

KEYWORD: Foreign Influence; Personal Conduct

DIGEST: Applicant, a naturalized citizen of the U.S. since 1993, has three siblings who are citizens and residents of Afghanistan. His younger brother is mentally disabled, his older brother is a taxi driver, and his sister is a housewife married to a bathroom fixture salesman. Applicant did not disclose his three siblings and an arrest for assault and battery on his security clearance application (SF 86). He has refuted the allegation of intentional falsification of his SF 86 and mitigated the security concern based on foreign influence. Clearance is granted.

CASE NO: 03-11269.h1

DATE: 04/25/2006

DATE: April 25, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-11269

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Tamara Shifrin, Personal Representative

SYNOPSIS

Applicant, a naturalized citizen of the U.S. since 1993, has three siblings who are citizens and residents of Afghanistan. His younger brother is mentally disabled, his older brother is a taxi driver, and his sister is a housewife married to a bathroom fixture salesman. Applicant did not disclose his three siblings and an arrest for assault and battery on his security clearance application (SF 86). He has refuted the allegation of intentional falsification of his SF 86 and mitigated the security concern based on foreign influence. Clearance is granted.

STATEMENT OF THE CASE

On October 21, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. ⁽¹⁾ The SOR alleges security concerns under Guidelines B (Foreign Influence) and E (Personal Conduct). The SOR initially alleged Applicant's sister and two brothers are citizens of Afghanistan residing in Pakistan (¶ 1.a.), he maintained telephonic contact every two months with them in Pakistan (¶ 1.b.), and he sent them \$200 a month (¶ 1.c.). At the hearing, I granted a motion to amend the SOR ¶¶ 1.a. and 1.b. to allege Applicant's siblings reside in Afghanistan instead of Pakistan. Under Guideline E, the SOR alleges Applicant falsified his SF 86 by failing to disclose his three siblings (¶ 2.a.) and failing to disclose an arrest for assault and battery (¶ 2.b.).

Applicant answered the SOR in writing on December 9, 2004. He admitted having three siblings who are citizens and residents of Afghanistan but denied intentionally falsifying his SF 86. He offered explanations, and initially did not request a hearing. On February 28, 2005, he requested a hearing. ⁽²⁾ The case was assigned to me on February 14, 2006 and heard as scheduled on March 10, 2006. DOHA received the transcript (Tr.) on March 24, 2006.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is 35 years old. He fled from Afghanistan at age 16 to avoid military service, and walked through the mountains to Iran. He came to the U.S. as a refugee in 1987 and became a U.S. citizen in April 1993. Applicant has never returned to Afghanistan and has no plans to do so, unless his duties require it. He has no financial interests in Afghanistan. [\(3\)](#)

Applicant began working as a linguist for a defense contractor in 2002. He has been repeatedly recognized for his exemplary performance of duty. [\(4\)](#) He has never held a security clearance. [\(5\)](#)

In June 1999, Applicant and his wife were involved in an argument, and he began breaking things in the house. Neighbors called the police, who arrested Applicant and charged him with assault and battery. He was handcuffed, taken to the station, and released after about an hour. He was fined \$500 (with \$300 suspended) and placed on probation. [\(6\)](#)

Applicant executed a SF 86 on February 1, 2002. He listed eight family members living in the U.S. on the form, but he did not list his three siblings then living in Pakistan. He also did not disclose his arrest for assault and battery. When he was interviewed by a security investigator in July 2002, he admitted the arrest and fully described the circumstances. [\(7\)](#)

The SF 86 executed by Applicant was a barely legible copy. His answers are legible, but the questions are very difficult to read. He testified he did not list his three siblings then living in Pakistan because he misunderstood the question and thought it applied only to family members in the U.S. [\(8\)](#)

At the hearing, Applicant admitted his arrest in 1999 for assault and battery. He testified he rushed through the form and did not remember the arrest when he filled out the SF 86 in 2002. He thought the form was merely a job application and did not know anything about the security clearance process at the time. [\(9\)](#)

Since coming to the U.S., Applicant has obtained an associate's degree from a community college and an electronic engineering certificate from a vocational school.⁽¹⁰⁾ He also received a certificate declaring him an "Expert on the Constitution" based on a special examination on the U.S. Constitution during a history course.⁽¹¹⁾ Before his current job, he worked as a cab driver, car salesman, and manager of a film processing facility.⁽¹²⁾

More recently, Applicant has become a real estate agent. His real estate co-worker and partner considers him very honest. His partner testified she did not believe Applicant understood that his arrest in 1999 was encompassed in the question on the SF 86, nor did he understand he was executing a government security application as opposed to a contractor's employment application.⁽¹³⁾

During the hearing, Applicant seemed puzzled about the relevance of evidence concerning Afghanistan. He stated: "Afghanistan is no longer my country. I gave it up when I became a citizen. I don't understand why you're bringing [up] all these things."⁽¹⁴⁾

Applicant's younger brother is mentally disabled and lives with his older brother, who is a taxi driver. Applicant's sister is a housewife, married to a bathroom fixture salesman. None of his siblings are connected to the government.⁽¹⁵⁾

Applicant's siblings fled to Pakistan in 1996 to escape the Taliban. Applicant sent them about \$200 per month until 2002, when they were able to return to Afghanistan.⁽¹⁶⁾ He has contact with his sister and older brother every three months, by telephone or internet.⁽¹⁷⁾ He has not seen his siblings in person since 1984. They have never visited the U.S. All three siblings are seeking visas into the U.S. Applicant is sponsoring his sister's application.⁽¹⁸⁾

Applicant's spouse was born in Afghanistan and came to the U.S. in 1990. She is a U.S. citizen. All of her family resides in the U.S.⁽¹⁹⁾

Afghanistan is an emerging democracy, friendly to and supported by the U.S., but its government ministries and institutions are in their infancy. The government is still establishing its policies and procedures, and it faces an array of security, legal, commercial, and infrastructure problems. Crime and lawlessness are major problems because of widespread unemployment and lack of basic services. Remnants of the Taliban and terrorist groups are devoted to driving Westerners out of Afghanistan, by violence if necessary. Armed rivalry among political and tribal groups contribute to the volatile and unpredictable environment.⁽²⁰⁾ Serious problems remain with human rights abuses by
⁽²¹⁾

local security forces and police.

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 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 and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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).

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 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 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; *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

Guideline B (Foreign Influence)

A security risk may exist when an applicant's immediate family, or other persons to whom he or she 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 [spouse, father, mother, sons, daughters, brothers, sisters], 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. The evidence that Applicant's three siblings are citizens and residents of Afghanistan establishes DC 1.

Since the government produced substantial evidence to establish DC 1, the burden shifted to Applicant to produce evidence 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 is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). 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).

In cases where an applicant has immediate family members who are citizens or residents of a foreign country or who are connected with a foreign government, a mitigating condition (MC 1) may apply if "the immediate family members, cohabitant, or associate(s) in question 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 ¶ E2.A2.1.3.1. 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").

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). The distinctions between friendly and unfriendly governments must be made with caution. Relations between nations can shift, sometimes dramatically and unexpectedly.

Furthermore, 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 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.

No one in Applicant's immediate family is connected to the government or businesses likely to be involved in industrial espionage. His younger brother appears to be mentally incapable of being exploited to influence Applicant. His older brother and sister are not involved with military forces, terrorist or insurgent groups, or tribal politics. The government of Afghanistan is friendly to and supported by the U.S.

Applicant is loyal to the U.S., feels no connection to Afghanistan, and cannot understand what relevance events in Afghanistan have to him. He has spent all his adult life in the U.S. and has been a citizen for 13 years. All his family members want to live in the U.S. They fled Afghanistan to escape the Taliban. Applicant is loyal to his family, and he provided them financial support even when his own income was meager, but I believe, based on his testimony and demeanor, that he would fiercely resist any effort by or through his siblings in Afghanistan to exercise foreign influence on him.

None of the individual family circumstances discussed above are determinative. Nevertheless, Applicant's evidence of his family's absence of governmental connections, financial dependence on the government, or business connections susceptible to industrial espionage is relevant. After evaluating each family member's individual circumstances as well as the totality of Applicant's family ties to Afghanistan, I conclude MC 1 is established. After weighing the disqualifying and mitigating conditions and evaluating the evidence in the context of the whole person, I conclude Applicant has mitigated the security concern based on foreign influence.

Guideline E (Personal Conduct)

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. A disqualifying condition (DC 2) under this guideline may be established by "deliberate omission, concealment, or falsification of relevant and material 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." Directive ¶ E2.A5.1.2.2.

When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant's explanation for not listing his three siblings living outside the U.S. is plausible. Although he works as a translator, English is his second language, and he misunderstands questions occasionally. My impression during the hearing was that he sometimes understands the literal meaning of a word but not the concept or context. When he executed his SF 86, he thought he was filling out a job application, not a security clearance application. He was working with a questionnaire on which the questions were barely legible. Based on his demeanor and testimony at the hearing, and the testimony of his business partner about his truthfulness, I found him believable. I am satisfied he did not intend to conceal his siblings living in Pakistan and later in Afghanistan.

His failure to list his arrest is a closer question. Although he testified he "forgot" about the arrest, I am not convinced the word "forgot" accurately describes his state of mind. I do not believe he understood his arrest was encompassed by the question on the questionnaire. I also do not believe he understood the importance of full disclosure on the SF 86. He fully disclosed his arrest when he was interviewed by a security investigator in July 2002. At the hearing, he was open about the incident, did not seem to regard it as a significant event, and did not seem embarrassed by it. I am satisfied he did not intend to conceal relevant and material facts. Based on all the evidence, I conclude DC 2 is not established, and Applicant has refuted the allegations of intentional falsification. Accordingly, I resolve SOR ¶¶ 2.a. and 2.b. in his favor.

FORMAL FINDINGS

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

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

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2. Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge

1. 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).

2. Hearing Exhibit (HX) I.
3. Tr. 59-60.
4. Applicant's Exhibit (AX) A through D, F.
5. Tr. 56-60.
6. Tr. 68-70.
7. Government Exhibit (GX) 3.
8. Tr. 67-68.
9. Tr. 70-72.
10. Tr. 74.
11. AX E.
12. GX 1 at 3.
13. Tr. 77-79.
14. Tr. 41.
15. Tr. 61-62.
16. Tr. 63-64.
17. Tr. 65.
18. Tr. 66.
19. Tr. 67.
20. HX II (U.S. Dept. of State, *Consular Information Sheet: Afghanistan*) at 1-2 (Jan. 31, 2006); HX III (U.S. Dept. of State, *Travel Warning: Afghanistan*) at 1 (Jan. 31, 2006).
21. HX III (U.S. Dept. of State, *Country Reports on Human Rights Practices: Afghanistan*) at 1 (Feb. 28, 2005).