



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



In the matter of:)
)
) ISCR Case No. 13-00036
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

09/27/2013

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the security concerns under Guideline B, foreign influence. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On April 10, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline B, foreign influence. DOD acted 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 answered the SOR on May 8, 2013. He requested a hearing before an administrative judge. The case was assigned to me on July 17, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 20, 2013,

with a hearing date of September 9, 2013. The hearing was convened as scheduled. The Government offered exhibits (GE) 1 through 5, which were admitted into evidence without objection. The Government's requests that I take administrative notice of certain facts were marked as hearing exhibits (HE) I and I-A. Department Counsel's exhibit list was marked as HE II. Applicant testified and offered exhibit (AE) A that was admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on September 25, 2013.

Procedural Ruling

Department Counsel requested that I take administrative notice of facts concerning the countries of Afghanistan and Pakistan.¹ Department Counsel provided supporting documents that verify, detail, and provide context for these facts in the Administrative Notice request. See the Afghanistan and Pakistan section of the Findings of Fact of this decision, *infra*, for the material facts from Department Counsel's submissions on these countries.

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

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. Those admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 42 years old. He was born in Afghanistan in 1971 and became a United States naturalized citizen in April 1995. He is married and his wife is a naturalized citizen of the United States. His five children are all citizens of the United States. He has never held a security clearance. He has no history of military service in the U.S. military.⁴

In 1979, Applicant fled Afghanistan and arrived in Pakistan where his family lived for the next several years. In 1983, his family was granted refugee status and they moved to the United States. Two of his sisters and a brother remained in Afghanistan.

¹ Tr. at 11, 12; See HE I and I-A.

² See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004) and *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)).

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

⁴ Tr. at 5; GE 3, 5.

He returned to Pakistan in 1994 to marry his wife. He also visited Pakistan in 1995 and 1997. He has not been back to either Afghanistan or Pakistan on personal business since then.⁵

Applicant was hired by a defense contractor as a linguist in 2007 and was sent to Afghanistan in October 2007. He returned to the United States in November 2007 and was terminated by the contractor because of “outside influences.” Applicant was sent a letter about one year later telling him that no “outside influences” could be determined and he was free to reapply for a linguist position. He reapplied for a linguist position in June 2012 and was hired by his current employer. He recently returned from an overseas deployment to Afghanistan where he spent most of the past year working as a linguist for the U.S. military. He faced dangerous situations on a daily basis when deployed. One of his brothers was also employed as a linguist by the U.S. military and Applicant saw him once or twice in Afghanistan. Applicant did not have contact with any other of his in-country relatives when he was deployed to Afghanistan.⁶

Applicant has the following relatives who are residents and/or citizens of Afghanistan or Pakistan:

1. A sister, a citizen of Afghanistan, who recently moved back to Afghanistan after residing in Pakistan for a number of years. She is a homemaker and does not work for the Afghanistan government. Applicant has not seen her since 1997. His contact with her varied over time from as much as monthly telephone contact to as infrequently as quarterly telephone contact.

2. A brother-in-law and sister-in-law (on his wife’s side) who currently reside in Pakistan. His brother-in-law is a Pakistani citizen and his sister-in-law is a citizen of Afghanistan. Applicant has never met his brother-in-law and has not seen his sister-in-law since 1994. They have no affiliation with the government. Applicant has contact with them about once every year, or two. There is also a language barrier with his brother-in-law. Applicant’s wife talks with her sister once every month or two.

3. A sister-in-law (his deceased brother’s wife), who is an Afghan citizen, and who resided in Pakistan for some time, but now is residing in Afghanistan. Applicant testified that his brother was killed in 1997 (Applicant’s earlier personal subject interview indicated that his brother was killed in 1994) by the Taliban. He apparently was at one time the mayor of Jalabad and this may have led to his death. Consequently, Applicant took it upon himself to help support his brother’s family (widow and four children) by sending them approximately \$1,000 per year. He has telephone contact with his sister-in-law about four times a year. His contact is less frequent now because his nieces and nephews have grown up. He last sent money to his sister-in-law in April or May 2012.

⁵ Tr. at 23-25; GE 5.

⁶ Tr. at 40, 42-43, 54; GE 3; AE A.

He no longer needs to support her because two of her children who reside in other countries are doing so. His sister-in-law has no affiliation with the Afghan government.

4. His mother-in-law who is a citizen and resident of Afghanistan. He has not seen her in 30 years. He has contact with her infrequently, and no more than three times a year. Applicant's wife has telephone contact with her mother about once every month or two. His mother-in-law has no affiliation with the Afghan government.⁷

Applicant is strongly supported by the military chain of command he provided linguistic support for during his recent deployment. The commander noted that he "would proudly work with him again in the future." A non-commissioned officer who worked with Applicant noted that he was an "excellent linguist." Two team leaders, who worked with him in over 50 missions in hostile territory, stated that Applicant was the best and most professional linguist with whom they had ever worked. His friends and neighbors wrote about his personal qualities of integrity, strength, and his dedication to family.⁸

Afghanistan

Formerly under the control of the United Kingdom, Afghanistan received independence in August 1919. It is a rugged and mountainous country in Southwestern Asia, approximately the size of Texas, and has common borders with Pakistan on the east and the south, Iran on the west, and Russia on the north. In 2009, the population was about 28 million people. Afghanistan has had a turbulent political history, including an invasion by the Soviet Union in 1979, occupation by the Soviet Union until 1989, and civil war between the occupiers and home-grown freedom fighters, known as Mujahidin. Anarchy ensued, and fighting continued among the various ethnic, clan, and religious warlords and their respective militias even after the Soviet Union withdrew from the country. By the mid-1990s, the Taliban rose to power and controlled significant portions of the country, imposing repressive policies and sharia law, guiding all aspects of Muslim life. Afghanistan became a sanctuary for terrorist groups.

After the September 11, 2001 terrorist attacks in the United States, U.S. demands that Afghanistan expel Osama Bin-Laden and his followers were rejected by the Taliban. In October 2001, U.S. forces and coalition partners led military operations in the country, forcing the Taliban out of power. Following a few years of governance by an interim government, a democratic presidential election took place in October 2004, and a new democratic government took power. Despite the election, many daunting challenges remained largely because terrorists, including al-Qa'ida and the Taliban, continue to assert power and intimidation within the country. Terrorists continue to target United States and Afghan interests through suicide bombings, assassinations, and hostage taking.

⁷ Tr. at 26, 28, 33-34, 46-50; GE 3-5.

⁸ AE A.

Afghanistan's human rights record remains poor, for there are continuing extrajudicial killings; torture and other abuse; widespread official corruption with impunity; ineffective government investigations of abuses by local security forces; arbitrary arrest and detention; judicial corruption; violations of privacy rights; violence and societal discrimination against women; sexual abuse of children; trafficking in persons; and restrictions on freedoms of religion, the press, assembly, and movement.

The Taliban-led insurgency in Afghanistan has diminished in some areas, but remains resilient and capable of challenging U.S. and international goals. Security gains are especially fragile in areas where International Security Assistance Forces (ISAF) surge forces have been concentrated since 2010 and are now transitioning the security lead to Afghan National Security Forces (ANSF). The ANSF will require international assistance through 2014 and beyond.

In May 2012, the United States and Afghanistan signed the Enduring Strategic Partnership Agreement (SPA). This ten year agreement demonstrates the United States' commitment to strengthen Afghanistan's sovereignty, stability, and prosperity and continue cooperation to defeat al-Qa'ida and its affiliates.⁹

Pakistan

Pakistan has extensive terrorist networks operating within its borders. Members of the Taliban are known to be located in provinces of Pakistan and their senior leaders continue to enjoy safe haven there. The leader of the Taliban has operated openly in Pakistan.

The Federally Administered Tribal Area (FATA) of Pakistan continues to be a vital sanctuary to al-Qa'ida and other extremist groups. Al-Qa'ida and other Afghan extremist groups exploit that operating environment to plan and direct operations. Al-Qa'ida operatives are balancing support for attacks in Pakistan with guidance to refocus the global jihad externally, against U.S. targets. Pakistan military leaders have limited success against al-Qa'ida operatives, other foreign fighters, and Pakistani militants who pose a threat to Islamabad.

The U.S. Department of State has defined terrorist safe havens as ungoverned, under-governed, or ill-governed physical areas where terrorist groups that constitute a threat to U.S. national security interests are able to organize, plan, raise funds, communicate, recruit, train, transit, and operate in relative security because of inadequate governance capacity, political will, or both. The U.S. Department of State has concluded that, despite increased efforts by Pakistani security forces, al-Qa'ida terrorists, Afghan militants, foreign insurgents, and Pakistani militants continue to find safe haven in portions of Pakistan's FATA, Khyber Paktunkwa, and Baluchistan, and have operated in those areas to organize, train, and plan attacks against the United States and its allies in Afghanistan.

⁹ HE I.

The Haqqani Network, an extremist organization operating as a strategic arm of Pakistan's Inter-Service Intelligence Agency, is also operating from Pakistan with impunity. U.S. special forces personnel raided a large al-Qa'ida compound located in Pakistan and shot and killed their leader Osama bin Laden.

The U.S. State Department warns U.S. citizens to defer traveling to Pakistan, as the presence of al-Qa'ida, Taliban elements, and indigenous militant sectarian groups poses a danger to American citizens. In 2011, Pakistan experienced hundreds of bomb blasts, suicide attacks, and sectarian violence resulting in thousands of deaths. These included attacks that targeted Americans. Terrorists have demonstrated their willingness and capability to attack targets where Americans are known to congregate or visit.

Pakistan has major human rights problems that include extrajudicial killings, torture and disappearances committed by security forces, as well as by militant, terrorist and extremist groups.¹⁰

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.

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

¹⁰ HE I-A.

mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of 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

Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

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.

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; and

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

AG ¶¶ 7(a), 7(b), and 7(d) apply because of Applicant's relationships with his sister, sisters-in-law, brother-in-law, and mother-in-law who are living in Afghanistan or Pakistan. Applicant communicates with these relatives on an infrequent basis. There is a rebuttable presumption that a person has ties of affection for, or obligation to, their immediate family members. Applicant has not attempted to rebut this presumption, although he established that his contact with these relatives is minimal at most. Nevertheless, Applicant's relationships with his relatives living in Afghanistan and Pakistan are sufficient to create "a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion."

The mere possession 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.

The nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an Applicant's family members are vulnerable to government coercion or inducement. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member 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 and Pakistan with the United States places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his relationships with his relatives living in Afghanistan and Pakistan do not pose a security risk. Applicant should not be placed in a position where he might be forced to choose between loyalty to the United States and a desire to assist his relatives living in Afghanistan or Pakistan who might be coerced by terrorists or other Governmental entities in either country.

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."¹¹ 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

¹¹ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

espionage against the United States, especially in the economic, scientific, and technical fields.

While there is no evidence that intelligence operatives or terrorists from Afghanistan or Pakistan seek or have sought classified or economic information from or through Applicant, or his relatives living in Afghanistan or Pakistan, it is not possible to rule out such a possibility in the future. Although Applicant's communications with his relatives living in these countries are sporadic, he continues to feel an obligation to them and affection for them. Applicant's concern for his relatives is a positive character trait that increases his trustworthiness; however, it also increases the concern about potential foreign influence. Department Counsel produced substantial evidence to raise the issue of potential foreign pressure or attempted exploitation. AG ¶¶ 7(a), 7(b) and 7(d) apply, and further inquiry is necessary about potential application of any mitigating conditions.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns:

(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. AG ¶¶ 8(d) through 8(f) are not applicable. Applicant's current linguistics position is something that could be exploited against him. Applicant has limited contact with his relatives who live in Afghanistan and Pakistan. The amount of contacts between an Applicant and relatives living in a foreign country is not the only test for determining whether someone could be coerced through their relatives. Because of his connections to his relatives living in Afghanistan and Pakistan and the presence of Taliban and other terrorist organizations there, Applicant is not able to fully meet his burden of showing there is "little likelihood that it could create a risk for foreign influence or exploitation."

Applicant has met his burden to establish his "deep and longstanding relationships and loyalties in the U.S." He has lived in the United States for 30 years, he has been a citizen for 18 years, and his wife and children are citizens of the United States. Additionally, he volunteered to go into harm's way to serve as a linguist for U.S. forces in Afghanistan. In performing his linguist duties, he earned the admiration and respect of the troops with whom he served. The evidence supports that Applicant has longstanding loyalties toward the United States and would resolve any conflict of interest in favor of the United States. AG ¶ 8(b) applies.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The circumstances tending to support granting Applicant's clearance are more significant than the factors weighing towards denying his clearance at this time. Applicant has demonstrated his longstanding loyalty to this country by raising his family in the United States and by serving as a linguist for the U.S. military, at great risk to himself. Therefore, he provided sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline B, foreign influence.

Formal Findings

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

Paragraph 1, Guideline B: FOR APPLICANT

Subparagraphs 1.a – 1.d: 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.

Robert E. Coacher
Administrative Judge