



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



In the matter of:)
)
) ISCR Case No. 13-00694
)
Applicant for Security Clearance)

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: *Pro se*

02/05/2014

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guidelines B, foreign influence, and E, personal conduct. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On April 1, 2013, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines B, foreign influence and E, personal conduct. 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 effective within the DOD for SORs issued after September 1, 2006.

Applicant answered the SOR on September 14, 2013. He elected to have his case decided on the written record. On November 21, 2013, Department Counsel submitted the Government's file of relevant material (FORM). The FORM was mailed to Applicant, and it was received on December 12, 2013. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted additional information. Department Counsel had no objections and the documents were entered in the record. The case was assigned to me on January 14, 2014.

Request for Administrative Notice

Department Counsel submitted a written request, as part of the FORM, that I take administrative notice of certain facts about Afghanistan. The documents are attached to the record. Applicant did not object, and I have taken administrative notice of the facts contained in the record. The facts are summarized in the Findings of Fact, below.

Findings of Fact

Applicant admitted the allegations in SOR. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 61 years old. He was born in Afghanistan. He married his wife in 1977 in Afghanistan. His wife was born in Afghanistan. He has five children, ages 34, 33, 31, 29, and 27, all born in Afghanistan. Four of them are citizens and residents of Afghanistan. His 27-year-old daughter is a permanent resident of the United States and a citizen of Afghanistan. Applicant and his wife became naturalized U.S. citizens in January 2012. He has worked for his present employer, a federal contractor, since May 2012, some of which has been in Afghanistan. He worked in the United States as a linguist for a federal contractor from 2002 to 2012.¹

Applicant illegally entered the United States in 1998 through Mexico at the California border. He wanted to leave Afghanistan because the Taliban was fighting a civil war within his country. He and his family lived in fear of violence and because the Taliban made it difficult for him to find work. He paid a smuggler \$5,000. He was aware that the U.S. Embassy in Pakistan was not issuing visas to the United States and it would take years to get to the United States through formal processing. He traveled from Pakistan with a layover in Germany and then from Germany to Mexico. Once in Mexico he was hidden in a passenger van with darkened windows, and he illegally crossed the border and was dropped off in San Diego. He saved his money for two years, and in 2000 he hired an attorney and applied for a visa with U.S. immigration. He had been working without a visa as a security guard.²

¹ Item 4.

² Item 6, 7.

In 2001, Applicant's wife and two daughters left Afghanistan and went to Pakistan. After a few months, his wife's father paid a smuggler \$8,000 to bring them to the United States. They flew to Canada and were driven by an unknown person from Canada into the United States. Applicant hired the same attorney to assist him in obtaining permanent residency status for himself and his family. They were all issued permanent resident cards in 2006. Applicant told a government investigator during his background interview in May 2012 that he became a U.S. citizen because of a job requirement.³

Applicant's 33-year-old daughter, who had lived in the United States, returned to Afghanistan in 2006 because she wanted to be with her brothers who did not have close relatives living near them. She has married and is a housewife. Applicant indicated in his background interview that his wife contacts her about once a year. Applicant indicated that he has not had any personal contact with her since 2006. It is unclear if this means that he has not seen her or if it means he has contacted her by telephone.

Applicant's second daughter has remained in the United States and is a teacher. She no longer lives with Applicant and his wife. Applicant sees or talks to her monthly. He indicated that she intends on applying for U.S. citizenship when she can afford to do so.⁴

Applicant's stated in his background interview that his three sons are all self-employed shopkeepers. He is unsure of the nature of their business and has not seen them since leaving Afghanistan. From 1998 to the present he has had about once yearly telephonic contact with their children when his wife calls them.

Applicant's sister is a citizen and resident of Afghanistan. Applicant noted on his security clearance application that his last contact with his sister was in 1997.⁵ No other information was provided by Applicant about his sister.

Applicant completed an Electronic Questionnaire for Investigations Processing (e-Qip) on May 15, 2012. He answered "No" to Section 22, which asked if in the past seven years he had been issued a summons, citation, or ticket to appear in court in a criminal proceeding; if he had been arrested by any police officer, sheriff, marshal, or any other type of law enforcement officer; if he had been charged, convicted, or sentenced for a crime in any court; and if he ever had been convicted of any offense involving domestic violence or a crime of violence (such as battery or assault) against a child, dependent, cohabitant, spouse, former spouse, or someone whom he shared a child in common. Applicant failed to disclose he had been arrested in January 2007, and convicted on April 2007, of battery against a spouse/cohabitating partner, and sentenced to confinement for one day and three years probation.

³ Item 7.

⁴ Item 7.

⁵ Item 5.

During his background interview in May 2012, Applicant was asked if he had ever been arrested. Applicant again stated “No.” He was then confronted with information about the January 2007 battery against his spouse. He stated he did not believe he was arrested because he voluntarily went to the police station after being contacted by them. In response to questions from the government investigator about being arrested, he admitted that he was handcuffed, fingerprinted, and held behind bars. His explanation of the incident was that it was a misunderstanding between his wife and hospital personnel due to a language barrier. Applicant told the government investigator that he thought the hospital personnel involved the police because they believed his wife had been injured by him. Applicant denied he injured his wife. He stated that his wife apologized to him because her injury caused the police to get involved.

Applicant explained to the government investigator that he and his wife were walking up the stairs in their apartment and were joking. She made a hand gesture as part of the conversation and accidentally slammed her hand into the wall. The next day, Applicant went to work and his wife was worried about her hand because it was swollen. She went to the emergency room and explained to hospital personnel how she injured her hand and mentioned that her husband, Applicant, was present at the time. Applicant assumed from his wife’s story, the hospital personnel suspected she was a victim of domestic violence. Upon returning home from work, Applicant was contacted by the police. They did not believe Applicant’s explanation due to the nature and seriousness of his wife’s injury. After he was handcuffed, fingerprinted, and detained in jail for a few hours, he posted bond and was released. He was also issued a restraining order. He appeared in court a few days later and the restraining order was lifted. Applicant indicated that when he saw his wife she was crying and angry with the police for arresting him.⁶

Police records indicate Applicant’s wife went to the emergency room in January 2007, with injuries consistent with domestic violence. The police were contacted and interviewed Applicant’s wife. The police report stated that Applicant’s wife told police she was involved in a verbal argument with Applicant about housing. He began to call her names and punched her in the mouth. During the physical altercation she raised her left hand in defense and her left ring finger was bent back. Applicant’s wife had previously been admitted to the hospital in June 2006 with a mark on her forehead that she claimed she received from a fall. She admitted that she did not fall but rather Applicant had punched her in the head. Applicant’s wife did not want to press charges. She told police “women in our culture never fight back.”⁷

The report stated that during Applicant’s interview with the police, he admitted he and his wife were arguing and he pushed his wife and she fell down. He stated when he pushed her she hit her mouth on the stairwell. When she got up he admitted he hit her in the mouth with a closed fist. The police report noted that Applicant stated, “I beat

⁶ Item 7.

⁷ Item 8.

her.”⁸ When his wife asked Applicant to take her to the hospital, he told her it was not that serious. The police read Applicant his Miranda rights and he indicated he understood them. He was asked if he wished to answer any questions or change his statement and he indicated “no.”⁹

Court records confirm that Applicant was arrested and charged with two counts of inflicting corporal injury on a spouse/cohabitant, misdemeanors. He appeared in court in April 2007, and was represented by counsel. The charges were amended to add a third count of battery against a spouse/cohabitating partner. Applicant entered a conditional plea and was advised about the consequences of pleading guilty or nolo contendere. He indicated he understood the potential penalties and that his conviction may be alleged as a prior offense. He indicated orally to the court that he read and understood the acknowledgement of waiver or rights form and what the maximum and minimum penalties were. He signed the forms. The court found there was a factual basis for his plea, and Applicant entered a plea of nolo contendere to the battery charge. The two remaining charges were dismissed. The imposition of sentence was suspended, and Applicant was placed on formal probation for three years and was ordered to report to his probation officer within three days. He was required to pay \$100 to the state restitution fund and \$400 as to the state revenue division as a domestic violence fee. He was also required to complete 40 hours of community service and to attend and complete one year of domestic violence counseling. He was sentenced to serve one day in jail. He was given one day credit for time served. In June 2008, Applicant returned to court with his attorney and probation officer, and his probation was converted from formal to informal. He was no longer required to report to his probation officer.¹⁰

In Applicant’s answer to the SOR he explained that the reason he failed to disclose his arrest and conviction was that he was confused and he had difficulty understanding the e-Qip questions. He specifically noted that a question that asked if he was currently on trial or awaiting trial on criminal charges confused him. He was also confused because his probation period had expired. In his response to the FORM, Applicant repeated that he misunderstood the question about whether he was currently on trial or awaiting a trial on criminal charges. He failed to address why he answered “no” to the specific questions alleged in the SOR regarding his arrest, conviction, and the offense involving domestic violence. Applicant deliberately and intentionally failed to disclose his arrest and conviction on his e-Qip.

Applicant provided character letters. He is described as pleasant, dedicated, self-motivated, hard-working, a team player, leader, advisor, and mentor. He sets the

⁸ Item 8.

⁹ Item 8.

¹⁰ Item 3, Answer to SOR and attachments; Item 8. The criminal offense and conviction is not alleged in the SOR and it will not be considered for disqualifying purposes, but will be considered when analyzing the whole person and making a credibility determination.

highest goals for himself and the team that he works with and ensures that the goals get met. He is respected and has a strong work ethic. While serving as a linguist in Afghanistan he traveled in dangerous circumstances. He is considered an outstanding linguist.¹¹

Afghanistan

On May 2, 2012, the United States and Afghanistan signed the Enduring Strategic Partnership Agreement. It is a 10-year strategic partnership agreement that demonstrates the United States' enduring commitment to strengthen Afghanistan's sovereignty, stability, prosperity and continue cooperation to defeat al-Qaida and its affiliates. The United States has supported the elected Afghan government, providing development aid and stabilizing the country. The United States supports the Afghan government's goals to steadily increase security and to take action to combat corruption, improve governance and provide better services to its people. Despite some progress, Afghanistan still faces daunting challenges in defeating terrorists and insurgents.

No part of Afghanistan is immune from violence, either targeted or random, against United States and other Western nationals. Various groups oppose the strengthening of a democratic government and will use violence to achieve their goals. U.S. citizens who are also citizens of Afghanistan, may be subject to other laws that impose special obligations.

There are serious human rights problems in Afghanistan that include widespread violence from armed insurgent groups against persons affiliated with the government. There are indiscriminate attacks on civilians. There are credible reports of torture and abuse of detainees by security forces. There is pervasive corruption, endemic violence, and societal discrimination against women and girls. There are numerous other human rights problems associated with security forces.

The Department of State warns U.S. citizens against travel to Afghanistan and warns that the security threat to all U.S. citizens in Afghanistan remains critical. Extremist networks and groups coordinate complex suicide attacks and assassinations against government leaders. These terrorist groups operate within Afghanistan and also in nearby Pakistan.

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 are used in evaluating an applicant's eligibility for access to classified information.

¹¹ Item 3.

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 avoided drawing 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 as to obtaining 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 as to 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

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding 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 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 describes conditions that could raise a security concern and may be disqualifying. I have considered all of them and the following are potentially applicable:

- (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
- (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.

AG ¶ 7(a) requires substantial evidence of a "heightened risk." The "heightened risk" required to raise this 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 owning property in a foreign country. The totality of Applicant's family ties to a foreign country as well as each individual family tie must be considered.

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."¹²

Applicant's sister and four of his children are citizens and residents of Afghanistan. Applicant indicated in his e-Qip that his last contact with his sister was in 1997. He indicated that he speaks to his children about once a year. Afghanistan is a country with a poor human rights record and has challenges combating terrorism and insurgents within the country. There is pervasive corruption, endemic violence, and societal discrimination against women and girls. This creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion. It also creates a potential conflict of interest. AG ¶¶ 7(a) and 7(b) have been raised by the evidence.

¹² ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

I have analyzed the facts and considered all of the mitigating conditions under AG ¶ 8 and conclude the following are potentially applicable:

- (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 and 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 interests in favor of the U.S. interests; and
- (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.

Applicant has not had contact with his sister since 1997. His contact or communication with his sister is so infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation. AG ¶ 8(c) applies to Applicant's sister.

Applicant indicated that he only has contact with his children in Afghanistan once a year. No other information was provided. The bond between a parent and a child is strong. Even contact once a year is enough to raise concerns. These concerns are increased when the country has issues of violence and corruption as serious as they are within Afghanistan. There is insufficient evidence to conclude that the familial connections and the nature of the relationship Applicant and his wife have with their children in Afghanistan would make it unlikely that Applicant would be placed in a position of having to choose between their family interests and the interests of the United States.

The nature of a nation's government and its relationship with the United States is 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 foreign government or the country is known to conduct intelligence operations against the United States. Four of Applicant's children are citizens and residents of Afghanistan. Although it is possible that Applicant's children do not pose a security risk, I cannot make that determination without additional evidence. The record is void of sufficient information about Applicant's children that would allow me to find that any of the mitigating conditions are applicable.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern about personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

I considered the disqualifying conditions under AG ¶ 16 that could raise a security concern and concluded the following has been raised:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant deliberately and intentionally failed to disclose on his e-Qip that he was arrested, charged, and convicted of a domestic violence offense. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant deliberately and intentionally failed to disclose he had been arrested, charged and convicted of battery on his spouse. The police reports and court records document that he was aware he was arrested. He had an attorney when he went to court and entered a nolo contendere plea. He completed his community service and court-mandated year-long domestic violence counseling. He later returned to court and had the terms of his probation reduced. Despite those actions, Applicant continued to make statements to investigators throughout the investigative process that he was confused and did not know he was arrested. He denies that he assaulted his wife, which contradicts previous admissions to the police. He claims he was confused by a question about probation and whether a trial was pending. He failed to address why he did not disclose his arrest on his e-Qip and when specifically asked by a government investigator if he had been arrested. Applicant's explanations are not credible. I find none of the above mitigating conditions 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 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. I have incorporated my comments under Guidelines B and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under these guidelines, but some warrant additional comment.

Applicant is 61 years old. He has been a United States citizen since 2012. He has worked as a linguist for a federal contractor in the United States for ten years before working for his present employer where he travels to Afghanistan. He is considered an outstanding linguist. He has four children who are citizens and residents of Afghanistan. He failed to provide sufficient information to meet his burden of persuasion to mitigate the foreign influence security concerns. Applicant deliberately and intentionally failed to disclose his arrest and conviction for domestic violence on his May 12, 2012 e-QIP and

during an interview with a government investigator. His explanations were not credible and are contradicted by records from the 2007 criminal case. The record evidence leaves me with questions and serious doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline B, foreign influence, and Guideline E, personal conduct.

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 E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline B:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge