



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
-----)	ISCR Case No. 07-10566
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

December 4, 2008

Decision

ROSS, Wilford H., Administrative Judge:

The Applicant submitted his Security Clearance Application (SF 86), on September 25, 2006 (Government Exhibit 1). On March 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant, which detailed security concerns under Guideline B stating 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 action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

The Applicant answered the SOR in writing on March 31, 2008, and April 8, 2008, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on May 21, 2008. This case was assigned to me on May 28, 2008. DOHA issued a notice of hearing on June 11, 2008, and I convened the hearing as scheduled on July 1, 2008. The Government offered Government Exhibits 1 and 2, which were received without objection. The Applicant testified on his own behalf, called one additional witness, and submitted Applicant's Exhibits A through E. DOHA received the transcript of the hearing, and the record closed, on July 11, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural Ruling

Request for Administrative Notice

Department Counsel submitted a formal request that I take administrative notice of certain facts relating to the Islamic Republic of Afghanistan. (Transcript at 15-21.) The request and the allied documents were not admitted into evidence, but are included in the record. The Applicant had a specific objection to one statement in the Government's request. I took notice of that objection, and have considered it in this decision. (Transcript at 20.) The facts administratively noticed are limited to matters of general knowledge and not subject to reasonable dispute. The facts administratively noticed are set out in the Findings of Fact, below.

Findings of Fact

The Applicant is 59 and married with two American born children. He is employed by a Defense contractor as a Cultural Advisor/Interpreter and seeks a security clearance in connection with his employment in the defense industry. In his Answers to the SOR, Applicant admitted allegations 1.a. and 1.c. in the Statement of Reasons. He denied allegation 1.b.

Paragraph 1 (Guideline B - Foreign Influence)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has foreign contacts and interests that could lead to the exercise of poor judgment, unreliability or untrustworthiness on the part of the Applicant.

The Applicant was born in Afghanistan in 1949. In addition to his parents, he had two brothers. His older brother has passed away. The Applicant first came to the United States in 1966-67 to attend a high school student exchange program. He returned to the United States in 1976 to attend graduate school. He received his Master's degree in 1978.

After the Soviet invasion of Afghanistan in 1979, the Applicant asked for and was granted asylum in the United States. He became an American citizen on July 3, 1986. He said the following regarding this decision, "I found the place [the United States] a free country so that I can live and I can talk and I can do whatever I want to do within the, of course, framework of law. So I decided to stay in United States and ask for citizenship." (Transcript at 48-50; Government Exhibit 1 at Section 8.)¹

The Applicant married his Afghan born wife on August 20, 1978. She became a naturalized American citizen on February 17, 1989. (Government Exhibit 1 at Section 15.) As stated above, they have two American born children.

The Applicant worked at several jobs over the years after 1978, including working for the post office. He worked at the post office from 1992 until 2004. (Transcript at 50-54.) The Applicant further testified:

2004, I found out that I can be used as a - - I can use my language, go to Afghanistan, help my birthplace as well as help my country which I live in and I love the freedom that I have and I can use my talent. I can use my ability. So I took one year leave without pay, went to Afghanistan, 2004, July of 2004. (Transcript at 54.)

The Applicant served in Afghanistan in 2004 and again in 2006-07. During his time in Afghanistan the Applicant had several important assignments with various units, and served with several high ranking American officers throughout the country. He served with bravery, was in combat, and was injured in a non-combat incident. (Transcript at 54-60.) Because of his injury, the Applicant was unable to return to Afghanistan, but has been used as a cultural advisor to help prepare American forces for Afghanistan. (Transcript at 60-61.)

As stated earlier, the Applicant left Afghanistan before the Soviet invasion. His parents and brothers fled to Pakistan after the invasion. His parents and one brother have passed away. The Applicant's other brother has returned to Pakistan and works for the current Afghan government. At one point the Applicant would send this brother money, when his family lived in Pakistan. The Applicant no longer sends his brother any money. (Transcript at 45-46, 66.) In response to a question from Department Counsel about what the Applicant would do if approached by his brother, or anyone else, to reveal information about the United States, he stated, "I wouldn't respond to him at all or to her or anybody asking us about any of those because part of my duty, I know what's my duty as a U.S. citizen. I would not - - I would not share anything if I know to share with them at all. No." (Transcript at 68.)

During the time he was stationed in Afghanistan, the Applicant visited his brother in 2006. This visit was in conjunction with the wedding of his nephew. This visit was

¹Other statements concerning the Applicant's pride in being an American citizen can be found in the Transcript at pages 63 and 67.

made with the knowledge and permission of the Applicant's chain-of-command. After the wedding, the Applicant wrote a report about what he had seen and learned. (Transcript at 46-47, 66-67.)

A senior officer in the United States Armed Forces who served with the Applicant in Afghanistan testified on his behalf. During his entire testimony the witness described events where the Applicant's presence and his abilities were useful and worthwhile. (Transcript at 28-42.) This officer held a senior staff post during his tour in Afghanistan, during which time the Applicant acted as his interpreter for ten months and, "performed magnificently." (Transcript at 29.) Regarding the Applicant's reliability the witness stated, "I would trust my life to this man. I have trusted my life to this man." (Transcript at 31.) The witness also said, "He [the Applicant] is an American hero." (Transcript at 31.) The witness has personal knowledge of the importance of security clearances in his military job. Concerning the Applicant the witness stated, "He [the Applicant] never gave me any reason to doubt his trustworthiness." (Transcript at 31-32.)

The Applicant submitted several statements from Soldiers he served with attesting to his capabilities and contributions to the U.S. Armed Forces' efforts in the Global War on Terror throughout his time in Afghanistan. Applicant's Exhibit A contains statements from 2007 and 2008, including one from his current civilian employer about his job. The statement dated February 1, 2007, is particularly worthwhile, since it is from the officer who commanded the unit the Applicant supported in 2006. This officer describes the Applicant as "conscientious, prompt, articulate in multiple languages, dedicated, and absolutely fearless under the most stressful circumstances." (Applicant's Exhibit A at 4.)

Applicant's Exhibits B, C and D are letters of recommendation from 2004 and 2005, as well as various certificates of appreciation from units he served with in Afghanistan. All of these documents confirm that the Applicant served ably and with courage under difficult circumstances.

The Applicant has contacts with Afghanistan. Accordingly, it is appropriate to discuss the relationship between Afghanistan and the United States at this time.² In 2001-2002, the United States led a coalition to remove the Taliban from power in Afghanistan. After free elections, Afghanistan's new government took office. Despite the elections and new government, Afghanistan suffers from continuing violence, perpetrated by Taliban terrorists and other insurgents, including Al Qa'ida. Numerous attacks and kidnappings have targeted members of the U.S. Armed Forces, their allies, contractors, and other civilians, as well as Afghans. The Afghani armed forces are improving, but are still unable to secure the country on their own. The threat of terrorism in Afghanistan remains high. Terrorist groups conduct intelligence activities as effectively as state intelligence services.

²All of the following statements are supported by the documents submitted by the Department Counsel in support of his request for administrative notice. (Administrative Notice Documents I through VIII.)

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. In addition, the Administrative Judge may also rely 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.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Finally, as emphasized by President Eisenhower in Section 7 of 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.” See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has family members in Afghanistan (Guideline B). The Applicant, on the other hand, has successfully mitigated the Government's case.

Paragraph 2 (Guideline B - Foreign Influence)

The concern under Guideline B is styled as follows:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

In this case, Applicant has contact with his one brother who remains in Afghanistan and works for the Afghan government. It is worth noting that the Applicant had not traveled to Afghanistan for over 25 years before going there as a translator for the U.S. military. His relationship with his brother in Afghanistan, tenuous though it is, does create a heightened risk of foreign pressure or attempted exploitation because of his brother's employment, and the fact that terrorists in the Middle East seek intelligence and are hostile to the United States' interests.

Based on the evidence the Government has presented, the following Disqualifying Conditions apply to this case: 7.(a) *Contact with a foreign family member . . . who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;* and (b) *connections to a foreign person . . . that create a potential conflict of interest between*

the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person . . . by providing that information.

The Applicant has provided compelling evidence to show that the following Mitigating Conditions also apply to this particular case, given his particular background: 8(a) *the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;* and (b) *There is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest.*

Afghanistan is not a safe place for anyone, that much is true. It is a war zone. However, there is substantial evidence that the Applicant behaved in a courageous and honorable way during his tours of duty in Afghanistan. Officers and senior non-commissioned officers from both the Army and Navy testified and submitted glowing written statements discussing the Applicant's activities in Afghanistan, his integrity, and specifically his ability to safeguard classified information in a combat area.

Applicant established application of Mitigating Conditions 8(a) and (b). Based on his relationships and depth of loyalty to the United States, he can be expected to resolve any conflict of interest in favor of the United States interest. He has lived in the United States since 1976, after going to high school here in the 1960s, and did not return to Afghanistan until his employment with the U.S. Armed Forces in 2004. The Applicant has been a naturalized American citizen for over 20 years, and his wife for over 18 years. Both of his sons are native-born American citizens. He has limited contact with his brother living in Afghanistan and there is no evidence that he has connections or contact with anyone over there other than his brother.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(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 individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security

clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

The DOHA Appeal Board requires the whole person analysis address “evidence of an applicant’s personal loyalties; the nature and extent of an applicant’s family’s ties to the U.S. relative to his [or her] ties to a foreign country; his or her social ties within the U.S.; and many others raised by the facts of a given case.” (ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).)

The Applicant’s ties to the United States are much stronger than his ties to his one brother living in Afghanistan. There is no evidence that he has ever taken any action that could cause potential harm to the United States or members of its military. On the contrary, there is substantial evidence that he was a respected member of the team while serving in Afghanistan. Military members who served with him find him to be loyal, trustworthy, conscientious and eligible for a security clearance and access to classified information. As stated earlier, after leaving Afghanistan in 1976, he did not return until 2004.

Applicant served in Afghanistan without any indication that he had breached security policies or procedures. While that fact is not normally to be considered a factor in granting a clearance, the Appeal Board stated in ISCR Case No. 05-03846 at 6 (App. Bd. Nov. 14, 2006) the following:

As a general rule, Judges are not required to assign an applicant’s prior history of complying with security procedures and regulations significant probative value for purposes of refuting, mitigating, or extenuating the security concerns raised by the applicant’s more immediate disqualifying conduct or circumstances. See, e.g., ISCR Case No. 01-03357 at 4 (App. Bd. Dec. 13, 2005); ISCR Case No. 02-10113 at 5 (App. Bd. Mar. 25, 2005); ISCR Case No. 03-10955 at 2-3 (App. Bd. May 30, 2006). However, the Board has recognized an exception to that general rule in Guideline B cases, where the applicant has established by credible, independent evidence that his compliance with security procedures and regulations occurred in the context of dangerous, high-risk circumstances in which the applicant had made a significant contribution to the national security. See, e.g., ISCR Case No. 04-12363 at 2 (App. Bd. July 14, 2006). The presence of such circumstances can give credibility to an applicant’s assertion that he can be relied upon to recognize, resist and report a foreign power’s attempts at coercion or exploitation.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have particularly considered the possibilities of terrorist activities in Afghanistan and the fact the Applicant’s brother still lives there and works for the Afghan government. The evidence shows that the Applicant is a patriotic American citizen. The Applicant eloquently testified about the

importance of his family in the United States, and his pride in being an American citizen, to have served in Afghanistan, and be a member of the defense industry. He is knowledgeable about security and understands his responsibility. I find that there is little or no “potential for pressure, coercion, exploitation, or duress” as set forth in AG ¶ 2(a)(8). Using the whole person standard, the Applicant has mitigated the security significance of his foreign connections and is eligible for a security clearance.³

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusory allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline B:	FOR THE APPLICANT
Subparagraph 1.a.:	For the Applicant
Subparagraph 1.b.:	For the Applicant
Subparagraph 1.c.:	For the Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge

³I conclude that the whole person analysis weighs heavily toward approval of the Applicant's security clearance. Assuming a higher authority reviewing this decision determines that the mitigating conditions articulated under Mitigating Conditions 8(a) and (b) do not apply and severs any consideration of them, I find that the whole person analysis standing alone is sufficient to support approval of a security clearance in this case.