



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ICSR Case No. 13-00535
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq. Department Counsel
For Applicant: *Pro se*

03/11/2014

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings and exhibits, eligibility for access to classified information is granted. Applicant mitigated security concerns for foreign influence.

Statement of the Case

On January 23, 2012, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance for his employment as an interpreter for a defense contractor. (Item 5) The Department of Defense (DOD) could not make the affirmative findings required to issue a security clearance. DOD issued Applicant a Statement of Reasons (SOR), dated August 29, 2013, detailing security concerns for foreign influence. (Item 1) 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 in the DOD on September 1, 2006.

Applicant answered the SOR on September 23, 2013. He admitted five and denied four of the nine factual allegations concerning foreign influence. He attached a detailed statement explaining his response. Applicant elected to have the matter decided on the written record. (Item 4) Department Counsel submitted the

Government's written case on January 14, 2014. Applicant received a complete file of relevant material (FORM) on February 4, 2014, and was provided the opportunity to file objections and to submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant timely provided additional information in response to the FORM by a sworn statement dated February 8, 2014. The case was assigned to me on February 25, 2014.

Procedural Issues

Department Counsel requested as part of the FORM that administrative notice be taken of certain facts concerning Afghanistan. I have considered the request and the documents provided by Department Counsel. Administrative notice is taken of the facts pertaining to Afghanistan as noted below in the Findings of Fact.

Findings of Fact

After a thorough review of the pleadings, I make the following essential findings of fact.

Applicant is 57 years old and has been a linguist for the U.S. Forces serving in Afghanistan since January 2012. He was born in Afghanistan in 1957. He left in 1978 to pursue his college education in India. He left that country in 1980 because he was unable to renew his student visa since the Soviet Union had invaded Afghanistan and the government had changed. He applied for and received refugee status in the United States in September 1980. After arriving in the United States, he worked as a taxi driver and store clerk. He married in 1983. His wife was born in India. He and his wife became United States citizens on November 14, 1986. He has two children born in the United States who are citizens and residents of the United States. (Item 7, e-QIP, dated January 23, 2012; Item 7, Screening Documents, dated January 23, 2012)

The SOR alleges that Applicant has a cousin who is a citizen and resident of Afghanistan (SOR 1.a) and was employed as a director in the Afghanistan Ministry of Finance from 2003 until 2012 (SOR 1.b). Applicant denied these allegations. Applicant noted that his cousin is now employed as an administrator in the Afghan Ministry of Commerce issuing business permits. The individual is a young man and a distant cousin who is the sole surviving member of his father's family still in Afghanistan. He had no communication with his cousin until 2003 when he saw him while visiting Afghanistan for his mother's funeral. Since then, he has had only brief telephone conversations with his cousin on religious holidays. He last had contact with his cousin in 2010. (Item 4 and item 7, Item 9, Response to FORM)

The SOR alleges that Applicant's uncle was a law advisor for the Afghanistan Ministry of Justice from 1945 until 2009. The SOR also alleges that his uncle is a citizen and resident of Afghanistan. (SOR 1.c and 1.d) Applicant admits that his uncle was a Director in the Ministry of Justice from 1945 until 1978. When the Soviet Union invaded Afghanistan in 1978, his uncle was dismissed by the Soviets from his position. After the fall of the Taliban and the arrival of the U.S. Army in Afghanistan, his uncle again served

as a law advisor in the Ministry of Justice from 2006 until 2009. The uncle left his job with the Ministry of Justice in 2009 due to poor health. Applicant's uncle is very old and neither the uncle nor Applicant has any desire for continued communication. Applicant has not had any contact with his uncle since 2010. (Item 4, Item 5, Item 7, and Item 9)

The SOR alleges that Applicant's brother is a citizen of Afghanistan residing in the United States who served as a District Attorney in Afghanistan from 1972 until 1978. Applicant noted that his brother has been a citizen of the United States for over 25 years. He is now serving as an interpreter for United States forces in Afghanistan. His brother has not had any contact with any Afghan government officials since he left his position as a district attorney in 1978. (Item 4)

The SOR alleges that another of Applicant's brothers is a citizen and resident of the United States. He had been employed as a police officer in Afghanistan from 1968 until 1978. (SOR 1.f) Applicant provided information that his brother sought refugee status in the United States after the Soviets invaded Afghanistan in 1978. He has been in the United States since 1979 and is now retired.

The SOR also alleges that Applicant's sister served as a teacher in Afghanistan from 1974 until 1978. (SOR 1.g) She has been a United States citizen for over 25 years and lives with her son in the United States. Neither his brothers nor his sister have any personal or financial interests in Afghanistan. (Item 4)

The SOR alleges that Applicant's father was a senator in the Afghan Parliament until 1970. (SOR 1.h) Applicant admits his father was an Afghan senator. His father died in an automobile accident in 1970. (Item 4)

The SOR alleges that Applicant's uncle was a provincial governor in Afghanistan from 1948 until 1973. (SOR 1.i) Applicant provided information that when the Soviets invaded Afghanistan in 1973, his uncle was dismissed as the provincial governor. He was executed by the Soviets in 1978. All of the uncle's children are citizens and residents of the United States. One of his uncle's sons is now serving as an interpreter for United States forces in Afghanistan. (Item 4)

Applicant presented a letter of recommendation and two Certificates of Appreciation with his answer to the SOR. The letter of recommendation from the team lead of a U. S. counterintelligence support team in Afghanistan recognizes Applicant for his critical support to the team. Applicant's linguistic support and mentorship of other interpreters and team personnel was a key element in the team's success. Applicant is dependable and provided linguistic support for long hours without complaint. He has been very careful with operational security and classified information. Applicant presented a Certificate of Appreciation for his linguistic support from a U.S, Army intelligence unit, and a Certificate of Appreciation from a Federal Bureau of Investigation (FBI) team in Afghanistan. (Item 4 at 9-11)

Afghanistan

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 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 formed a democratic government in 2004. The United States and its coalition partners have over 50,000 troops serving in Afghanistan assisting the Afghan government in maintaining peace and stability in the country. Even though progress has been made since then, Afghanistan faces many challenges including defeating terrorists and insurgents, recovering from decades of civil strife, and rebuilding an economy and infrastructure. The Taliban-backed insurgency has continued with frequent, sophisticated, dangerous, and destabilizing activities in spite of United States and coalition military operations. Civilians continue to bear the brunt of the violence. The Taliban continues to maintain momentum in spite of losses to their leadership. Armed conflict has spread to almost one-third of the country. The lack of security in many areas and generally low government capacity and competency has hampered efforts at self-governance and economic development. There is continued government corruption and substantial drug trade.

Afghanistan's human rights record is generally poor with extrajudicial killings, torture, poor prison conditions, official impunity, prolonged pretrial detention, restrictions on freedom of press and religion, violence against women, sexual abuse against children, and human trafficking. Its poor human rights record is due to the continuing insurgency, the weak government, and ongoing recovery efforts from two decades of war. In spite of efforts by the United States 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 casualties. The Taliban has strengthened its activities because of Pakistan funding sources, the drug trade, and kidnappings. The Taliban insurgent operations result in numerous attacks and deaths targeted at non-government organizations, journalists, government workers, and United Nation workers. There are militant attacks by rockets, vehicle-borne explosive devices, and suicide bombing, even in the capital city, Kabul. The United States Department of State classifies the situation in Afghanistan as a critical security threat to United States citizens.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant 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. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Foreign Influence

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 the U.S. interest, 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 consideration as whether the foreign country 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 ¶ 6)

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. Even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security. Friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. The nature of a nation's government, its relationship with the United States, the presence of U.S. and coalition forces in the country, and Afghanistan's 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.

The SOR alleges that Applicant's siblings are now citizens and residents of the United States but worked for the Afghan government in the 1970s. The SOR also alleges that Applicant's father was an Afghan senator until his death in 1970, and his uncle an Afghan provincial governor from 1942 until 1973. There is evidence that Applicant's family had strongly affiliated with some of the Afghan governments over the years. However, no immediate family member has served for the present Afghan government. Even though his father and uncle were Afghan government officials in the 1940s to 1970s, they have been deceased for many years. His siblings worked for the Afghan government in the 1970s but left the country and came to the United States as refugees when Afghanistan was invaded by the Soviets in the late 1970s. They have been citizens and residents of the United States for over 25 years. Applicant and one brother are now serving in Afghanistan as interpreters for the U.S. Forces. They are not considered residents of Afghanistan since they are serving with the U.S. Forces. Under these circumstances, there are no security concerns created by Applicant's siblings, his deceased father, or his deceased uncle. I find for Applicant as to SOR 1.e, 1.f, 1.g, 1.h, and 1.i.

The SOR alleges that Applicant's cousin and uncle are citizens and residents of Afghanistan and work or have worked for the Afghan government. Their presence in Afghanistan may place Applicant in a position where he is vulnerable to pressure or coercion by a foreign interest. His uncle and cousin may present a security concern because of the potential to manipulate or induce Applicant to help a them or a foreign person or group in a way that is not in the U.S. interest.

Two disqualifying conditions are relevant to the security concerns raised in SOR 1.a to SOR 1.d: 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).

Under the old adjudicative guidelines, a disqualifying condition based on foreign family members could not be mitigated unless an applicant could establish that the family members were not in a position to be exploited. The Appeal Board consistently applied this mitigating condition narrowly, holding that an applicant should not be placed in a position where he or she is forced to make a choice between the interests of the family member and the interests of the United States. Thus, an administrative judge was not permitted to apply a balancing test to assess the extent of the security risk. Under the new guidelines, however, the potentially conflicting loyalties may be weighed to determine if an applicant can be expected to resolve any conflict of interest in favor of the U.S. interest.

The mere existence of foreign relationships and contacts is not sufficient to raise the above disqualifying conditions. 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. The nature of Applicant's contacts and relationships must be examined to determine whether it creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. One factor that may heighten the risk in Applicant's case is the threat of violence, harassment, repressions, and terrorism in Afghanistan. An applicant with foreign family ties to a country that presents a heightened risk has a very heavy burden of persuasion to show that neither he nor his family members are subject to influence by that country. The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. There is a risk presented because Applicant has distant family members in Afghanistan, a very dangerous country.

Applicant raised facts to mitigate the security concerns arising from his cousin and uncle in Afghanistan. I have considered Foreign Influence Mitigating Conditions 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 or infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation).

The nature of the Afghan government, the threats from terrorist organizations operating in the country, the disregard for human rights, and the hostility of the Taliban to the United States, place a heavy burden on Applicant in mitigating the disqualifying conditions and the security concerns. Applicant's contact with his uncle and cousin are minimal at best. He did not meet his cousin until 2003. He talked to him by phone only on religious holidays until 2010. He has had no contact with the cousin since 2010. He has not seen his uncle in many years and has had no contact with him since 2010. The risk created by his cousin and uncle are normal risks for having family members in a dangerous foreign country. The risk is not heightened because the contact with both family members was only casual and infrequent and ended in 2010. Applicant does not have strong ties to his distant family members still citizens and residents of Afghanistan. Any ties he does have are not so strong as to place Applicant in a position to have to choose between his family members and the interests of the United States. This lack of a connection to family members in Afghanistan negates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

Applicant has strong ties to the United States. He has been a U.S. resident for over 34 years, and a U.S. citizen for over 27 years. His immediate family, his siblings, and his siblings' family members are all residents and citizens of the United States. His loyalty to the United States is such that it is unlikely that Applicant could be placed in a position to choose between any sense of loyalty or obligation he has to his distance family members in Afghanistan and his sense of loyalty or obligation to the United States. In balancing all of the factors mentioned and considered above, I am satisfied Applicant's loyalty to the United States is such that he can be expected to resolve any conflict of interest in favor of the United States interest. There is no risk to the national interest if Applicant has access to classified information. The mitigating conditions in AG ¶¶ 8(a), (b), and (c) apply. Applicant has met his heavy burden to show that his family members in Afghanistan do not cause a security concern. I conclude that Applicant has mitigated security concerns for foreign influence.

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 access to sensitive information 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 carefully considered all of the circumstances discussed above in regard to disqualifying and mitigating conditions as well as the following factors in light of the whole-person concept. The “whole-person concept” requires consideration of all available information about Applicant, not a single item in isolation, to reach a commonsense determination concerning Applicant’s security worthiness.

I considered that Applicant came to the United States as a refugee over 34 years ago. He and his family are citizens and residents of the United States. I considered that his other immediate family members, his siblings and their family members, are all citizens and residents of the United States. I considered that his father and uncle were Afghan officials up to the 1970s and did not work for any recent Afghan government. Both his father and uncle have been long deceased.

I also considered that Applicant and one of his siblings have been serving as interpreters for U.S. Forces in Afghanistan. I considered that his superiors praised his service to the U.S. Forces, and considered him an excellent worker who provided invaluable service to the U.S. Forces. During his service he protected the national security interest of the United States and properly handled classified information. As a general rule, 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 conduct or circumstances. However, there is an exception to that general rule in Guideline B cases, where the applicant has established by credible, independent evidence that his compliance with security procedures and regulations occurred in the context of dangerous, high-risk circumstances in which the applicant had made a significant contribution to the national security. The presence of such circumstances can give credibility to an applicant’s assertion that he can be relied upon to recognize, resist, and report a foreign power’s attempts at coercion or exploitation.

The Government has a compelling interest to protect sensitive information. This requires that any doubt about the risks associated with Applicant’s foreign contacts be resolved in favor of the Government. Applicant’s uncle and cousin in Afghanistan do not create an unacceptable risk for Applicant that must be resolved in favor of the Government. Overall, the record evidence leaves me without questions and doubts about Applicant’s eligibility and suitability for access to classified information. Applicant has met the heavy burden to mitigate the potential security concerns for foreign influence arising from his family’s connection to Afghanistan. Applicant is granted access to classified information.

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.i: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is granted.

THOMAS M. CREAN
Administrative Judge