



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



In the matter of:)
)
) ISCR Case No. 18-02199
)
Applicant for Security Clearance)

Appearances

For Government: Mary M. Foreman, Esq., Department Counsel
For Applicant: J. Nathan Overstreet, Esq.

02/25/2019

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline B, foreign influence. Eligibility for access to classified information is denied.

Statement of the Case

On September 27, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) 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; 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 June 8, 2017.

Applicant answered the SOR on October 31, 2018, and requested a hearing before an administrative judge. The case was assigned to me on December 18, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on the same day. I convened the hearing as scheduled on January 17, 2019. The Government offered

exhibits (GE) A through C. Applicant testified and offered Applicant Exhibits (AE) 1 through 10. There were no objections to any of the exhibits offered, and they were admitted into evidence. DOHA received the hearing transcript on January 28, 2019.

Request for Administrative Notice

Department Counsel submitted Hearing Exhibits I, a written request that I take administrative notice of certain facts about Afghanistan. Applicant did not object, and I have taken administrative notice of the facts contained in the request that are supported by source documents from official U.S. Government publications that were provided as part of the exhibit.¹ The facts are summarized in the Findings of Fact, below.

Findings of Fact

Applicant denied all of the allegations in the SOR. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 59 years old. He was born in Afghanistan. He completed high school and college there. He is married and has six children, four girls and two boys. He served as an officer in the Afghan Army from 1980 to 1992. He served as an infantry instructor. In 1992, the Afghan Army sent Applicant to Uzbekistan to attend law school. He moved there with his wife and four children at the time. He earned a law degree. He does not maintain contact with any members of the Afghan military.²

While living in Uzbekistan, Applicant and his wife had two more children, daughters. During that period, Afghanistan was invaded by the Soviet Union, and Applicant could not return to his home country. In 2005, he and his family were granted asylum by the United States, left Uzbekistan, and immigrated to the United States. In 2009, Applicant began working as a cultural affairs advisor and was employed by several federal contractors until 2014, when he and many of the cultural advisors, were laid off. In 2015, he opened a business with a friend. It was unsuccessful. In 2016, he went back to work for the U.S. Government, and has since been working as a linguist. He speaks four languages. He was deployed to Afghanistan from April 2018 to January 2019. Because of his duties with the U.S. Government, he did not visit his family during this deployment.³

In 2011, Applicant became a U.S. citizen. Applicant's four eldest children, who were born in Afghanistan, also became U.S. citizens in 2011. His two youngest children

¹ Source documents are attached to Hearing Exhibit I.

² Tr. 29-36, 96-98.

³ Tr. 36-50, GE A.

became U.S. citizens in 2015, and his wife became a U.S. citizen in 2016. All of them have U.S. passports. None have retained foreign passports or Afghan citizenship.⁴

Applicant's eldest son is mentally disabled. His other son works as a linguist for a U.S. military contractor in Afghanistan. He lives on a U.S. military base. He is married to an Afghan citizen, and they have one child.

In 2016, Applicant's wife moved to Afghanistan. Two adult daughters and their disabled son also moved back to Afghanistan with her. Because Applicant's wife, son, and two daughters had previously been citizens of Afghanistan, they were not required to obtain an Afghan visa, which is normally required. They do not possess any type of Afghan identification cards. Applicant testified that most people are unaware of his wife and children's citizenship status. However, some of her neighbors are aware that they are U.S. citizens. One daughter, who accompanied her mother, suffers from depression and was advised by her doctor to go with her mother to help improve her mental health.

Applicant testified that his wife moved back to Afghanistan for two reasons. First, his elderly father needed care and secondly, their son and his wife lived there. His son's wife and child live in the same apartment as Applicant's wife. Due to his job, his son is required to live on base. Applicant's son provides his wife and son financial support. His paycheck is deposited directly into his bank account in the United States and then his younger sisters, who have access to the account, wires money to his wife. Applicant's son's wife is an Afghan citizen.⁵

Applicant's other daughter who returned to Afghanistan, married in 2017. Her husband, an Afghan citizen, has worked for a U.S. contractor in Afghanistan for about five years. They have one child. Applicant testified that this daughter has applied for her husband to come to the United States with her when she returns. It is unknown when she intends to return.⁶

Applicant's father died in October 2018. Applicant testified that his wife plans on returning to the United States, along with their disabled son and daughter. They do not yet have plane tickets to return. Applicant is their sole source of financial support. Applicant's two youngest daughters, who are college students and live in the United States, have access to their father's account. They wire money to their mother from their father's account in the United States for her financial needs. Their mother retrieves the money by going to the transfer office and showing her U.S. passport. Applicant has not visited his wife since 2017. He was not permitted to visit her or his children when he was deployed to Afghanistan in 2018. He maintains contact with her by telephone.⁷

⁴ Tr. 40-42, 98-100-101.

⁵ Tr. 68, 100-109, 130-131-136. Applicant testified that the Afghan Government changed the rule, waiving the requirement of a visa for former citizens. Applicant testified that his son has a security clearance.

⁶ Tr. 68-75, 141.

⁷ Tr. 21-29, 51-54, 68-77-78, 81-82, 125-127.

Applicant's two youngest daughters share an apartment, and Applicant provides them financial support. They both intend on remaining in the United States after they graduate from college. Applicant stays with them when he is in the United States.⁸

Applicant's mother predeceased his father many years earlier. Applicant did not inherit any property from his father. His father had 10 children with Applicant's mother and six children with his stepmother. Seven of Applicant's siblings are citizens and residents of Afghanistan. The other three siblings live in Germany, India, and Australia. All of his siblings living in Afghanistan are married and have children who also live there. One brother is employed in the Afghan ministry of agriculture. The last time Applicant visited this brother was in 2016. Applicant's wife visits Applicant's siblings sometimes because they live in the same city. Applicant does not have contact with his stepbrothers and stepsisters. He does not provide support to any of his siblings or step-siblings. Applicant has a brother-in-law who was a colonel in the Afghan military. He retired a couple of years ago and receives a military pension.⁹

Applicant traveled to Afghanistan with his family in 2014, 2015, and 2016 to visit his father and family. In 2017 he traveled there with his youngest daughters to visit his immediate and extended family. They stayed for about a month. While there he visited some siblings. He does not have contact his siblings throughout the year, but does when he is in the country and visits them.¹⁰

In about 2004, Applicant met an Afghan citizen when he lived in Uzbekistan. He had a casual social acquaintance with him because they were both Afghans. They greeted each other on three to four occasions, but they were not friends. In approximately 2015, this person was appointed as the Afghan ambassador to Uzbekistan. When Applicant became aware of this person's appointment to ambassador, he sent him a congratulatory note on Facebook. This was the extent of their contact.¹¹

Applicant does not provide financial support to any family members in Afghanistan except his immediate family. He does not provide financial support to his children's friends, who are citizens and residents in Afghanistan. In approximately 2016 or 2017, he loaned \$500 to a distant relative. The relative repaid him.¹²

Applicant does not own a home in Afghanistan or the United States. When in the United States, he stays with his daughters in their rented apartment. He intends to retire

⁸ Tr. 21-29, 51, 54, 68-74, 80-82, 129-154.

⁹ Tr. 57-67, 83-86, 109-114, 124, 127.

¹⁰ Tr. 60-67, 78-79, 125.

¹¹ Tr. 86-89, 119-123.

¹² Tr. 114-119, 127-128.

in about five years and live in the United States. He provided an undated letter of appreciation from a military commander for his service as a cultural advisor.¹³

Afghanistan¹⁴

The United States Department of State's travel warning for Afghanistan remains in effect and it warns U.S. citizens against travel there because of continued instability and threats by terrorist organizations against U.S. citizens. Travel there is unsafe due to ongoing risk of kidnapping, hostage-taking, military combat operations, and armed rivalry between political and tribal groups, militant attacks, suicide bombings, and insurgent attacks. These attacks may also target Afghan and U.S. Government convoys and compounds, foreign embassies, military installations, and other public areas.

As recently as December 2018, the U.S. Embassy in Kabul warned U.S. citizens in Afghanistan of reports that militants plan to conduct attacks against hotels, compounds, international organizations, universities, airports and other locations frequented by U.S. citizens and other foreign nationals.

Afghanistan continues to experience aggressive and coordinated attacks by different terrorist groups. These groups remain active and were able to conduct a number of high-profile, mass-casualty attacks in Kabul against sectarian and Afghan government targets. They continue to plan such attacks against U.S. and coalition forces and Afghan interests. Border regions of Afghanistan and Pakistan remain safe havens for terrorists. The Afghan government struggles to assert control over this remote region.

According to a June 2017 U.S. Department of Defense report on Afghanistan, Afghanistan faces a continuing threat from as many as 20 insurgent and terrorist networks present and operating in the Afghanistan-Pakistan region, in what is the highest concentration of extremist and terrorist groups in the world.

The State Department's report on human rights for Afghanistan notes there was widespread violence, including indiscriminate attacks on civilians and killings of persons affiliated with the government by armed insurgent groups, widespread disregard for the rule of law and little accountability for those who committed human rights abuses. There was also targeted violence and endemic societal discrimination against women and girls.

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. 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.

¹³ Tr. 90-92, 123-124; AE 10.

¹⁴ HE I.

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(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 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. 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. Directive ¶ E3.1.15 states 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 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 that an applicant may deliberately or inadvertently fail to 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 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 expresses the security concern regarding foreign influence:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they resulted 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 it associated with a risk of terrorism.

AG ¶ 7 describes conditions that could raise a security concern and may be disqualifying. I have considered all of them and the following are potentially applicable:

(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.

AG ¶ 7(a) requires evidence of a "heightened risk." The "heightened risk" required to raise this disqualifying condition is a relatively low standard. "Heightened risk" denotes a risk greater than the normal risk inherent in having a family member living under a foreign government or owning property in a foreign country. The totality of Applicant's family ties to a foreign country as well as each individual family tie must be considered.¹⁵

The United States Department of State warns U.S. citizens against travel to Afghanistan because of continued instability and threats by terrorist organizations against U.S. citizens. It also has serious concerns about terrorist activities in Afghanistan. Recent threats are directed toward U.S. citizens. Extremists groups are active throughout Afghanistan and terrorist threats are a serious concern.

Applicant, his wife, and four of his six children were born in Afghanistan. They subsequently became U.S. citizens. In 2016 Applicant's wife, their eldest son, and two adult daughters moved back to Afghanistan. Their other son resides in Afghanistan with his wife and child. Since she returned, Applicant's adult daughter married an Afghan citizen and has a child. Applicant's two youngest children live in the United States. From 2013 to 2016, Applicant and his family returned to Afghanistan each year to visit his father and other family members. He and his two youngest daughters returned in 2017 to visit

¹⁵ The mere possession of a close personal relationship with a person who is a citizen or resident of a foreign country is not, as a matter of law, disqualifying under Guideline B. However, depending on the facts and circumstances, this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information.

their immediate and extended family. Applicant's contacts with his spouse and children, who are residents of Afghanistan, and his daughter-in-law, son-in-law, two grandchildren, and numerous siblings and their families, who are residents and citizens of Afghanistan, create a heightened risk. AG ¶ 7(a) applies.¹⁶

I find Applicant does not have sufficient contact with his stepmother or stepsiblings to create a heightened risk. His father is deceased and no longer raises a concern. AG ¶ 7(a) does not apply to these people.

There is insufficient evidence to conclude that Applicant provided financial support to his children's friends. There is sufficient evidence that he provides substantial financial support to his wife and unmarried children living in Afghanistan. Applicant's family residing in Afghanistan, his familial obligations and financial support to them creates a potential conflict of interest and a foreign influence concern. AG ¶ 7(b) applies.

Applicant's contact with the Afghan ambassador to Uzbekistan was insubstantial and more of a courtesy than a friendship. His contact does not rise to the level of a heightened risk or create a conflict of interest. I find no disqualifying condition applies. I find in Applicant's favor for SOR ¶ 1.e.

After the Government produced substantial evidence of those disqualifying conditions, the burden shifted to Applicant to rebut them or otherwise prove mitigation. Three mitigating conditions under AG ¶ 8 are potentially applicable to the disqualifying security concerns based on the facts:

(a) the nature of the relationship 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 and 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 interests in favor of the U.S. interests; and

(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.

Applicant's wife, two sons, two daughters, son-in-law, daughter-in-law, two grandchildren, seven siblings and their spouses are all residents of Afghanistan. His wife

¹⁶ Applicant's grandchildren are U.S. citizen because one of their parents is a citizen. It is unknown if they also hold Afghan citizenship because they were born in Afghanistan and their other parent is an Afghan citizen.

and children living there are citizens of the United States. They moved back to Afghanistan in 2016. There is significant evidence that terrorist groups target U.S. citizens living in Afghanistan. Some of Applicant's wife's neighbors are aware that she and her family are U.S. citizens. In order for her to retrieve money that has been wired to her, she must show her U.S. passport. Based on Applicant's significant personal contacts in Afghanistan and the heightened security threats for U.S. citizens living there, I am unable to find that it is unlikely that Applicant will be placed in a position of having to choose between the interests of his family and the interests of the United States. AG ¶ 8(a) does not apply.

Applicant worked as a cultural advisor for the U.S. Government from 2009 to 2014 when he was laid off. He was hired again in 2017 and deployed to Afghanistan in 2018. His son works as a contractor in Afghanistan. His son-in-law also works for a U.S. contractor. He provided a letter of appreciation from a military commander for his service as a cultural advisor. He has two daughters living in the United States. These are all facts that must be weighed against all of the other facts. Applicant has a minimal financial interest in the United States. His wife and three of his children moved back to Afghanistan in 2016. They have not returned to the United States. Applicant believes they will in the future, but when that may occur is unknown. He indicated his wife moved there to care for his father, who is now deceased. She also moved there to be closer to her son who is married with a child. One daughter, who moved with her, is now married to an Afghan national and has a child. Applicant testified that she has applied to have him move with her back to the United States. Applicant has numerous siblings with whom his wife maintains some contact. Applicant visits some of them when he is in the country

Applicant is a dedicated family man. He is a dutiful father who provides for his family financially. I have considered Applicant's loyalty, devotion, and commitment when working with federal contractors in the United States and his recent mission to Afghanistan. However, with Applicant's immediate family, including his wife, four children, their spouses, two grandchildren, and his multiple siblings all living in Afghanistan, his ties there are too significant at this time. He does not have financial interests in the United States and his only personal ties are his two youngest daughters. Afghanistan continues to have significant terrorist activity that specifically targets both Afghans and Americans. Applicant's close relationship with his family in Afghanistan, his visits to see his family, and his financial support for them is commendable. Given those connections, it is too great of a burden to expect him to be loyal to the interests of the United States and resolve any conflicts in favor of the United States over those of family. AG ¶ 8(b) does not apply.

Applicant and his family traveled yearly from 2013 to 2016 to visit their family in Afghanistan. Applicant and his youngest daughters visited his family in Afghanistan in 2017. They visited for a month. While there, he had some contact with his siblings. Applicant provides financial support to his wife and unmarried children living in Afghanistan. His contact with his family members is not casual or infrequent. Insufficient evidence was produced to apply AG ¶ 8(c).

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

Applicant is 59 years old and has been a naturalized U.S. citizen since 2011. His immediate family are naturalized citizens of the United States. All but his two youngest daughters, live in Afghanistan. I have given considerable weight to Applicant's service and commitment to the United States, but it is not outweighed by his deep familial ties and loyalty to his closest family members. This situation may be minimized when his immediate family returns to the United States. Until then, the heightened risks raised by those familial ties in Afghanistan continue to raise significant security concerns under Guideline B and are unmitigated. At this time, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance.

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:	AGAINST APPLICANT
Subparagraphs 1.a-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 security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge