



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



In the matter of:)
)
-----) ISCR Case No. 12-12301
)
Applicant for Security Clearance)

Appearances

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

11/06/2013

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant failed to mitigate security concerns regarding her husband, mother, and in-laws, all of whom are citizens and residents of Afghanistan. Applicant's eligibility for a security clearance is denied.

Statement of the Case

In a July 2011, security clearance application, Applicant disclosed that she had several relatives who were citizens and residents of Afghanistan. On March 14, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B (Foreign Influence). 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 DOD on September 1, 2006.

In a letter notarized March 29, 2013, Applicant admitted all five allegations without elaboration and requested a decision without hearing. The Government

prepared a File of Relevant Material (FORM), which included a request for administrative notice regarding Afghanistan, on June 19, 2013. Applicant did not respond to the FORM. The case was assigned to another Defense Office of Hearings and Appeals (DOHA) administrative judge on September 10, 2013, before it was assigned to me on September 24, 2013, for caseload considerations.

After receiving the official case file, I reviewed its contents in its entirety. Noting no objections, I granted the Government's request for administrative notice on certain facts regarding Afghanistan. Based on a thorough review of the case file and the FORM, I find that Applicant failed to carry her burden in mitigating security concerns arising under Guideline B. Consequently, eligibility for a security clearance is denied.

Request for Administrative Notice

Department Counsel submitted a Request for Administrative Notice regarding certain facts about the nation of Afghanistan. It was accepted into the record as part of the FORM. Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (*citing* ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are either well known or from Government reports. See Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Various facts pertaining to Afghanistan were derived from the offered request and its attachments.

The facts thus derived regarding Afghanistan are as follows: In May 2012 the United States and Afghanistan signed a ten-year strategic partnership agreement that demonstrated the United States' enduring commitment to strengthen Afghan sovereignty, stability, and prosperity. Since that time, the core goal of the United States in Afghanistan has been to disrupt, dismantle, and defeat al-Qaida and its affiliates, and to prevent their return to Afghanistan. Despite progress made since the Taliban was deposed, Afghanistan still faces challenges like defeating terrorists and insurgents, recovering from over three decades of civil strife, and rebuilding shattered physical, economic, and political infrastructure.

Afghanistan's human rights record has remained poor, and the Afghan-Taliban dominated insurgency has become increasingly sophisticated and destabilizing. Human rights problems include: armed insurgent groups' killings of persons affiliated with the government and indiscriminate attacks on civilians; torture and abuse of detainees by security forces; extrajudicial killings; poor prison conditions; arbitrary arrests and detention; prolonged pretrial detention; judicial corruption; violation of privacy; restrictions on freedom of speech; and abuse of children. Overall, the State Department has declared that the security threat to all American citizens in Afghanistan remains critical as no part of Afghanistan is immune from violence. U.S. citizens who are also citizens of Afghanistan may be subject to other laws that impose special obligations.

Findings of Fact

Applicant is a 48-year-old linguist working for a defense contractor. She was born in Afghanistan, where she completed secondary school and a technical school program. Her first husband died in 1989 while serving in the Afghani Army during an altercation with Russian forces. As a pregnant young widow and mother of one small child, she was encouraged to flee Afghanistan. She eventually arrived in the United States. She became a naturalized citizen in U.S 1999, the same year in which her second husband died in a car accident. Applicant admits that her current husband, mother, father-in-law, mother-in-law, and three sisters-in-law are citizens and residents of Afghanistan. She is currently in the process of sponsoring her husband, a private sector mechanic, to come to this country. His paperwork has thus far been stalled, but the reason for this is unclear.

The FORM reveals scant facts about Applicant's relatives in Afghanistan. It is noted that her father abandoned Applicant and her mother years ago. He is believed to now be a United States citizen, but his current place of residence is unknown. Applicant's current husband resides with his parents in Afghanistan. He does not entirely understand the type of work she does for a living. He and Applicant only speak by phone about once a month because calls to Afghanistan are costly. Applicant's mother has always been a homemaker. She has no known affiliation with the Afghani government. She and Applicant speak by phone about once a month. The mother has no plans to come to the United States. Applicant's parents-in-law manage their farm and have no known nexus to the Afghani government. Applicant has contact with her parents-in-law about 8-15 times a year by telephone. Two of Applicant's sisters-in-law are teachers with no known connection to the Afghani government. The third sister-in-law is a homemaker with no nexus to the Afghani government. Applicant converses with her sisters-in-law about 8-15 times a year by phone.

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.

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 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 not drawn 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, 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 the applicant may deliberately or inadvertently fail to safeguard classified information.

Section 7 of Executive Order 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

The security concern relating to the guideline for Foreign Influence is set out in 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’s husband, mother, parents-in-law, and three sisters-in-law are citizens and residents of Afghanistan. Applicant maintains regular telephonic contact with all of

these relatives. Only Applicant's husband seems to have a desire to emigrate from Afghanistan. His efforts, however, have thus far been rebuffed due to undisclosed administrative difficulties. Consequently, there is no evidence that the status of any of these relatives is soon to change. I find that the following disqualifying conditions apply under AG ¶ 7:

AG ¶ 7(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion; and

AG ¶ 7(b) connection 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.

Foreign family ties can pose a security risk even without a connection to a foreign government. This is because an applicant may be subject to coercion or undue influence when a third party pressures or threatens an applicant's family members. Under these facts, a third party coercion concern potentially exists. In addition, I specifically note that AG ¶ 7(a) requires substantial evidence of a heightened risk. The heightened risk required to raise a 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 substantial assets in a foreign nation. Terrorist groups and other criminal organizations operate within Afghanistan. They participate in nefarious activities. These facts are sufficient to find a heightened risk exists with regards to Applicant's Afghani relatives. Given these considerations, the evidence provided is sufficient to raise the above disqualifying conditions.

AG ¶ 8 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 8 including:

AG ¶ 8(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, or government and the interests of the U.S.; and

AG ¶ 8(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.

Applicant has the burden to demonstrate evidence sufficient to refute or mitigate the allegations.

Here, the primary concern is Applicant's relationships with her husband and mother. While they, like Applicant's in-laws, initially seem unlikely candidates for third-party manipulation, the evidence available regarding these kin is too scant to make a thorough assessment. Similarly, the available evidence reveals little about Applicant and both her life in and ties to the United States. While there is no suggestion of disloyalty on the part of Applicant, more information is needed under the AG to assess her relationship to the United States, as opposed to any remaining loyalties she may have to her place of birth. Given these factors, I find that AG ¶ 8(a) and AG ¶ 8(b) do not apply.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). 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 incorporated my comments under the three guidelines at issue in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 48-year-old linguist working for a defense contractor. Born in Afghanistan, where she completed secondary school and a technical school program, Applicant decided to immigrate to the United States after her first husband was killed in 1989. She became a naturalized citizen in U.S 1999, the same year in which her second husband died. Applicant concedes that her current husband, mother, father-in-law, mother-in-law, and three sisters-in-law are citizens and residents of Afghanistan. She offers many facts bolstering the Government's case in this matter.

With disqualifying conditions raised, however, the burden shifted to Applicant to proffer facts and evidence in mitigation of the security concerns raised. Here, her answers to the SOR were reduced to the bare minimum. She then declined to respond to the FORM. With so few facts upon which to assess both Applicant and her kin, I find that Applicant failed to meet her burden and that security concerns are left unmitigated.

