

DATE: January 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-10886

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has siblings who are citizens of Afghanistan and reside in the U.K., Pakistan, and Afghanistan. One brother and his mother-in-law are citizens of Afghanistan and reside in the U.S. His brother-in-law is a U.S. citizen and resides in Afghanistan. Security concerns based on foreign influence are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On March 22, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guideline B (Foreign Influence). It alleges several members of Applicant's immediate family and his mother-in-law are citizens of Afghanistan, and some of them reside in foreign countries (SOR ¶¶ 1.a. - 1.e.). It alleges his brother-in-law, a U.S. citizen, resides in Afghanistan (SOR ¶ 1.f.). Finally, it alleges Applicant maintains regular contact with his relatives who reside in foreign countries, traveled twice to Pakistan, and worked for a voluntary association providing humanitarian aid to Afghani citizens. (SOR ¶¶ 1.g. - 1.i.)

Applicant answered the SOR in writing on April 8, 2004. He admitted the allegations in ¶¶ 1.a. - 1.f., denied maintaining regular contact with relatives in foreign countries (¶ 1.g.), stated traveled to Pakistan only once (¶ 1.h.), and admitted he worked as a volunteer for a humanitarian organization in Afghanistan (¶ 1.i). He offered explanations, and elected to have the case decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's written case on May 21, 2004. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on November 2, 2004, but did not respond. The case was assigned to me on December 15, 2004.

FINDINGS OF FACT

Based on the entire record, I make the following findings of fact:

Applicant is a 44-year-old linguist employed by a defense contractor. Both he and his wife were born in Afghanistan and became naturalized U.S. citizens, in August 1999 and November 1993, respectively. He has worked for his present employer and held a security clearance since August 2002.

Applicant has siblings who are citizens of Afghanistan and reside in the U.K., Pakistan, and Afghanistan. One brother and his mother-in-law are citizens of Afghanistan and reside in the U.S.

Applicant's brother-in-law is a U.S. citizen residing in Afghanistan. The brother-in-law's status is unclear. In October 2003, in a sworn response to interrogatories, Applicant said his brother was a linguist employed by a defense contractor in Afghanistan. In his answer to the SOR, Applicant said his brother-in-law was a member of the U.S. Army stationed in Afghanistan.

Applicant does not have regular or frequent contact with his family members who live in foreign countries. He has contact about once a year with his immediate family and occasional e-mail with his brother-in-law. He visited Pakistan once, from June to August 2000, to visit his brothers and sister.

From August 1992 to July 1993, Applicant worked as a volunteer in Afghanistan for an association providing humanitarian aid to citizens of Afghanistan. The association describes itself as "a humanitarian, nonprofit, non-political, non-sectarian, and non-governmental organization." It was founded in Afghanistan in 1990 "to participate in the process of relief, rehabilitation and development of the country," and to encourage Afghan refugees to return to their homeland. See www.afgha.com-organizations.

In August 2002, Applicant completed a "Counterintelligence and Security Screening Questionnaire for Contract Linguists." Question 33 asks, "If you or your family is threatened, will you continue to work for the US military?" Question 34 asks, "If you are captured, will you safeguard or maintain secrecy of US military operations?" Applicant answered "no" to both questions.

Afghanistan is an emerging democracy, strongly supported by the U.S. Remnants of the former Taliban regime and terrorist networks are in parts of Afghanistan, and there is a continuing threat of terrorism and kidnaping for ransom.

Pakistan became a strong ally of the U.S. in the war on terrorism after September 2001. It also is afflicted with widespread terrorism. The U.S. State Department has determined that the Pakistani government's record on human rights is "poor."

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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a

fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that 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, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (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. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* Directive ¶ E3.1.15. 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* Directive ¶ E2.2.2.

CONCLUSIONS

A security risk may exist when an applicant's immediate family, or other persons to whom he may be bound by affection, influence, or obligation, are not citizens of the U.S. or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Directive ¶ E2.A2.1.1. A disqualifying condition (DC 1) may arise when "[a]n immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country." Directive ¶ E2.A2.1.2.1. Applicant has several immediate family members who are citizens of Afghanistan and reside in a foreign country. He also has occasional contact with a brother-in-law residing in Afghanistan. Applicant's visit to Pakistan in 2000 to vacation and visit his brothers and sister reinforces the security concerns under Guideline B. I conclude that DC 1 is established.

In cases where an Applicant has immediate family members who are citizens or residents of a foreign country, a mitigating condition (MC 1) may apply if "the immediate family members (spouse, father, mother, sons, daughters, brothers, sisters) . . . are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States." Directive ¶ E2A2.1.3.1.

Notwithstanding the facially disjunctive language of MC 1 ("agents of a foreign power **or** in a position to be exploited"), it requires proof "that an applicant's family members, cohabitant, or associates in question are (a) not agents of a foreign power, **and** (b) not in a position to be exploited by a foreign power in a way that could force the applicant to choose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004); *see* 50 U.S.C. § 1801(b) (defining "agent of a foreign power"). Since the Government has produced substantial evidence to establish DC 1, the burden has shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

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). Applicant's family ties to Afghanistan and Pakistan, and the possible effect they may have on his conduct are relevant considerations under Guideline B (Foreign Influence). ISCR

Case No. 01-02452 at 8 (App. Bd. Nov. 21, 2002). "[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002).

Guideline B is not limited to countries that are 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). The distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

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. Finally, we know that even friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. *See* ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Nevertheless, the nature of a nation's government, its relationship with the U.S., 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 U.S.

Applicant has provided no information about his family members' occupations, social positions, political positions, or other factors that would shed light on their vulnerability to coercion, persuasion, or duress. His answers to questions 33 and 34 of his counterintelligence and screening questionnaire strongly suggest his vulnerability to pressure on his family. Applicant has not carried his burden of establishing MC 1. I resolve the allegations in the SOR, ¶¶ 1.a.-1.e. and 1.h., against Applicant.

Applicant's brother-in-law's residence in Afghanistan does not raise security concerns. Applicant has given conflicting information, but it appears to be clear the brother-in-law is working in Afghanistan in support of U.S. interests. Accordingly, I resolve the allegation in the SOR, ¶ 1.f., for Applicant.

A mitigating condition (MC 3) may apply if "[c]ontact and correspondence with foreign citizens are casual and infrequent." Directive ¶ E2.A2.1.3.3. Applicant has infrequent contact with his family members in foreign countries. I conclude that MC 3 is established. I resolve the allegation in the SOR, ¶ 1.g., for Applicant.

Applicant's volunteer work with the humanitarian organization raises no security concerns. Department Counsel has presented no evidence that the organization's interests and activities are inimical to U.S. interests. Accordingly, I resolve the allegation in the SOR, ¶ 1.i., for Applicant.

FORMAL FINDINGS

The following are my findings as to each allegation in the SOR:

Paragraph 1. Guideline B (Foreign Influence): AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant a security clearance to Applicant. Clearance is denied.

LeRoy F. Foreman

Administrative Judge