

DATE: May 3, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-10626

**DECISION OF ADMINISTRATIVE JUDGE**

**MARTIN H. MOGUL**

**APPEARANCES**

**FOR GOVERNMENT**

Eric H. Borgstrom, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a 46 year-old naturalized United States citizen, born in Afghanistan. His sister, brother-in-law and parents-in-law are citizens and residents of Afghanistan. The extremely limited evidence offered into the record by Applicant could not demonstrate that Applicant's family is not in a position to be exploited, and could not mitigate the foreign influence security concerns of the United States Government. Clearance is denied.

**STATEMENT OF THE CASE**

On August 4, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

In a signed, sworn statement, dated August 8, 2005, Applicant responded to the SOR allegations. He requested that his case be decided on the written record in lieu of a hearing. On November 10, 2005, Department Counsel prepared the Department's written case. A complete copy of the File of Relevant Material (FORM) was provided to Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant filed a response to the FORM. The case was assigned to this Administrative Judge on January 23, 2006.

Department Counsel offered 12 documentary exhibits, identified as Items 1-12, and Applicant offered a two page letter from himself (Item A), a two page letter from his employer (Item B), and additional information concerning Afghanistan (Item C). All of the documents have been admitted into the record without objection.

**FINDINGS OF FACT**

In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline B of the Directive. The SOR contains three allegations, 1.a., through 1.c., under Guideline B. In his response to the SOR, Applicant admitted allegation 1.a., and denied 1.b. and 1.c. The admitted allegation is incorporated herein as a Finding of Fact.

Unfortunately, in this case the evidence offered into the record regarding Applicant's background and the allegations alleged in the SOR is extremely limited. After a complete and thorough review of the evidence that has been entered in the record, including Applicant's Answer to the SOR and the admitted documents, and upon due consideration of that evidence, I make the additional Findings of fact:

Applicant is 46 years old. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector. Applicant is married and has three children (Item 3).

Applicant was born in Afghanistan in 1961, and became a naturalized United States citizen in 1993.

1.a. Applicant's sister and brother-in-law are citizens and residents of Afghanistan. Applicant's employer indicates that they operate a clothing store in Kabul, Afghanistan (Item B). The frequency of his contact with them, whether they have any contact or interaction with employees or representatives of the Government of Afghanistan, and whether they have any financial interests in Afghanistan that Applicant may inherit, is unknown.

1.b. The Government has alleged that Applicant traveled to Afghanistan in 1999, after he became a naturalized United States citizen in 1993. Applicant did not travel to Afghanistan, but he did travel to Pakistan in 1999, as a result of a death in his family (Items 2, B). The evidence indicates that he used his United States passport when he traveled. Applicant's one trip to Pakistan in 1999, while using his United States passport, does not have security significance.

1.c. The Government has alleged that Applicant's father-in-law and mother-in-law are citizens and residents of Pakistan. Applicant's in-laws were born in Afghanistan and are Afghanistani citizens. While they did reside for a number of years in Pakistan, they now reside in Afghanistan (Items 2, B). Again, the frequency of his contact with his in-laws, whether they have any contact or interaction with employees or representatives of the Government of Afghanistan, and whether they have any financial interests in Afghanistan that Applicant may inherit, is unknown.

It is also not known if Applicant has any other financial interest in Afghanistan or whether he keeps in contact with any other individuals in the country. Finally, Applicant never offered evidence as to what he would do if representatives of the Government of Afghanistan threatened his family if he did not cooperate with that Government.

## POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case.

As set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct

- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future."

The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

### **BURDEN OF PROOF**

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

### **CONCLUSIONS**

Based on the evidence of record, the Government has established an initial reason to deny Applicant a security clearance because of foreign influence. Applicant's immediate family members, including his sister, brother-in-law, and parents-in-law are citizens and residents of Afghanistan. The citizenship and residency of members of Applicant's immediate family create the potential for foreign influence that could result in the compromise of classified information because it makes Applicant potentially vulnerable to coercion, exploitation, or pressure. The possession of such ties raises a security concern sufficient to require Applicant to present evidence in rebuttal, extenuation, or mitigation sufficient to meet his burden of persuasion that it is clearly consistent with the national interest to grant or continue a security

clearance for him. ISCR Case No. 99-0424, 2001 (App. Bd. Feb. 8, 2001). This Applicant has not done.

The evidence of immediate family members, who are citizens and residents of Afghanistan comes within Disqualifying Condition (E2.A2.1.2.1.), an immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident in, a foreign country. There has been no evidence offered into the record from which I could determine that Applicant's family members do not constitute an unacceptable security risk. I find that no Mitigating Condition applies.

Accordingly, Applicant has not mitigated the security concerns, which would demonstrate that it is clearly consistent with national security to grant him a security clearance. Guideline B is found against Applicant.

### **FORMAL FINDINGS**

#### **Guideline B: AGAINST APPLICANT**

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against 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 or continue a security clearance for Applicant.

Martin H. Mogul

Administrative Judge