the defense industry, both before and after he became a U.S. citizen. He began working for his current employer in 2009. He deployed to Afghanistan from April 2010 to August 2012 and worked with U.S. forces. After taking time off, he redeployed to Afghanistan from February 2013 to November 2014. He was then laid off because his company had no work for permanent U.S. residents. He was unemployed in the U.S. for several months before finding work outside the defense industry. (Tr. 34-39, 62-64; GE 1)

Applicant resumed working for his current employer in 2016, when he submitted his SCA. He redeployed to Afghanistan as a linguist and translator in January 2017. He remained there until December 2018. He has never held a clearance before. (Tr. 6, 15, 60-65; GE 1)

The SOR alleges foreign influence security concerns due to Applicant's family members who are citizens and residents of Afghanistan, specifically his parents, a sister, five brothers, and a brother-in-law. Applicant's family lives in a major city in Afghanistan. Their details are as follows:

Applicant's mother: (SOR ¶ 1.b) She passed away in early December 2018, three days after Applicant returned to the U.S. on leave. He did not return to Afghanistan for her funeral. (Tr. 31, 65, Answer; GE 1) Understandably, Applicant has spoken to his father and his siblings frequently since then, including two days before the hearing. (Tr. 41, 66) SOR ¶ 1.b is found for Applicant, since his mother is deceased. (Tr. 95)

Applicant's father: (SOR ¶ 1.a) He is in his mid-70s. He retired about 25 years ago as a colonel in the Afghan army. He collects a monthly pension. Applicant usually contacts his father monthly. His father has never visited the United States. (Tr. 40-43, 48, 70; Answer; GE 1)

Applicant's sister and brother-in-law (SOR ¶¶ 1.c, 1.e) Applicant's sister, age 39, is a housewife. She is married to Applicant's brother-in-law, who is also his cousin. He is about 45 years old, and is an officer in the Afghan army, assigned to a training facility. He was recently promoted from major (as alleged) to lieutenant colonel. Applicant has little direct contact with him, though he speaks to his sister every three or four months. Through his oldest brother, he sends her money (less than \$100) every few months. They have never visited the United States. (Tr. 43-44, 48, 54, 69-70)

Applicant's oldest brother: Applicant is in closest contact with his oldest brother, at least once a month, sometimes more. Applicant sends him money to be distributed to his other siblings. This brother is married and has several children. He formerly owned a hotel and a restaurant but now drives a taxi. He has no military or government affiliations. (Tr. 48-51, 67; Answer; GE 1)

Applicant's second older brother: He owns a small shop near his other family members. He has no military or government affiliations. He is married with several children. Applicant contacts him every four to six months to check on his well-being, and occasionally sends money for his children (\$100). (Tr. 50-51; Answer; GE 1)

Applicant's third older brother: He worked with U.S. forces as a local interpreter from 2009 to 2011, when he was wounded on a mission. He lives at home with his father. He is seeking to come to the U.S. on a special immigrant visa. Applicant contacts him about every two months. (Tr. 51-52; Answer; GE 1)

Applicant's two younger brothers. One brother recently graduated from college and started a job for an American company, working in Afghanistan. Applicant's youngest brother is still in college. Neither is married, and they have no children. Applicant speaks to them about every two months. (Tr. 52-53; Answer; GE 1)

During his prior deployments, Applicant earned as much as \$185,000 annually. He estimated that he sent his family between about \$50,000 and \$65,000 between 2010 and 2014. He paid to renovate his parents' house in Afghanistan, and he sent money to one of his brothers as an engagement and wedding present, which the brother used to buy a car. Since then, he has not sent them nearly as much money. In 2017, he sent his family about \$600. In 2018, he and his girlfriend sent his father about \$2,000. (Tr. 42, 53-54, 73)

Applicant testified that his family members know that he is deployed to Afghanistan, but they do not know what he does. He is not allowed to visit them while on duty because he is not authorized to leave the base. Applicant has visited his family when he is on leave. He is not allowed to visit his family while on his current contract, so he will not see them after his return to Afghanistan after the hearing. (Tr. 44-47, 66-69)

Applicant owns no property in Afghanistan and he has no assets there. He may inherit a share of his father's house one day, like his other siblings. He is registered to vote in the U.S. He has money in the U.S. stock market through an investment account, which he valued at about \$100,000. His pay is deposited into a U.S. bank account. Applicant's U.S. home of record is his girlfriend's parents' house. (Tr. 57-60, 71, 72)

Applicant's girlfriend, age 37, is a naturalized U.S. citizen from Afghanistan. She came to the U.S. with her parents and siblings as a child, in 1990. She became a U. S. citizen in 2008, and holds a U.S. passport. Her parents and two of her four brothers are also naturalized U.S. citizens. Since leaving as a child, she has never been back to Afghanistan, though she has extended family there. She has spoken to several of

Applicant's Afghan family members by phone. She has a bachelor's degree. She helps her mother, who owns a hair salon. (Tr. 80-88)

Applicant and his girlfriend met online and have been together since August 2013. She testified that he is dedicated, patient, fair, and loving. He is trustworthy and reliable. (Tr. 80-84) She said he took the job in Afghanistan to help them build for the future. (Tr. 88-89)

Applicant supplied strong character references from several U.S. military officers who served with him in Afghanistan, often on a daily basis, both several years ago, and recently. All attested to his professional skill and high value as an interpreter, cultural advisor, and trusted team member. They universally attest to his loyalty, reliability, and trustworthiness. (AE B - AE F, AE I) Applicant also submitted several certificates of appreciation and training certificates, detailing his hard work, dedication, and exemplary performance. (AE A, AE G, AE H)

Administrative Notice-Afghanistan⁵

The U.S. State Department warns U.S. citizens not to travel to Afghanistan due to crime, terrorism, civil unrest, and armed conflict. Extremists associated with various Taliban networks, the Islamic State of Iraq and Levant, and members of other armed opposition groups are active throughout the country. Afghanistan continues to experience aggressive and coordinated attacks by the Taliban and other terrorist groups. The border region between Afghanistan and Pakistan remains a safe haven for terrorists. The country's most significant human-rights concerns are widespread violence, armed insurgent groups' attacks on civilians, and killing of persons affiliated with the government.

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 used in evaluating an applicant's eligibility for access to classified information.

⁵ AN I. All of the excerpts cited in the Government's administrative notice filing are from U.S. Government documents published in 2017. Many have since been updated, including the most recent travel advisory for Afghanistan, <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/afghanistan-advisory.html>, published July 9, 2018; the 2017 U.S. State Department Human Rights report for Afghanistan (<https://www.state.gov/documents/organization/277519.pdf>), and the 2017 State Department Country Reports on Terrorism, Chapter 2: South and Central Asia (including Afghanistan) (<https://www.state.gov/j/ct/rls/crt/2017/282845.htm>). I take administrative notice of certain more recent (but largely similar) facts in these updated reports, consistent with my obligation to make assessments based on timely information in cases involving foreign influence.

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 adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a careful weighing 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 national security eligibility will be resolved in favor of the 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of 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 *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline B, Foreign Influence

AG ¶ 6 explains the security concern about "foreign contacts and interests" as follows:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern

if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

AG ¶ 7 indicates conditions that could raise a security concern and may be disqualifying in this case:

(a) contact, regardless of method, 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 classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology.

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 or inducement. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member or friend is associated with or dependent upon the government, the country is known to conduct intelligence collection operations against the United States, or the foreign country is associated with a risk of terrorism. The relationship between Afghanistan and the United States places a significant, but not insurmountable, burden of persuasion on Applicant to demonstrate that his relationships with his relatives living in Afghanistan do not pose a security risk. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist his relatives living in Afghanistan who might be coerced by governmental or non-governmental entities, or pressured to assist 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."⁶ Furthermore, friendly nations can have profound disagreements with the United States over matters they view as important to their vital

⁶ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

interests or national security. Finally, friendly nations are known to have engaged in espionage against the United States, especially in the economic, scientific, and technical fields.

While there is no evidence that intelligence operatives from Afghanistan have sought classified or economic information from or through Applicant or his relatives living in Afghanistan it is not possible to rule out such a possibility in the future. AG ¶¶ 7(a) and 7(b) apply based upon Applicant's family members who are residents and citizens of Afghanistan.

AG ¶ 8 lists 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.; and

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

Applicant has several immediate family members remaining in Afghanistan, and he remains in close contact with them. He has provided them financial support. Applicant's father is a retired Afghan Army officer and Applicant has limited direct contact with his brother-in-law, also an Army officer there. No other relatives have government or military connections. One brother was wounded while working with U.S. forces.

Since 2005, Applicant has spent many years working with U.S. forces in Afghanistan, both before and after he came to the U.S. on a special immigrant visa in 2009, and before and after he became a U.S. citizen in 2016. I give this evidence significant weight, given his many years of service to the U.S. military and to U.S. interests in Afghanistan, in difficult, dangerous conditions. Applicant testified credibly that he abides by the rules and does not visit his family in Afghanistan if it is not permitted. With his mother's recent passing, in December 2018, his contact with his family members increased, though this is perfectly understandable under the sad circumstances. Applicant does not intend to return to Afghanistan to live. He has begun to build a life in the United States with his girlfriend.

While he has numerous relatives in Afghanistan, Applicant presented sufficient evidence to establish that it is unlikely that he would be placed in a position to choose between the interest of his relatives living in Afghanistan and those of the United States. AG ¶ 8(a) applies.

Applicant has met his burden to establish his “deep and longstanding relationships and loyalties in the U.S.” He immigrated to this country in 2009 on a special immigrant visa after working for several years with U.S. forces in Afghanistan. His brave and highly valuable work with U.S. forces has continued, both stateside and in Afghanistan, including through several long deployments. Numerous U.S. military officers who served with him closely attest to his loyalty, dedication, and overall trustworthiness. The evidence supports a conclusion that Applicant has longstanding ties to the United States and would resolve any conflict of interest in favor of the United States. AG ¶ 8(b) applies.

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(d):

- (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. The circumstances tending to support granting Applicant’s clearance are more significant than the factors weighing towards denying his clearance. I considered the recommendations of the U.S. military officers who have served with him and who recommend him highly. I also considered his strong ties to this country, as shown most strongly by his long service overseas. He has demonstrated his longstanding loyalty to the United States. Therefore, he provided sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me without questions or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I

conclude that the security concerns arising under Guideline B, foreign influence concerns are mitigated.

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.e:	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.

Braden M. Murphy
Administrative Judge