



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 -----) ISCR Case No. 12-07661
)
 Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: -----, Personal Representative

October 23, 2013

Decision

ROSS, Wilford H., Administrative Judge:

Applicant submitted his most recent Electronic Questionnaire for Investigations Processing (e-QIP) on February 2, 2011. (Government Exhibit 3.) On September 4, 2012, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline B (Foreign Influence), Guideline C (Foreign Preference), and Guideline E (Personal Conduct). The action was taken under 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant submitted an Answer to the SOR, including attachments, on September 26, 2012, and requested a decision without a hearing. Pursuant to ¶ E3.1.7 of the Additional Procedural Guidance at Enclosure 3 of Directive, Department Counsel converted this case to a hearing before the Defense Office of Hearings and Appeals. (Transcript (Tr.) 7.) Department Counsel was ready to proceed on October 17, 2012. The case was assigned to me on June 5, 2013. Notices of hearing were issued on June

25, and July 16, 2013. The hearing was held on August 13, 2013. The Government submitted four exhibits, which were admitted without objection. (Government Exhibits 1 through 4.) Applicant testified, called one additional witness, and submitted four exhibits, which were also admitted without objection. (Applicant Exhibits A through D.) Applicant requested that the record remain open for the admission of an additional exhibit. He submitted Applicant Exhibit E on August 14, 2013, which is admitted without objection. The transcript was received on August 22, 2013. The record closed on that date.

Procedural Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the Islamic Republic of Afghanistan. Applicant did not object. The facts administratively noticed are set out in the Findings of Fact, below. (Tr. 19-22.)

Findings of Fact

Applicant is 81 and married. He has been employed by a defense contractor as a linguist, and seeks a security clearance in connection with his employment in the defense industry. Applicant admitted the factual allegations in subparagraph 1.a of the SOR. He denied the other allegations. He also submitted additional information to support his request for access to classified information.

Applicant is employed as a linguist. However, during the hearing it was sometimes difficult to converse with him in English. His personal representative, who is also Applicant's son, occasionally had to translate for Applicant. That being said, Applicant was able to express his case competently and completely.

Paragraph 1 (Guideline B - Foreign Influence)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has foreign contacts and interests that could lead to the exercise of poor judgment, unreliability or untrustworthiness. Applicant was born and raised in Afghanistan. He came to the United States in 1989. He became a naturalized citizen of the United States in 1996. (Applicant Exhibit E.) His wife is also a naturalized citizen of the United States. (Government Exhibit 3 at question 17A.) He has four children, three of whom were born in Afghanistan and one in Pakistan. All of his children are naturalized citizens of the United States. He has one surviving brother, and one surviving sister, who live in Canada and the Netherlands. (Government Exhibit 3 at Section 18.) Applicant testified that he feels himself only to be an American. (Tr. 48-49.)

1.a. Applicant's mother-in-law is a citizen and resident of Afghanistan. Applicant may talk to her on the telephone two or three times a year. According to Applicant, neither he nor his wife provide any financial support to his mother-in-law. (Tr. 34-40.)

1.b. Applicant was an advisor to an Afghan government ministry from September 2002 through November 2003. This was done through the auspices of an international organization.(Answer Attachment at 1; Government Exhibit 4 at 2.) Applicant also stated that he did it "[b]ecause the United States Government every time says, we want to help the people." (Tr. 44.)¹ Before leaving Afghanistan in 1989 Applicant was involved in a specific area of infrastructure in Afghanistan. His duties as an advisor were to assist the Afghan government ministry in restoring the program. He was paid a minimal salary and expenses during this time. He has had no contact with the Afghan government since that time. (See Tr. 43-49.)

Paragraph 2 (Guideline C - Foreign Preference)

The Government alleges in this paragraph that Applicant has engaged in activities, which show a preference for another country instead of the United States.

2.a. Applicant denied using an Afghan passport to travel to Afghanistan in 2002. His United States passport contains an entry permit from the Afghan Embassy in the United States dated September 27, 2009. (Answer Attachment at 2; Applicant Exhibit D at 5; Tr. 50-51.)

Applicant admitted that he obtained an Afghan passport once he was in Afghanistan in 2002 and used it to travel to Pakistan. At this time Applicant's wife had traveled to Pakistan to visit her parents. Once there, she fell seriously ill and Applicant had to travel from Afghanistan to Pakistan to take care of her. Applicant stated that he wanted to travel to Pakistan on his American passport, but was advised by Afghani government officials not to do so. They told him, "it will be very dangerous for me [Applicant] if the Taliban agents or the kidnapers find out that I am a U.S. citizen, they will either kill me or kidnap me to get a large amount from my family." (Answer Attachment at 2.) (See Tr. 51-52.)

Applicant went on to state:

In this situation I was desperate and didn't know what to do. Someone in the Minister's office said that since there is an agreement between the Govt. of Afghanistan the United States that Afghans living in the U.S.A. as U.S. citizen can have dual citizenship of Afghanistan and U.S.A.

¹It is noted that in 2003 the United States Government created an organization called Supporting Our Friends in Iraq and Afghanistan, described as a "Department of Defense program that seeks to hire motivated civilian employees to help the fledgling Iraqi and Afghani governments in their quest to become full-fledged democracies." United States Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs), *News Release: Supporting Our Friends in Iraq and Afghanistan (SOFIA) Web Site Opens*, <http://www.defense.gov/releases/release.aspx?releaseid=5749> (October 30, 2003.)

Therefore, with the help of an employee of the ministry I applied for an Afghan passport and I was issued an Afghan passport. (Answer Attachment at 2.)²

Using the Afghan passport Applicant traveled to Pakistan for ten days to two weeks to take care of his wife. He used the Afghan passport to return from Pakistan to Afghanistan. After that he never used the Afghan passport again and it has subsequently been destroyed. (Tr. 53-55.)³ Finally, it must be emphasized that at this particular period in time Applicant was not employed in the defense industry and did not have a security clearance.

I take administrative notice of the facts concerning the Islamic Republic of Afghanistan, as set forth in the documents provided by Department Counsel. Of particular significance are the poor human rights situation; and the active and hostile presence of Al Qaida, the Taliban, and other militant extremist groups that generate instability and openly attack police and military forces of the Afghan government, as well as the local populace and U.S. persons and interests.

Paragraph 3 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant has engaged in conduct involving questionable judgment, lack of candor or dishonesty.

Applicant denied incorrectly reporting his actual date of birth on various official documents. The genesis for this allegation appears to be a statement written by an interviewer in 2010. That document states, "All of CANDIDATES paperwork shows that HE was born in 1931, but he was actually born in 1941. There was a miscalculation from the Islamic calendar to the Gregorian calendar."⁴ HE notified immigration about the

²The existence of dual Afghan/American citizenship is recognized by the United States Government. The U.S. Embassy in Afghanistan states, "U.S. citizens born in Afghanistan (i.e., dual citizens) who do not have an Afghan passport, should not apply for a visa in their U.S. passport. Instead, they should submit an application for an entry permit." U.S. Dept. of State, Embassy of the United States, Kabul, Afghanistan, *Resources for U.S. Citizens in Afghanistan*, "Information on Afghan Visas for American Citizens, Entry Permits," <http://kabul.usembassy.gov/iavfac2.html> (accessed October 18, 2013). See also U.S. Dept. of State, Bureau of Consular Affairs, *Country Specific Information: Afghanistan*, "Entry/Exit Requirements for U.S. Citizens," http://travel.state.gov/travel/cis_pa_tw/cis/cis_1056.html (accessed October 18, 2013).

³See also testimony of Applicant's Personal Representative/son at Tr. 71-72.

⁴Information concerning the official calendar of Afghanistan, and how to convert Afghan dates to Gregorian dates can be found at the following website: Wikipedia, *Solar Hijri Calendar*, http://en.wikipedia.org/wiki/Solar_Hijri_calendar (accessed October 18, 2013). (See also testimony of Applicant's Personal Representative/son at Tr. 74-77.)

mistake and they told him it would take a while to fix it. HE never followed up.” (Government Exhibit 4 at 1.) (Emphasis in original.)⁵

Applicant maintains that this statement is in error. Rather, he states that he was born in 1931, and that he accidentally put the year of his birth as 1941 on immigration forms when he entered the United States. He states:

After I noticed this mistake immediately I went to the U.S. Immigration office in [his home city] and informed them about the mistake I had made, the person in the Immigration office told me that this mistake can be corrected while I apply for U.S. citizenship. Since, at that time I was a new person in the country, therefore, I accepted the Immigration officer’s advice. (Answer Attachment at 3.) (See Tr. 58-59, 72-73.)

Applicant’s Certificate of Naturalization shows his date of birth as March 19, 1931. (Applicant Exhibit E; Tr. 60-63.)

I have examined the available evidence closely and find that there is insufficient evidence to show that Applicant *deliberately* falsified his date of birth on government forms. It appears that a mistake was made when Applicant entered the United States in correctly calculating his year of birth. The Afghan calendar is vastly different than the Gregorian calendar, and converting dates involves considerable work as described in footnote 4, above, so an error like Applicant’s is not out of the question. Besides, as stated by Applicant:

There was absolutely no reason for me to purposely put wrong date of birth at the beginning, because 1941 makes me 10 years younger, however, 1931 which is my actual date of birth makes me 10 years older. In both cases I am over retirement age and I was disabled too. So, what is the possible reason for my putting wrong date of birth purposely on the official documents? (Answer Attachment at 3-4.)

Mitigation

Applicant worked in an extremely important and sensitive installation in Afghanistan. The Linguist Manager for his task force, an Army Sergeant First Class, wrote a letter of recommendation for Applicant. Her letter states that Applicant “has been a consistent source of knowledge and provided excellent linguistic and translation services to our unit in performance of our . . . mission. . . . [Applicant] has always displayed a high degree of integrity, responsibility, and ambition. . . . He is dependable, exercises good judgment, and has a mature outlook concerning all endeavors.” She further states, “[Applicant] has proven his dedication and loyalty to the United States of America. [He] has demonstrated himself to be an outstanding U.S. Citizen and

⁵It is noted that this particular statement is by a third party, and is not endorsed or affirmed in writing by Applicant.

continues to be a trusted employee and advisor to the U.S. Army. It is without hesitation that I recommend him. I would gladly serve with him again in any capacity.” (Applicant Exhibit A.) (See Applicant Exhibits B and C.)

Policies

Security clearance decisions are not made in a vacuum. When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used as appropriate 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 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. In addition, the administrative judge may also rely on his or her own common sense, as well as his or her knowledge of the law, human nature and the ways of the world, in making a reasoned 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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. Security clearance decisions include, by necessity, consideration of the possible risk that the 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.

Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination 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

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the applicant's circumstances and concerns about the granting or continued holding of a security clearance. If such a case has been established, the burden then shifts to the applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

Paragraph 1 (Guideline B - Foreign Influence)

The concern under Guideline B is styled as follows under AG ¶ 6:

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.

Applicant has family connections to Afghanistan, and also worked as an advisor to the Afghan government in 2002 and 2003. The following disqualifying conditions under AG ¶ 7 apply to this case based solely on these facts:

(a) contact with a foreign family member, business or professional associate, 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.

Applicant has provided sufficient evidence to show that the following mitigating conditions under AG ¶ 8 apply to this particular case, given his particular background:

(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; 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 has submitted considerable evidence to show that he has substantial family ties in the United States that outweigh his relationship to Afghanistan and his wife's single relative there. His contact with his mother-in-law is very casual and infrequent. I have also considered his wife's relationship with her mother. Under the specific circumstances of this case, the assumption that she has a close relationship with her mother can be mitigated by Applicant's overall situation. His immediate family lives in the United States, and his brother and sister live in allied nations.

His evidence also shows that he does not have a conflict of interest between his loyalties to Afghanistan, the country of his birth, and the United States. In 2002 and 2003 Applicant, out of a desire to assist the Afghan people, and under the auspices of an international organization, returned to Afghanistan as an advisor to their government. This is, and was, a laudable act. It was also ten years ago, during a period when the United States Government was encouraging such actions, and Applicant has no continuing contact with anyone in the Afghan government.

Based on my analysis of the available information, Guideline B is found for Applicant.

Paragraph 2 (Guideline C - Foreign Preference)

In this case the Government has met its initial burden of proving by substantial evidence that Applicant obtained an Afghani passport in 2003, and used it to travel to Pakistan from Afghanistan to assist his wife. Applicant has mitigated the Government's concerns about this conduct.

The concern is stated thus under this Guideline at AG ¶ 9:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

After review, none of the Disqualifying Condition under AG ¶ 10 apply to the facts of this case. The only one that may possibly apply is:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

(1) possession of a current foreign passport.

As stated, Applicant obtained his Afghan passport in 2003. It has expired, accordingly it is no longer "current," and has been destroyed. Accordingly, "the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated," as required by Mitigating Condition AG ¶ 11(e).

Applicant used this Afghan passport for a discrete period of time, to resolve a unique situation concerning his wife. He only obtained it at the behest of senior members of the Afghan government, in an attempt to help Applicant be safe in a difficult time. Finally, it is worth noting that Applicant was not working in the defense industry at that time and had no knowledge of security requirements.

Applicant has worked hard at his job, as shown by the letter and certificates of appreciation that he has received. His job is of particular importance, and he is acknowledged to be one of the best practitioners. His service in Afghanistan is without any indication that he had breached security policies or procedures. While that fact is not normally to be considered a factor in granting a clearance, the Appeal Board stated the following in ISCR Case No. 05-03846 at 6 (App. Bd. Nov. 14, 2006):

As a general rule, Judges are not required to assign an applicant's prior history of complying with security procedures and regulations significant probative value for purposes of refuting, mitigating, or extenuating the security concerns raised by the applicant's more immediate disqualifying conduct or circumstances. See, *e.g.*, ISCR Case

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

See *also*, ISCR Case No. 12-09326 at 2 (App. Bd. Jun. 18, 2013). Without being more specific than is appropriate, I find that Applicant's service in his present employment occurred under such circumstances and produced such contributions.

Paragraph 3 (Guideline E - Personal Conduct)

The security concern for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest in any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

As stated above, I do not find that Applicant intentionally falsified information concerning his date of birth. Accordingly, none of the disqualifying conditions or mitigating conditions have application to this allegation. Paragraph 3 is found for Applicant.

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. 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. My analysis under Guidelines B, C, and E is applicable to the whole-person analysis as well. Applicant is a patriotic American citizen, whose work has been of particular value to our military mission in Afghanistan. He presented considerable evidence showing that his preference is for the United States and not Afghanistan. Accordingly, I find that there is little or no “potential for pressure, coercion, exploitation, or duress” as set forth in AG ¶ 2(a)(8). Using the whole-person standard, Applicant has mitigated the security significance of his foreign connections, alleged foreign preference, and alleged personal conduct. He is eligible for a security clearance.

On balance, it is concluded that Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1, 2 and 3, of the Government's Statement of Reasons.

Formal Findings

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

Paragraph 1, Guideline B:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline C:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	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.

WILFORD H. ROSS
Administrative Judge