



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



In the matter of:

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) ISCR Case No. 14-00032
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Applicant for Security Clearance

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: Ronald P. Ackerman, Esquire

July 17, 2014

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on December 1, 2011. On February 25, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines B and J for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing on March 18, 2014, and requested a hearing before an Administrative Judge. The Defense Office of Hearings and Appeals (DOHA) received the request soon thereafter, and I received the case assignment on April 22, 2014. DOHA issued a notice of hearing on May 7, 2014, and I convened the hearing as scheduled on May 23, 2014. The Government offered Exhibits (GXs) 1 and 2, which were received without objection. Applicant testified on his own behalf and

submitted Exhibits (AppXs) A through F, which were received without objection. DOHA received the transcript of the hearing (TR) on June 4, 2014. I granted Applicant's request to keep the record open until June 20, 2014, to submit additional matters. Applicant submitted nothing further on his behalf. The record closed on June 20, 2014. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural and Evidentiary Rulings

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to Afghanistan. The request was granted. The request, and the attached documents, were not admitted into evidence, but were included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in Subparagraphs 1.b., and 2.a.~2.e. of the SOR, with explanations. He denied the factual allegations in Subparagraph 1.a. of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Guideline B - Foreign Influence

Applicant was born in Afghanistan in 1966. He immigrated to the United States in 1982 at the age of 16 where he attended high school. (TR at page 26 lines 11~21.) He joined the United States Navy in 1987 where he served honorably until his discharge in 1991. (TR at page 27 line 12 to page 29 line 8, and AppX C.) Applicant became a naturalized U.S. citizen in 1992. (TR at page 27 lines 3~7, and GX 1 at page 7.)

1.a. Applicant was divorced from his Afghan born wife in June of 2013, and has had no contact with her since the divorce. (TR at page 30 line 15 to page 32 line 25, at page 46 line 7 to page 47 line 18, and AppX D.) Applicant has had no contact with his former Afghan mother-in-law since his 2005 wedding. (*Id.*)

1.b. Applicant has had no contact with his Afghan born uncle and a cousin since his 2005 wedding. (TR at page 33 line 1 to page 34 line 2, and at page 48 lines 4~7.)

I also take administrative notice of the following facts. Afghanistan's national institutions continue to improve their ability to provide constitutional, stable, effective, and responsive governance, but still face sizable challenges. Corruption, ineffective program monitoring, budget shortfalls at all levels, inability to generate revenue, and limited public financial management capacity continue to plague the national government.

The convergence of insurgent, terrorist, and criminal networks is pervasive and constitutes a threat to Afghanistan stability. Security in Afghanistan is challenged by several armed groups, loosely allied with each other. The Department of State warns U.S. citizens against travel to Afghanistan and warns that the security threat to all U.S. citizens remains critical.

Guideline J - Criminal Conduct

2.a. In 1996, Applicant was charged with and subsequently convicted of Soliciting a Prostitute. (TR at page 34 line 6 to page 35 line 4, at page 48 line 12 to page 50 line 20, and GX 2 at page 2.) He was placed on probation for one year and fined approximately \$500. (*Id.*)

2.b. In June of 1999, Applicant was arrested and charged with Battery on a Person. (TR at page 35 lines 5~25, at page 50 line 21 to page 51 line 14, and GX 2 at page 2.) Applicant avers that his actions were in self-defense; and as a result, the charge was dropped. (*Id.*)

2.c. In July of 1999, Applicant was arrested and charged with misdemeanor Possession of Marijuana. (TR at page 36 line 1 to page 37 line 3, at page 51 line 15 to page 52 line 25, and GX 1 at page 39.) A marijuana pipe, a gift from a girlfriend, was found in the glove compartment of Applicant's car. (*Id.*) He was fined \$50. (GX 1 at page 39.)

2.d. In October of 2001, Applicant was charged with, and subsequently convicted of, misdemeanor Simple Assault/Battery. (TR at page 37 line 4 to page 38 line 15, at page 53 lines 1~22, GX 1 at pages 39~40, and GX 2 at page 2.) He got in an altercation with a gas station attendant. (*Id.*) He was sentenced, in part, to five days in jail, and fined approximately \$100. (GX 2 at page 2.)

2.e. In May of 2010, Applicant was arrested and charged with Assault and Battery. (TR at page 38 line 16 to page 41 line 13, and at page 53 line 23 to page 54 line 7.) Applicant took issue with the fact that his 13 year old sister was playing loud music late at night when he was trying to sleep. (*Id.*) His sister called the police, but has since recanted any allegation of criminal conduct on Applicant's part. (AppX E.) The charge was dropped.

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 useful 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 over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG Paragraph 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. Paragraph 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 Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph 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 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 the Applicant may deliberately or inadvertently fail to protect or 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

Paragraph 6 of the adjudicative guidelines sets out the security concern relating to Foreign Influence:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign 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 a foreign interest.

Here, Paragraph 7(a) is arguably applicable: *“contacts with a foreign family member . . . 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.”* Applicant’s former spouse, former mother-in-law, uncle and cousin are citizens and residents of Afghanistan. This is countered, however, by the first mitigating condition, as *“the nature of the relationships with foreign persons, the country in which these persons are located . . . 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 . . . and the interests of the U.S.”* Applicant has had no contact with his former mother-in-law, uncle and cousin since his wedding in 2005. Furthermore, he has had nothing to do with his former spouse since their June 2013 divorce. There is no evidence that any of them work for the Afghan government.

Guideline J - Criminal Conduct

Paragraph 30 of the adjudicative guidelines sets out the security concern relating to Criminal Conduct:

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

The adjudicative guidelines set out certain conditions that could raise security concerns. Subparagraph 31(a) provides that *“a single serious crime or multiple lesser offenses”* may raise security concerns. Applicant has three convictions, one in 1996, one in 1999, and one in 2001. The last incident, a misdemeanor conviction, occurred in October of 2001. He was also arrested in May of 2010. Here, these are countered by the mitigating condition in Subparagraph 32(a) as *“so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.”* The Applicant’s last arrest was more than three years ago, and the alleged victim has recanted any criminal conduct on Applicant’s part. The other incidents are over ten years ago, and do not show a pattern.

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. 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.

The Administrative Judge should also 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.”

Applicant has the unqualified support of those with whom he worked in Afghanistan. (AppX A.) I have considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Overall, the record evidence leaves me without questions or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his alleged Foreign Influence and Criminal 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 B:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	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 a security clearance. Eligibility for access to classified information is granted.

Richard A. Cefola
Administrative Judge