



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 13-00532
)
 Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

05/01/2014

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on August 19, 2009. On September 20, 2013, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), alleging security concerns under Guideline B. The 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) implemented by DOD on September 1, 2006.

Applicant received the SOR on November 11, 2013; answered it on November 12, 2013; and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on March 11, 2014. On the same day, a complete copy of the file of relevant material (FORM) was sent to Applicant, who

was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on April 8, 2014, and he responded on April 10, 2014. Department Counsel did not object to the materials submitted by Applicant in response to the FORM. The case was assigned to me on April 29, 2014.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about Afghanistan. The request and supporting documents are included in the FORM. I have taken administrative notice as requested. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations. His admissions are incorporated in my findings of fact.

Applicant is a 59-year-old linguist employed by a defense contractor since October 2008. He received an interim clearance in January 2009.

Applicant was born in Afghanistan. He completed high school in Afghanistan, graduating in December 1973. In 1974, he attended the American Center School in Kabul, Afghanistan, to learn English, and that experience ignited his interest in coming to the United States. He still remembers his teacher's name. (Response to FORM.)

Applicant married a native of Afghanistan in March 1980. To escape from the Soviet occupation, he and his family left Afghanistan in May 1980 and went to Germany as refugees. They came to the United States in 1982. (Item 6 at 1.) Applicant became a U.S. citizen in May 1989, and his wife became a U.S. citizen in August 1989. (Item 5, PSI at 1.) They have two adult children, who are citizens and residents of the United States.

Applicant has eight brothers. One is deceased, two are citizens and residents of the United States, one is a citizen of Afghanistan residing in Germany, one is a citizen of Afghanistan residing in the United Kingdom, one is a citizen of Afghanistan residing in the Netherlands, and two are citizens and residents of Afghanistan. One of his brothers in Afghanistan is a lieutenant colonel in the Afghan Army, working for the Ministry of Defense in the Intelligence Directorate, and the other owns a juice and vitamin store and a gymnasium. He has telephonic contact with his brothers in Afghanistan, including the brother working for the Ministry of Defense, three or four times a year. (Item 2 at 6; Item 4; Item 6, listing of relatives and associates.)

Applicant has six sisters. All are housewives and citizens of Afghanistan. One lives in the Netherlands, one lives in Canada, and four live in Afghanistan. He has

telephonic contact with his sisters in Afghanistan once or twice a year. (Item 4; Item 6, listing of relatives and associates.)

Applicant's mother-in-law is a citizen and resident of the United States. His father, mother, and father-in-law are deceased. (Item 4.)

Applicant never returned to Afghanistan until he was hired as a linguist for U.S. military forces. (Response to FORM.) He has worked with a Marine Corps special operations unit in the Helmand Province of Afghanistan for almost five years, without taking a long-term vacation to see his family. Applicant's team leader, a Marine Corps captain, submitted a letter on his behalf, stating that Applicant has "contributed tremendously" to the successes of his unit. He describes Applicant as highly reliable and committed to the unit. He states, "[Applicant's] trustworthiness and absolute reliability are proven and to be trusted without a doubt." Item 2 at 7.

I have taken administrative notice that Afghanistan has been an independent nation since 1919, and it was a monarchy until a military coup in 1973. Following a second military coup in 1978, a Marxist government emerged. In December 1979, the Soviet Union invaded and occupied Afghanistan, but they were resisted by the Afghan mujahedeen. The Soviet Union withdrew in February 1989 pursuant to an agreement signed by Pakistan, Afghanistan, the United States, and the Soviet Union. The mujahedeen were not a party to the agreement and refused to abide by it. The result was a civil war among several factions, including the Taliban. By the end of 1998, the Taliban controlled most of Afghanistan, committed atrocities against minority populations, and provided sanctuary to terrorist organizations. U.S. military forces, along with forces from a coalition partnership, forced the Taliban out of power by November 2001. With the assistance and support of the United States, a new democratic government took office in 2004.

Afghanistan's central government is improving its ability to provide constitutional, stable, effective, and responsive governance. However, local governance is weak, and all levels of government are plagued by corruption.

I also have noted that Afghanistan's human rights record is generally poor, due to the continuing insurgency, the weak government, and ongoing recovery efforts from two decades of war. In spite of efforts by the U.S. and the government of Afghanistan, it continues to be a violent, unsafe, unstable country. The weak government and internal instability have enabled hostile states, non-state actors, terrorists, and insurgents to continue operating in Afghanistan, including groups hostile to the United States. Insurgents use narcotics trafficking and kidnapping to finance their military and technical capabilities. Suicide bombing attacks continue to inflict large numbers of casualties. Helmand, Kandahar, Ghazni, and Kunar provinces are the most dangerous provinces for Afghan security personnel and International Security Assistance Force (ISAF) personnel. "Insider attacks" on ISAF personnel by members of Afghan forces or infiltrators into Afghan units are a serious concern, but they have declined since 2012,

as a result of Afghanistan's increased focus on the vetting and training of security force personnel.

Policies

"[N]o 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 applicants 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 AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and 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 that 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 made "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. Thus, a decision to deny a security clearance 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). “[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

Guideline B, Foreign Influence

The SOR alleges that Applicant’s two brothers are citizens and residents of Afghanistan (SOR ¶ 1.a), one of his two brothers is employed by the Defense Ministry of Afghanistan (SOR ¶ 1.b), and his four sisters are citizens and residents of Afghanistan (SOR ¶ 1.c). The security concern under this guideline is set out in AG ¶ 6 as follows:

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.

Two disqualifying conditions under this guideline are relevant to this case:

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): 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.

When foreign family ties are involved, the totality of an applicant’s family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No.

01-22693 at 7 (App. Bd. Sep. 22, 2003). There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002).

AG ¶¶ 7(a) requires substantial evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions 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. It is not necessary for the Government to prove affirmatively that a country specifically targets U.S. citizens in order to raise Guideline B security concerns. ISCR Case No. 08-09211 (App. Bd. Jan. 21, 2010). Furthermore, factors such as the family members’ obscurity or the failure of foreign authorities to contact them in the past do not provide a meaningful measure of whether an applicant’s circumstances post a security risk. ISCR Case No. 07-13696 at 5 (App. Bd. Feb. 9, 2009).

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, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.” ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, 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. 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 operations against the United States. In considering the nature of the government, an administrative judge must also consider any terrorist activity in the country at issue. See *generally* ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

There is no evidence that Afghanistan targets the United States for military or economic intelligence. However, the presence of Applicant’s siblings in Afghanistan, his regular contact with his siblings, his brother’s connection to the Afghan government, and the pervasive threat of terrorism in Afghanistan are sufficient to establish the “increased risk” under AG ¶ 7(a) and raise a potential conflict of interest under AG ¶ 7(b).

Three mitigating conditions under this guideline are potentially relevant:

AG ¶ 8(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.; 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 interest in favor of the U.S. interest; and

AG ¶ 8(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.

AG ¶ 8(a) is not established, for the reasons set out in the above discussion of AG ¶ 7(a). However, AG ¶ 8(b) is established. Applicant and his family fled from Afghanistan during the Soviet occupation, and he did not return until he began working as a linguist for the U.S. military. Present day Afghanistan bears little resemblance to the Afghanistan he left in 1980. He and his spouse have lived in the United States for about 32 years, and they have been citizens for almost 25 years. His children, two brothers, and mother-in-law are citizens and residents of the United States. He has held an interim security clearance and served with a Marine Corps unit in one of the most dangerous provinces in Afghanistan for almost five years. According to his Marine Corps supervisor, he "contributed tremendously" to the successes of his unit, and has established a reputation for "trustworthiness and absolute reliability."

Generally, an applicant's prior history of complying with security procedures and regulations is considered to be of relatively low probative value for the purposes of refuting, mitigating, or extenuating the security concerns raised by that applicant's more immediate disqualifying circumstances. However, where an applicant has established by credible, independent evidence that his or her compliance with security procedures and regulations occurred in the context of dangerous, high-risk circumstances in which the applicant made a significant contribution to the national security, such circumstances give credibility to an applicant's assertion that he or she will recognize, resist, and report a foreign power or terrorist's attempts at coercion or exploitation. In this case, Applicant has a track record of complying with security regulations and procedures in high-risk circumstances in which he made significant contributions to national security. See ISCR Case No. 07-06030 at 3 (App. Bd. Jun. 19, 2008); ISCR Case No. 06-25928 at 4 (App. Bd. Apr 9, 2008). Thus, I am confident that Applicant would resolve any conflict of interest in favor of the United States.

AG ¶ 8(c) is not established. Applicant's contacts with his siblings are infrequent, but he has not overcome the presumption that they are not casual.

Whole-Person Concept

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

Applicant is a mature adult who has lived more than half his life in the United States. He has cultural and familial connections to Afghanistan, but his loyalty is unquestionably to the United States. He has demonstrated his trustworthiness and reliability under austere and dangerous circumstances. Because Applicant requested a determination on the record without a hearing, I have had no opportunity to evaluate his credibility and sincerity based on his demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). However, his Marine Corps team leader in Afghanistan has assessed his trustworthiness and reliability based on daily contact and personal observation, and I find the team leader's assessment persuasive.

After weighing the disqualifying and mitigating conditions under Guideline B, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on foreign influence. Accordingly, I conclude that he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence): FOR APPLICANT

Subparagraphs 1.a-1.c:

For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge