



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



In the matter of:)
)
) ISCR Case No. 12-09446
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Department Counsel
For Applicant: *Pro se*

02/15/2013

Decision

HARVEY, Mark, Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Statement of the Case

On January 17, 2012, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86) (Item 5). On August 9, 2012, the Department of Defense (DoD) issued a statement of reasons (SOR) to him, alleging security concerns under Guideline B (foreign influence) and Guideline C (foreign preference). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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) promulgated by the President on December 29, 2005. The SOR detailed reasons why DoD could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him.

Applicant answered the SOR on September 8, 2012, and requested that his case be decided by an administrative judge on the written record without a hearing. Department Counsel submitted the Government's written case on November 5, 2012. A

complete copy of the File of Relevant Material (FORM), containing seven Government Exhibits (GX), was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM.

Applicant signed the document acknowledging receipt of his copy of the FORM on November 16, 2012, and returned it to the Defense Office of Hearings and Appeals (DOHA). He timely submitted a letter that I marked as Applicant Exhibit (AE) A and admitted into the record without objection from Department Counsel. I received the case assignment on January 7, 2013.

Procedural Rulings

Department Counsel requested administrative notice (AN) of facts concerning Afghanistan. (FORM.) Counsel provided 13 supporting documents to show detail and context for those facts. I marked the AN documents as GX 8 (1-13.) Applicant did not object to the documents, and I grant Department Counsel's 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) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). Usually administrative notice at ISCR proceedings is accorded to 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).

Findings of Fact

Applicant's SOR response admitted the allegations in SOR ¶¶ 1.a through 1.c, and denied the allegations in SOR ¶¶ 1.d, and 2.a. (GX 3.) His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 70 years old. He was born in Afghanistan and attended high school and a university there. He was conscripted into the Afghan army for one year. He worked for an Afghan governmental agency from 1970 to 1989. In April 1989 he left Afghanistan after the Soviet Union invaded the country. He then resided in Pakistan until September 1992, at which time he immigrated to the United States on a political asylum visa at the age of 52. In September 2001 he became a naturalized U. S. citizen. He has a current U.S. passport. (GX 5, 7.) He does not own property or bank accounts in Afghanistan. (GX 4.)

From April 2000 to December 2008, Applicant worked as a cashier. He has been unemployed since December 2008, supporting himself through his and his wife's social security benefits. In January 2012 he applied for a translator/linguist position with a defense contractor. (GX 7.)

Applicant's spouse was born and raised in Afghanistan. They married in 1966. She became a naturalized U.S. citizen. Applicant's four children were born in Afghanistan. Three of them are U.S. citizens and residents. One of them is a citizen and resident of Australia. Applicant's parents were citizens and residents of Afghanistan. Both are deceased. Applicant's mother-in-law and father-in-law were citizens and residents of Afghanistan. Both are deceased. Applicant has two brothers and one sister, who were born and raised in Afghanistan. His sister is a citizen and resident of Germany. One brother remains a citizen and resident of Afghanistan, and works for an airline. His other brother recently moved to Sweden to live with his daughter. That brother is a retired officer of an Afghan defense agency. In the past, Applicant sent money to his family in Afghanistan for financial assistance. He thinks he sent about \$300 total. He has not sent money in the past couple years. (GX 3, 5, 6, 7; AX A.) Applicant communicates with both brothers yearly. (GX 6.) He also has weekly or monthly communication with two friends, who served in the Afghan military with him. (GX 6.)

An investigator interviewed Applicant regarding information on his e-QIP. He asked Applicant, "Is there any country that you feel more loyal to or like more than the U.S.?" (GX 7 at 2.) In response, Applicant said, "Oh no I like MY (sic) country Afghanistan. I would say Afghanistan and then United States." (*Id.*) In his response to the FORM, he wrote that "I admit that I love U.S.A., my second country more than Afghanistan." (AX A.)

Applicant told the investigator that he wants to return to Afghanistan "to help improve Afghanistan, second to support HIMSELF (sic) and third help the U.S. Mission." (GX 7.) He acknowledged that:

Afghanistan's future right now is very sad. I am very home sick. . . . Everyone is looking for money. I wish I had all the money to give to them because of the poverty. It is very dangerous over there, especially as an American. I am like a foreigner to them now. (GX 7.)

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 Afghanistan, 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-Qaeda 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, and 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.

The United States-Afghan relationship is summarized as follows:

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.

During his December 1, 2009 speech at West Point, President Barack Obama laid down the core of U.S. goals in Afghanistan: to disrupt, dismantle, and defeat al-Qaeda and its safe havens in Pakistan, and to prevent their return to Afghanistan. . . . [T]he United States plans to remain politically, diplomatically, and economically engaged in Afghanistan for the long term.

(U.S. Department of State, *Background Note: Afghanistan*, Nov. 28, 2011 at 13) The United States has more combat troops deployed to Afghanistan than to any other foreign country. The U.S. Government plans to withdraw U.S. combat troops from Afghanistan in the next two years. The United States' extraordinary commitment to Afghanistan is balanced against the inherent dangers of the ongoing conflict in Afghanistan to citizens and residents of Afghanistan and Afghan Government problems developing and complying with the rule of law.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine

whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

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) and Guideline C (foreign preference).

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 three 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;
- (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;
- (e) 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.

AG ¶¶ 7(a) and 7(b) apply. Applicant, his parents, and siblings were all born in Afghanistan. One brother currently lives in Afghanistan, with whom he has yearly contact. Applicant provided some money for his family living in Afghanistan, but asserted that he does not any longer. He admitted that there are safety issues for people living in Afghanistan, especially for American citizens.

The mere circumstance 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 are vulnerable to government coercion or inducement. The risk of coercion, persuasion, or duress is 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. The relationship of Afghanistan with the United States places 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 his elderly brother 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 a family member in Afghanistan by providing sensitive or classified information. Department Counsel produced evidence of Applicant's contacts with his brother and has raised 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.

Applicant sent about \$300 to his family living in Afghanistan some years ago. He has not sent any money to them within the last couple years. That small financial contribution was insubstantial and does not raise a security concern under AG ¶ 7(e).

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) and 8(c) have limited applicability. Since leaving Afghanistan Applicant has maintained contact with his brother living in Afghanistan, and previously with his other brother who recently moved from there. His loyalty and connections to his brother in Afghanistan 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). Applicant also failed to provide sufficient evidence 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."

AG ¶ 8(b) has partial application. A key factor in the AG ¶ 8(b) analysis is Applicant's "deep and longstanding relationships and loyalties in the U.S." Applicant has some connections to the United States. In 1992 Applicant moved to the United States on a political asylum visa. In 2001 he became a U.S. citizen. His wife and three adult children are naturalized U.S. citizens, residing in the United States. He worked in the United States for at least eight years, and now collects social security benefits. There is

no evidence that he owns real estate or personal property in the United States, or has established other longstanding connections here.

Applicant's relationship with the United States must be weighed against the potential conflict of interest created by his relationships with his brother living in Afghanistan, and indirectly, his brother's relationships with other Afghan citizens living in Afghanistan. He acknowledged that he annually communicates with his brother living in Afghanistan over the years. There is no evidence, however, that terrorists, criminals, the Afghan Government, or those conducting espionage have approached or threatened Applicant or his brother in Afghanistan to coerce Applicant or his family for classified or sensitive information.¹ As such, there is a reduced possibility that Applicant or his brother would be specifically selected as targets for improper coercion or exploitation. On the other hand, Applicant has conceded that his brother, like every other person living in Afghanistan, is already at risk from terrorists and the Taliban. Applicant failed to present sufficient credible evidence to demonstrate that he has enough loyalties to this country necessary to warrant the full application of this mitigating condition and to outweigh his feelings of sympathy and connections to his place of birth.

AG ¶¶ 8(d) and 8(e) do not apply. At this time, the U.S. Government has not authorized Applicant's involvement with his brother living in Afghanistan. Nor has Applicant has been in a situation, which may require him to report his contacts with his brother living in Afghanistan. AG ¶ 8(f) has no application because there is no evidence that Applicant has any interest in property or bank accounts in Afghanistan.

Guideline C, Foreign Preference

Under AG ¶ 9 the security concern involving foreign preference arises, "[W]hen 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."

AG ¶ 10 describes a condition that could raise a security concern and may be disqualifying:

- (d) any statement or action that shows allegiance to a country other than the United States: for example, declaration of intent to renounce United States citizenship; renunciation of United States citizenship.

Applicant's initial statement to the investigator in which he professed greater allegiance to Afghanistan than the United States is not controverted by his subsequent written statement in his response to the FORM. It is, in fact, corroborated by his comments regarding his feelings of homesickness for Afghanistan. The evidence is sufficient to raise the above disqualifying condition.

¹There would be little reason for U.S. enemies to seek classified information from an applicant before that applicant has access to such information or before they learn of such access.

AG ¶ 11 provides conditions that could mitigate security concerns:

- (a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;
- (b) the individual has expressed a willingness to renounce dual citizenship;
- (c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;
- (d) use of a foreign passport is approved by the cognizant security authority.
- (e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and,
- (f) the vote in a foreign election was encouraged by the United States Government.

None of the above mitigating conditions are sufficient to mitigate the security concerns raised under this guideline. The record evidence does not outweigh Applicant's assertions of strong allegiance to Afghanistan.

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 relevant 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 Guidelines B and C 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 foreign influence security concerns arising from Applicant's brother, being a citizen and resident of Afghanistan. Applicant, his parents, and his siblings were born in Afghanistan. He was educated and raised there. He served in the Afghan army. He worked for an Afghan governmental agency for over 19 years. Since arriving in the United States in 1992, he has communicated with his elderly brother living in Afghanistan on an annual basis. He also communicates on a regular basis with two friends who served in the Afghan army with him. His brother in Afghanistan would be at a greater risk if Applicant obtained a position as a linguist and, if his clearance was granted, there is a theoretical increase in the risk to his family in Afghanistan. He is fully aware of the risks to himself, and he is also aware that his brother in Afghanistan is at risk from terrorists and the Taliban. Applicant expressed strong sympathies and homesickness for Afghanistan, raising foreign preference security concerns.

Applicant established connections to the United States, including his U.S. citizenship for the last eleven years, as well as his wife and children's U.S. citizenship and residency. He and his wife have worked in the United States and collect social security. He does not own property in Afghanistan. His request for employment as a translator is based on a desire to help Afghanistan, his financial situation, and the U.S. mission there. Although these factors weigh in favor of approval of Applicant's security clearance, they are not sufficiently persuasive to outweigh the factors against its approval, including his long history of connections to Afghanistan and recently expressed equivalence regarding allegiance to the United States.

Overall, the record evidence leaves me with sufficient doubt as to Applicant's present eligibility and suitability for a security clearance. He has not carried his burden to mitigate the foreign influence and foreign preference security concerns.

Formal Findings

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

Paragraph 1, Guideline B:	AGAINST APPLICANT
Subparagraphs 1.a through 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline C:	AGAINST APPLICANT
Subparagraph 2.a:	Against 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Shari Dam
Administrative Judge