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Applicant for Security Clearance

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ISCR Case No. 05-07910

## **DECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

### **APPEARANCES**

#### **FOR GOVERNMENT**

J. Theodore Hammer, Esq., Department Counsel

Stephanie C. Hess, Esq., Department Counsel

#### **FOR APPLICANT**

Betsy Thomas Amin-Arsala, Personal Representative

### **SYNOPSIS**

Applicant's brother is a citizen and resident of Afghanistan and a high-ranking official in the Afghan government. She has regular contact with him and has recently visited him twice for three or four months at a time. She has one nephew and one niece who are citizens of Afghanistan residing in the U.S. The security concern based on foreign influence is not mitigated. Clearance is denied.

### **STATEMENT OF THE CASE**

On October 28, 2005, 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. 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 a security concern under Guideline B (Foreign Influence). It alleges Applicant's brother is a citizen and resident of Afghanistan (¶ 1.a) that her brother is currently the Minister of Commerce of Afghanistan and formerly served as a Vice President of Afghanistan (¶ 1.b), she has three other relatives who are citizens of Afghanistan (¶ 1.c), she traveled to Afghanistan from September 2003 to December 2003 and August 2004 to December 2004 and stayed with her brother (¶ 1.d), and she was employed by Ariana Afghan Airlines from January 1970 to January 1978 and had regular contact with foreign diplomats and regularly attended diplomatic functions (¶ 1.e).

Applicant answered the SOR in writing on November 12, 2005, admitted the allegations, and requested a hearing. The case was assigned to me on April 20, 2006. On May 16, 2006, DOHA issued a notice of hearing setting the case for June 1, 2006. The case was heard as scheduled. DOHA received the transcript (Tr.) on June 9, 2006.

### **FINDINGS OF FACT**

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

Applicant is a 58-year-old linguist who has applied for employment by a federal contractor. (Tr. 56.) She speaks Farsi, Pashto, Urdu, and English. (GX 3 at 13.) She was tested and found qualified to translate in Pashto. She does not speak Arabic, the predominant language of al Qaeda. (Tr. 51.) She applied for the job because she wants to help the Americans in Afghanistan. (Tr. 48.) If she receives a security clearance, she will work as a translator in Afghanistan. (Tr. 57.) She has never held a security clearance.

Applicant was born in Kabul, Afghanistan. She completed high school and attended the University of Kabul from January to December 1969. She came to the U.S. in November 1978 to escape the Communist government. She entered the U.S. on a tourist visa and then applied for political asylum. (Tr. 64.) She became a U.S. citizen in April 1997. (Government Exhibit (GX) 1 at 1-2; GX 3 at 2.)

Applicant worked for Ariana Afghan Airlines from January 1970 to January 1978, where she was a cargo supervisor, responsible for handling diplomatic packages for the airline. While she was employed by the airline, she had contact with numerous embassies three to five times a week to process diplomatic cargo through customs. Because of her frequent contact with the embassies, she was invited to diplomatic receptions once or twice a year. (Tr. 60.) None of her business contacts with the embassies developed into personal ties. (Government Exhibit (GX) 2 at 2-3.) She has had no contact with former airline employees or embassy staff members since 1978. (Tr. 60-61.)

Applicant's parents are deceased. She has seven siblings, two brothers and five sisters. One brother is deceased. (GX 1 at 3-4.) All her siblings left Afghanistan shortly after she left. (Tr. 63.) All her siblings except one brother are now citizens and residents of the U.S. (Tr. 63.)

Applicant's brother is a citizen and resident of Afghanistan. He grew up and went to high school in Kabul. He continued his education in the U.S. and obtained a doctoral degree from a U.S. university. He lived in the U.S. and worked for the World Bank between 1969 and 1987. He did not become a permanent U.S. resident or apply for U.S. citizenship because he did not want to jeopardize any future opportunity to return to Afghanistan and restore its government. (Tr. 95-96.) He returned to Afghanistan in 1987 to join the resistance against Soviet occupation, and he served three years as the Finance Minister of the Afghan interim government in exile. He has been a strong advocate of the peace process and part of the Afghan government since December 2001. (HX VII) He served as inister of Finance for six months and then was a Vice-President for two and a half hears. He has been the Minister of Commerce since January 2005. (Applicant's Exhibit (AX) B.) His wife is a native-born U.S. citizen residing in the U.S. (Tr. 93.)

Applicant talks to her brother in Afghanistan every three or four months. (Tr. 74.) She visited Afghanistan and stayed with her brother from September to December 2003 and again from August to December 2004. (GX 2 at 2.)

Applicant has numerous nieces and nephews, of which only two are not U.S. citizens. Both reside in the U.S., and one has applied for U.S. citizenship. (Tr. 70.) She sees them about once a year. (Tr. 71.)

Afghanistan is an emerging democracy, but its government ministries and institutions are in their infancy. The government is still in the process of establishing its policies and procedures and dealing with its security, legal, commercial, and infrastructure problems. It is a very dangerous place because of U.S. military operations, as well as those of remnants of the former Taliban regime and terrorist groups. Kidnaping and assassinations are commonplace. The Afghan government is strongly committed to the war on terrorism. The ability of the Afghan government to maintain order and ensure the safety of its citizens as well as visitors is limited. Similarly, the government's ability to prevent abuses by security forces is limited. (Hearing Exhibit (HX) I at 1-2; HX II at 1-2; HX III at 71-72, 91, 92; HX IV at 8-9, 15-16; HX V at 1.)

Afghanistan has enormous economic needs, and offers broad opportunities for foreign and domestic investors. The government remains deeply involved in commerce and the transition to a competitive, market economy is moving slowly. (HX VI at 1-2.) Applicant's brother is a key player in Afghanistan's economic development.

## 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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, 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

The concern under this guideline is that 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. A disqualifying condition (DC 3) also may arise if an individual has relatives "who are connected with any foreign government." Directive ¶ E2.A2.1.2.3. Applicant's brother's citizenship, residence, and government position are sufficient to establish both DC 1 and DC 3.

A disqualifying condition (DC 6) may arise from "[c]onduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government." I conclude DC 6 is not established because Applicant's vulnerability arises from her familial relationship with a high-ranking official of the Afghan government, not her conduct.

Notwithstanding the inapplicability of DC 6, Applicant's vulnerability to coercion, exploitation, or pressure under the broader guideline of Directive ¶ E2.2.1.8 is relevant. She is a likely target because of her brother's high position. The potential for coercion, exploitation, or pressure runs both ways. She could be vulnerable to coercion, exploitation, or pressure exerted directly by or indirectly through her brother, and her brother could be vulnerable to coercion, exploitation, or pressure exerted through her and designed to undermine U.S. interests in Afghanistan.

Family ties with persons in a foreign country are not, as a matter of law, automatically disqualifying under Guideline B. However, such ties raise a prima facie security concern sufficient to require an applicant to present evidence of rebuttal, extenuation or mitigation sufficient to meet the applicant's burden of persuasion that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. *See* Directive ¶ E3.1.15; ISCR Case No. 99-0424, 2001 DOHA LEXIS 59 (App. Bd. Feb. 8, 2001).

Since the government produced substantial evidence to establish DC 1 and DC 3, 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).

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 chose between the person(s) involved and the United States." ISCR Case No. 02-14995 at 5 (App. Bd. Jul. 26, 2004).

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. Afghanistan is now heavily dependant on the U.S. However, as it becomes more self-reliant, it can reasonably be expected to have disagreements with the U.S. Applicant's brother has strong ties to the U.S., but his first loyalty is to Afghanistan.

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.

Applicant's brother is an agent of a foreign power, as that term has been defined by the Appeal Board. *See* ISCR Case No. 02-24254, 2004 WL 2152747 at \*4-5 (App. Bd. Jun. 29, 2004).<sup>(1)</sup>

Thus, I conclude MC 1 is not established.

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. There is a rebuttable presumption that contacts with an immediate family member in a foreign country are not casual. ISCR Case No. 00-0484 at 5 (App. Bd. Feb. 1, 2002). Applicant has a close and continuing relationship with her brother. Thus, I conclude MC 3 is not established for him.

Applicant has only occasional contact with her niece and nephew who are Afghan citizens residing in the U.S. I conclude MC 3 is established for them, and I resolve SOR ¶ 1.c in her favor.

Similarly, Applicant has had no contact with former airline employees and foreign diplomatic staff members whom she met while employed by the airline. Thus, MC 3 is established for her former airline and diplomatic contacts, and I resolve SOR ¶ 1.e in her favor.

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). While most of Applicant's individual ties do not raise significant security concerns, the totality of those ties raises a serious concern. After weighing the disqualifying and mitigating conditions and evaluating the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on foreign influence.

### **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: For Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: 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 Applicant a security clearance. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. The Appeal Board has declined to reexamine its broad definition of "agent of a foreign power," but it has not addressed the applicability of 50 U.S.C. § 438(6), which expressly applies the definitions in 50 U.S.C. § 1801(b) to security clearance determinations, nor has it addressed the significance of Executive Order 12968, § 1.1(f), which adopts the definition in 50 U.S.C. § 1801(b) for federal employees seeking security clearances. *See* ISCR Case No. 03-10954 at 7-8 (App. Bd. Mar. 8, 2006).