

DATE: August 21, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-12449

**DECISION OF ADMINISTRATIVE JUDGE**

**DARLENE LOKEY ANDERSON**

**APPEARANCES**

**FOR GOVERNMENT**

Edward W. Loughran, Department Counsel

**FOR APPLICANT**

Edward O. Lear, Attorney At Law

**SYNOPSIS**

Applicant's foreign influence has been mitigated. His foreign preference, which includes his twenty year service in the Afghan government and his possession of an Afghan diplomatic passport, his criminal conduct that includes an arrest, charge and conviction for Assault and Battery, and his personal conduct, that includes his intentional falsification of his security clearance application, which is a violation of Title 18, United States Code Section 1001, have not been mitigated by sufficient evidence of reform and rehabilitation. Clearance is denied.

**STATEMENT OF THE CASE**

On August 16, 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 the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on September 25, 2005, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on April 13, 2006. A notice of hearing was issued on May 2, 2006, and the hearing was scheduled for May 18, 2006. An amended notice of hearing was issued on May 5, 2006, rescheduling the hearing for May 22, 2006. At the hearing the Government presented seven exhibits. The Applicant presented eleven exhibits and called six witnesses. He also testified on his own behalf. The record was left open until the close of business of May 30, 2006, to allow the parties to submit additional evidence. A Motion to Amend the Statement of Reasons was made by Department Counsel. Applicant's Counsel responded, and attached a declaration from the Applicant's daughter referred to as Applicant's Post-Hearing Exhibit. The Motion to Amend the SOR was denied. The official transcript (Tr.) was received on June 1, 2006.

## FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the exhibits and the testimony. The Applicant is 55 years of age, married and holds a degree in Law from Kabul University in Afghanistan. He is employed as an interpreter or translator for a defense contractor. He seeks a security clearance in connection with his employment in the defense industry.

Paragraph 1 (Guideline C - Foreign Preference). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has acted in such a way as to show a preference for another country over the United States.

The Applicant was born in Afghanistan in 1950. He grew up there and obtained his college degree in Law, (Public Administration and Diplomacy) in 1972, from Kabul University in Afghanistan. At that time in Afghanistan there was a mandatory requirement that all males without exception serve in the military in some capacity, whether they were educated or not. If one was educated, he was required to serve one year. If one was not educated, he was required to serve two years. The Applicant being educated, was required to satisfy this mandatory one year requirement by entering a special program, which he contends was a civilian track at the Academy of War. The evidence is confusing and inconsistent since, in his answer to the SOR, the Applicant refers to his mandatory service as the Afghan military. From 1973 to 1975, he attended mandatory classes, wore a student uniform, and held the position of Third Lieutenant. (Tr. p. 44 - 46). I find that more likely than not, the Applicant served in the mandatory Afghan military for a one year period.

After completing this one year program, the Applicant worked for the Afghanistan government from 1973 to at least 1992, in several different capacities. He served as the First Secretary in the Afghan Embassy in Japan from 1992 to 1993. He served as the Director of Diplomatic Service in the Ministry of Foreign Affairs from 1990 to 1992, and he was the Chief of the Deputy Prime Minister's Office from 1988 to 1990. He served as the General Director of Planning for the General Auditor's Department from 1983 until 1986. He was an Auditor Inspector from 1975 to 1977 and 1978 to 1980. (See Applicant's Exhibit A).

In June 1992, the Applicant applied for and obtained an Afghanistan diplomatic passport. This passport was issued to him on June 23, 1992, and was reissued on February 28, 2002 and extended to February 27, 2004. (See Government Exhibit 3). The Applicant testified that he did not extend the passport and that he has no knowledge as to how it was extended.

In 1992, the Applicant immigrated to the United States. His family, including his wife and four children, were already residing here. He became a Naturalized United States citizen on February 8, 2000, and was issued a valid United States passport on February 28, 2000.

In July 2002, the Applicant was hired by a company to work in Afghanistan as a translator.

Due to a heart condition, he was sent back to the United States in November 2002. He changed employers and later returned to work as a translator in Afghanistan. In April 2004, it was determined that the Applicant's security clearance eligibility was in question, and he was again returned to the United States.

On November 11, 2001, the Applicant was arrested and charged with Assault and Battery, the circumstances of which are discussed below. In his defense, his attorney filed a Motion to Dismiss on July 10, 2002, in superior court on the grounds that the Applicant was a diplomat of the government of Afghanistan entitled to full immunity from prosecution under 22 United States Code, Section 254d. (See Government Exhibit 3). The Motion to Dismiss indicates that the Applicant possessed a valid diplomatic passport that was extended until February 27, 2004, and that he traveled to attend a conference in Germany in 2002, wherein an interim government for the country of Afghanistan was formed. The Applicant argues that the Motion to Dismiss contains material mis-statements and was withdrawn and never adjudicated. The Applicant contends that he does not know how or why this information was placed in the Motion to Dismiss. He states that he never communicated to his attorney that he had a Diplomatic passport from Afghanistan or that he traveled to Germany in 2002, for any conference, and in fact denies these allegations. The Applicant further states that he was in the hospital during the conference in Germany, that he does not appear on the list of participants, and that he did not possess an active Afghanistan passport at the time in question. He states that he has not used his

diplomatic passport since 1993.

I find the Motion to Dismiss that was filed in Superior Court by the Applicant's attorney to be reliable and trustworthy. The Motion indicates that the Applicant possessed a diplomatic passport that was extended until February 27, 2004. It also established that the Applicant traveled to Germany in 2002, using his diplomatic passport to attend a conference where an interim government for the country of Afghanistan was formed. The Motion to Dismiss was filed in superior court by the Applicant's attorney who certified and declared under penalty of perjury that the information contained therein was true and correct on July 10, 2002. (*See* Government Exhibit 3). If the information contained in the Motion to Dismiss was not true, the question then becomes how or why was the information placed in the Motion in the first place? This is the Applicant's burden to explain, which he has not done. Accordingly, I will consider the information contained in the Motion to Dismiss as accurate and reliable, as with any other court document. The fact that it was never adjudicated and was withdrawn is not relevant to this proceeding.

I note for the record that the alleged crime occurred on November 11, 2001, prior to the renewal of the diplomatic passport and therefore, the argument of diplomatic immunity probably would not have been successful had it been pursued.

Paragraph 2 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has foreign contacts that could create the potential for foreign influence that could result in the compromise of classified information.

While the Applicant was in Afghanistan between 2002 and 2004, he became acquainted with the Afghanistan President, the Minister of Foreign Affairs, the Minister of Agriculture, the Deputy Minister of Information, and the Minister of Defense and Commander of the Kabul Military Training Center. The Applicant explained that these acquaintances were made in his professional capacity and as a result of orders by superiors while working for the United States Military Information Operation officer. His visits were neither personal nor was he ever alone. He contends that these visits with these Afghanistan officials only occurred in the presence of another official or United States military officer.

The Applicant's wife, four children, and extended family including his mother, three brothers and three sisters, his mother in law, father-in-law, four sisters-in law, four brothers- in-laws and other extended family all reside in the United States.

Paragraph 3 (Guideline J- Criminal Conduct). The Government alleges in this paragraph that the Applicant has a history or pattern of criminal activity that creates doubt about his judgment, reliability and trustworthiness that could result in the compromise of classified information.

The Applicant's arrest, charge and conviction for Assault and Battery discussed above occurred on November 11, 2001. He explained that shortly after 9/11, he fell off of a ladder while trying to fix a light. He went to the hospital for x-rays which disclosed a broken wrist and a badly bruising body. He also suffered an episode of angina. He was treated with nitroglycerin tablets for his heart condition, his broken wrist was secondary. While in the hospital, his room was inspected by police several times who appeared to be searching for something. The Applicant requested pain medication from the nurse who refused to give it to him without a doctor's order. He states that he became upset and spit on the floor. Three witnesses to the incident report that the Applicant spit in the nurse's face, but that he was provoked to some extent. The Applicant was found guilty of the charge. He spent some time in jail and was then released. He was fined approximately \$100.00. (*See* Applicant's Exhibits E, G and H and Government Exhibit 3).

Paragraph 4 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in conduct involving questionable judgment, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

The Applicant completed a security clearance application dated August 5, 2004. (*See* Government Exhibit 1). Question 11 of the application asked him to if he has ever served in the military to include the Reserves, National Guard, Merchant Marines and Foreign Military Service. The Applicant answered, "NO". This was a false answer. He failed to list that he served as a Lieutenant in the Afghanistan military services from approximately 1973 through 1975. (*See*

Government Exhibit 1).

Question 15 of the same application asked the Applicant if in the last seven years he had an active passport that was issued by a foreign government. The Applicant answered, "No". (See Government Exhibit 1). This was a false answer. The Applicant failed to list that he possessed a Diplomatic passport issued by the Afghanistan government which was extended to February 27, 2004.

Question 16 of the same application asked the Applicant if he has traveled outside of the United States on other than official United States orders in the last seven years. The Applicant answered, "YES", and listed travel in 1996 and 2000. (See Government Exhibit 1). He failed to disclose that he traveled to Germany in 2002 to attend a conference where an interim government for the country of Afghanistan was being formed. I have considered the testimony of the Applicant that he was not at the conference, and I do not find his testimony credible on that point. The list of participants provided by the Applicant to support the fact that he did not attend the conference is dated in 2001. (See Applicant's Exhibit D). Applicant's hospital records indicate that he received treatment on various dates between 2000 and 2003, however there is no evidence in the record as to the exact date of the conference in question. (See Applicant's Exhibit E).

In the process of applying for work as a translator in Afghanistan, the Applicant contends that he completed several security clearance applications, each one requested by a different company. (See Applicant's Exhibit A). The Applicant argues that the particular security clearance application in question, namely Government Exhibit 1, was never finalized by him and was submitted to the United States Government without his authorization. I do not find this argument credible in that the Applicant's signature is reflected on the document.

Under the particular facts presented, I cannot find that the Applicant was truthful or candid in answering the questions on the security clearance dated August 5, 2004. There is no excuse for these inaccuracies and inconsistencies other than to attribute them to the Applicant's carelessness or his deliberate attempt to conceal this information from the Government. In either circumstance, he has not been forthcoming with the information and is ineligible for access to classified information.

#### Mitigation.

Six witnesses testified on behalf of the Applicant. His daughter, the Deputy Director of Information Operations with whom the Applicant worked as a translator in Afghanistan, a General in the Afghanistan Army, a close friend, and his sister and brother-in-law, all had favorable remarks concerning the Applicant. They all find him to be reliable, trustworthy, honest, intelligent, and essentially a person of high integrity. (See Tr. pp. 35-38, 70-82, 90-94, 102-107, and 109-117).

Numerous letters of recommendation submitted by professional associates, coworkers, friends and family members on behalf of the Applicant indicate that the Applicant is a man of honor and high moral integrity. (See Applicant's Exhibit J).

A declaration by the Applicant's daughter, submitted as a Post-Hearing Exhibit, indicates that her father (the Applicant) did not falsify his diplomatic passport but that she knows who did. This single statement coupled with its untimeliness is insufficient as to establish doubt as to the validity of the passport.

### **POLICIES**

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guidelines. However, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on her own common sense. 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. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

### Foreign Preference

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

#### Conditions that could raise a security concern:

1. The exercise of dual citizenship;
2. Possession and/or use of a foreign passport;

#### Conditions that could mitigate security concerns:

None.

### Foreign Influence

A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are: (1) not citizens of the United States or (2) may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

#### Condition that could raise a security concern:

1. An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country;

#### Condition that could mitigate security concerns:

2. Contacts with foreign citizens are the result of official U. S. Government business.

### Guideline J (Criminal Conduct)

#### Conditions that could raise a security concern:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

#### Condition that could mitigate security concerns:

None.

### Guideline E (Personal Conduct)

#### Condition that could raise a security concern:

2. The 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 statute, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

#### Condition that could mitigate security concerns:

None.

In addition, 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 general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- 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 criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination. The Administrative Judge can draw only those inferences or conclusions that have 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."

The Government must make out a case under Guideline C (Foreign Preference), Guideline B (Foreign Influence) and Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) that establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between Applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

An individual who demonstrates that he has foreign connections may be prone to provide information or make decisions that are harmful to the interests of the United States. The mere possession of a foreign passport raises legitimate questions as to whether the Applicant can be counted upon to place the interests of the United States paramount to that of another nation. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places.

## **CONCLUSIONS**

Having considered the evidence in light of the appropriate legal standards and factors, and having assessed the

Applicant's credibility based on the record, this Administrative Judge concludes that the Government has established its case as to all allegations in the SOR, and that Applicant's foreign contacts, criminal conduct and his falsifications have a direct and negative impact on his suitability for access to classified information.

The evidence establishes that the Applicant is a dual citizen of Afghanistan and that he possessed an Afghanistan diplomatic passport issued to him on June 23, 1992, which was reissued on February 8, 2002, and extended to February 27, 2004. Presently, no one seems to know where the passport is or how it was extended. It is unclear as to whether it still exists or has been destroyed. Under this guideline, it is the Applicant's burden to prove that he no longer exercises dual citizenship and no longer possesses or uses a foreign passport. He has not met this burden. Under Guideline C, Foreign Preference, Disqualifying Conditions (1) *The exercise of dual citizenship* and (2) *Possession and/or use of a foreign passport* apply. None of the mitigating conditions are applicable. Accordingly, I find against the Applicant under this guideline.

The Applicant's professional career includes almost twenty years of work and dedication to the Afghanistan government in various high level positions. His current position as a translator for the United States Defense Department, working in Afghanistan, allows him to become acquainted with a number of high level Afghanistan officials. There is no evidence that he has ever abused this position or that he has engaged in any activities that would subject him to coercion and black mail. Although Disqualifying Condition (1) *An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country* applies, Mitigating Condition (2) *Contacts with foreign citizens are the result of official U. S. Government business* also applies. Accordingly, Guideline B (Foreign Influence) is found for the Applicant.

Most importantly, this case turns on the credibility of the Applicant, as to whether he has been honest and forthright with the Government in every instance. As previously discussed, I find that the Applicant intentionally falsified his security clearance application in an effort to conceal this information from the Government. By doing so, he violated Title 18 of the United States Code, Section 1001. The Applicant completed and signed his security clearance application of August 5, 2004, with the understanding that the information contained therein was true and accurate. He was not honest with the Government when he answered questions 11, 15 and 16 on his security clearance application. The Government relies on the answers on the application to help determine ones trustworthiness and reliability. Furthermore, given the vast factual inconsistencies between the information set forth in the Motion to Dismiss filed in Superior Court by the Applicant's attorney, and the Applicant's version of the events, I cannot find with any degree of certainty the Applicant's version to be true. In addition, there are also vast inconsistencies between the police report of the Assault and Battery incident and the Applicant's version of the incident, which places even more doubt upon his credibility. The number and variety of unanswered questions raises significant doubts about what is true and what is not true. It is absolutely fundamental to the security clearance adjudication process that doubts be construed against the granting of a security clearance. Under the particular facts of this case, I do not find that the Applicant was forthcoming, and that he intentionally falsified his security clearance application in an effort to conceal this information from the Government. Accordingly, I find against the Applicant under Guidelines C (Foreign Preference) J (Criminal Conduct) and E (Personal Conduct).

Considering all the evidence, the Applicant has not mitigated the conditions of Guidelines C, J and E of the adjudicative guidelines set forth in Enclosure 2 of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guidelines C, J and E. As previously noted, Guideline B is found for the Applicant.

## FORMAL FINDINGS

Formal Findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subparas. 1.a.: Against the Applicant

1.b.: Against the Applicant 1.c.: Against the Applicant

1.d.: Against the Applicant 1.e.: Against the Applicant

Paragraph 2: For the Applicant.

Subparas. 2.a.: For the Applicant 2.b.: For the Applicant

Paragraph 3: Against the Applicant.

Subparas. 3.a.: Against the Applicant 3.b.: Against the Applicant

Paragraph 4: Against the Applicant.

Subparas. 4.a.: Against the Applicant

4.b.: Against the Applicant 4.c.: Against the Applicant

### **DECISION**

In light of the circumstances presented by the record in this case, it is not clearly consistent with the national interests to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson

Administrative Judge