



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



In the matter of:)
)
-----) ISCR Case No. 08-04182
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn E. Hoffman, Esquire, Department Counsel
For Applicant: Sheldon I. Cohen, Esquire

November 14, 2008

Decision

HARVEY, Mark W., Administrative Judge:

Applicant mitigated security concerns regarding foreign influence. Because of his deep and long-standing relationships with his family in the United States and his other connections to this country, as well as his support of the U.S. Army while serving under hazardous conditions in Afghanistan as a translator, I am confident he will resolve any conflicts in favor of U.S. interests. Access to classified information is granted.

Statement of the Case

On December 1, 2006, Applicant submitted an electronic Questionnaire for Sensitive Positions (Standard Form (SF) 86)(GE 1). On May 30, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. On August 30, 2006, the Under Secretary of Defense (Intelligence) directed application of revised Adjudicative Guidelines (AG) to all adjudications and other determinations made under

the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended. The SOR alleges security concerns under Guideline B (Foreign Influence). The SOR 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 him, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

On June 17, 2008, Applicant provided a response to the SOR allegations, and elected to have his case decided at a hearing (GE 6). On September 10, 2008, the case was assigned to me. On September 29, 2008, notice was issued for the hearing, which was held on October 30, 2008 (GE 4). At the hearing, Department Counsel offered three exhibits (Transcript (Tr.) 19, GEs 1-3), and Applicant offered 29 exhibits (Tr. 13, 28-29, 38-39, 166-167, 196, AE A-AC). There were no objections (except for AE M to W, AA and AB), and I admitted GEs 1-3 (Tr. 19) as well as AEs A-L, Y and AA (Tr. 28-29, 38-39, 166-167, 196). Additionally, I admitted the Hearing Notice, SOR and response to the SOR (GEs 4-6). DOHA received the transcript on November 7, 2008. The documents not admitted are attached to the record.

Procedural Rulings

Administrative Notice

Department Counsel and Applicant asked me to take administrative notice concerning materials related to the Afghanistan (GE 7, AE AC). Applicant objected to my consideration of facts beyond the Department Counsel's 6-page document entitled Administrative Notice, dated August 11, 2008 (Tr. 20-24, GE 7). Specifically, Applicant objected to admission or administrative notice for Exhibits I through VII because those documents contain facts that are not relevant to a security clearance determination. I granted Applicant's request; however, I offered the parties two days to request administrative notice of any additional facts (Tr. 20-25). Applicant requested Administrative notice of facts in AE AC, as supported by AE M through W (Tr. 27). Department Counsel did not object to my administrative notice of the facts in AE AC, and requested that AE M through W receive the same consideration as Exhibits I through VII (Tr. 27). I granted Department Counsel's request and took administrative notice of the facts in GE 7 and AE AC as indicated in the Afghanistan portion of the Statement of Facts section of this decision, and did not take administrative notice of supporting documents Exhibits I through VII and AE M through W (Tr. 27).

In support of the requested administrative notice of facts concerning Afghanistan, supporting documents show detail and context for those facts (Ex. I to VII—listed in Request for Administrative Notice at 6). Administrative or official notice is the appropriate type of notice used for administrative proceedings. See ISCR Case No. 05-11292 at 4 n.1 (App. Bd. Apr. 12, 2007); ISCR Case No. 02-24875 at 2 (App. Bd. Oct. 12, 2006) (citing ISCR Case No. 02-18668 at 3 (App. Bd. Feb. 10, 2004)); *McLeod v. Immigration and Naturalization Service*, 802 F.2d 89, 93 n.4 (3d Cir. 1986)). The most common basis for administrative notice at ISCR proceedings, is to notice facts that are

either well known or from government reports. See Stein, ADMINISTRATIVE LAW, Section 25.01 (Bender & Co. 2006) (listing fifteen types of facts for administrative notice). Exhibits I to VII are attached to GE 7 to ensure the administrative record is complete.

I advised the parties that I would provide a document to the parties after the hearing listing the facts I would include in my decision about Afghanistan, including possibly some facts from documents not already part of the record (Tr. 89-94, 254-255). The parties would have an opportunity to object or comment on the facts (Tr. 89-94, 254-255). On October 30, 2008, I emailed to the parties my proposed factual summary concerning Afghanistan with supporting documents (AJ Ex. I to VII). Applicant objected to some of the facts included for administrative notice as well as some of the references listed, and asserted some facts were taken out of context or incomplete (AJ Ex. IX). Department Counsel had no objections to my proposed administrative notice (AJ Ex. I). On November 5, 2008, I made some changes to the facts included for administrative notice, which I disclosed to the parties, and I offered an additional opportunity to object or to submit additional facts to ensure the record is complete (AJ Ex. I). The parties did not subsequently submit additional facts or objections, and I closed the record on November 12, 2008.

Exhibits AA and AB

Applicant offered Intelligence Community Directive (ICD) Number 704, "Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information and Other Controlled Access Program Information," effective October 1, 2008 (Ex. AA) (Tr. 29-32). Exhibit AA is an expression of the U.S. government's recognition "risk management" or the need for greater flexibility in approval of SCI clearance for Applicants with essential skills, who have family members living in dangerous countries (Tr. 29-32). Exhibit AA is applicable to determining eligibility for SCI access (para. C, Tr. 33). It authorizes a Head of an Intelligence Community Element authority to grant a waiver to express limitations "based on all available that the specific risk to national security is manageable and acceptable." (para. F.1). The overall goal of ensuring "the risk to national security in manageable and acceptable" (para. D.2) introduces a more flexible standard to SCI determinations, which allows translators and other essential personnel with family in dangerous foreign countries a greater possibility of receiving a clearance. *Compare* para. E *with* Director of Central Intelligence Directive 6/4 (superseded by ICD Number 704). I denied Applicant's request for admission of Exhibit AA because Applicant's case does not involve SCI or other controlled access. However, I accepted the parties' arguments that Applicant's performance under dangerous conditions in Afghanistan was a relevant, admissible consideration under the whole person concept (Tr. 34-39).

Exhibit AB is primarily a summary of the law as the Appeal Board has articulated it, concerning situations where an Applicant has provided valuable service to the United States in a combat zone, such as Afghanistan. Exhibit AB quotes portions of ISCR Case No. 07-09816 (AJ June 12, 2008), ISCR Case No. 07-00034 (App. Bd. Feb. 5, 2008), ISCR Case No. 05-03846 (App. Bd. Nov. 14, 2006), and ISCR Case No. 04-12363 (App. Bd. July 14, 2006), as well as some cases involving the "whole person concept."

Several Appeal Board and Administrative Judge decisions are attached to Exhibit AB. Department Counsel objected to admissibility because the brief was more akin to a closing argument than evidence. I declined to admit Exhibit AB as substantive evidence and instead considered it as a summary of the law.

Findings of Fact¹

As to the SOR's factual allegations, Applicant admitted the allegations in SOR ¶¶ 1.a to 1.d in his response to the SOR. He admitted his brother, nephew and sister are citizens and residents of Afghanistan (SOR ¶¶ 1.a to 1.c). His nephew is a body guard or security officer for government officials in Afghanistan (SOR ¶ 1.b). He traveled to his brother's funeral in Afghanistan (SOR ¶ 1.d). His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 56-year-old linguist employed by the U.S. Army in Afghanistan (Tr. 141, 202-203). He is fluent in Pashtun (Tr. 163). He was born in Afghanistan (Tr. 141). He was raised in Afghanistan and completed high school in Afghanistan (Tr. 148). He served one year in the Kingdom of Afghanistan Army from 1973 to 1974 (Tr. 231, GE 3). His military duty was as a military policeman (Tr. 231, GE 3). After high school he worked in the tourist industry and for the Afghan airlines as a clerk and accountant (Tr. 148, 204). Applicant and his wife left Afghanistan in 1979 because it was too dangerous to remain there (Tr. 142-143). They first went to Pakistan and stayed in a refugee camp (Tr. 143). From Pakistan they came to the United States as refugees 26 years ago when he was 29 years old (Tr. 144, 203, GE 3).² After arriving in the United States, he went to school to learn English and about computers (Tr. 145). His employment for the first 20 years in the United States was as a book keeper (Tr. 145). He worked for the same employer for 18 years (Tr. 146). He became a U.S. citizen on November 7, 1995 (Tr. 146). He did not return to Afghanistan after arriving in the United States until he went to Afghanistan in July 2005 on behalf of the United States (Tr. 203-204). The only passport he has ever received is his U.S. passport (Tr. 224). He did not believe he was a dual Afghan-U.S. citizen (Tr. 227). He thought his sole citizenship was United States citizenship (Tr. 227).

Applicant agreed to deploy for a government contractor in 2004 (Tr. 168). He went to Fort Benning, Georgia for two or three weeks for training (Tr. 168, 215). He deployed to Afghanistan in January 2005 (Tr. 124, 169). Every six months he received three weeks vacation in the United States, otherwise he was deployed to Afghanistan from January 2005 until July 2008 (Tr. 124, 169, 177-178, Ex. X, Y). Whenever he left a U.S. base in Afghanistan on a mission he wore body armor and a helmet because of the danger (Tr. 170-171). He did not carry a weapon (Tr. 171). He said he was under fire

¹ The facts in this decision do not specifically describe names, employment or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.

² Applicant misstated that he has lived in the United States 29 years. His CI Screening Questionnaire – Middle East shows his date of entry into the United States as February 2, 1982 (GE 3). I believe he meant to say he left Afghanistan 29 years ago, spent about two years in Pakistan and came to the United States 26 years ago.

(Tr. 171). He was exposed to danger from explosive devices while driving on the roads, and on one occasion there were injuries (Tr. 236). He successfully convinced the villagers that forces from the North Atlantic Treaty Organization (NATO) and the United States were there to build roads, hospitals and schools (Tr. 172-175, 216-217). They are attempting to establish peace and improve Afghanistan's infrastructure (Tr. 172-175). They are not in Afghanistan to occupy the country (Tr. 174). The Afghan people want to raise their standard of living, and NATO supports this goal (Tr. 217). The Afghan people were very hospitable once he explained the mission of the United States in Afghanistan (Tr. 173-174). He was very proud of helping the United States in Afghanistan (Tr. 176). The loss of his clearance resulted in his return to the United States in July 2008. He wants to return to his duties in Afghanistan as soon as he receives his clearance (Tr. 176, 215).

Applicant's wife make a statement at his hearing. She was born in Afghanistan. She and her husband left Afghanistan and moved to Pakistan (Tr. 97). She is a U.S. permanent resident alien (Tr. 99). She tried to pass the citizenship test twice, but was unable to do so because her English was poor (Tr. 99). They have been married for 33 years (Tr. 96). They have three children, a son (age 24), a daughter (age 21), and a son (age 17). All of their children were born in the United States and live in the United States (Tr. 97-98). They have not expressed any interest in becoming Afghan citizens (Tr. 227). Applicant was away in Afghanistan, except for brief annual visits for almost four years (Tr. 102, 113). Her daughter took care of the family because his wife had mental problems (Tr. 103). She has migraine headaches, is depressed and hears screaming (Tr. 111). She takes strong medicine, and feels better now (Tr. 111, 112). She described her husband as honest and trustworthy as well as a good husband and father (Tr. 104, 107). Applicant was proud of helping Americans in Afghanistan, but he did not discuss any details of his duties with her (Tr. 105, 108). She has two brothers who live in the United States (Tr. 106). She said Applicant was worried about his family that was still in Afghanistan because it was dangerous (Tr. 109). Her 95-year-old father still lives in Afghanistan (Tr. 109, 110). Her father has bad hearing and she does not call him on the telephone (Tr. 110). She and her brothers living in the United States send him money (Tr. 111). Sometimes Applicant talks to his father-in-law when his wife talks to him on the phone (Tr. 225).³ Applicant did not call or visit his father-in-law when he was in Afghanistan (Tr. 225).

Applicant's daughter made a statement at his hearing (Tr. 119-137). She was born and raised in the United States. She has never been to Afghanistan (Tr. 133). She currently attends college in the United States and plans to become a pediatrician (Tr. 119). She has a part time job at a retirement community (Tr. 119). She said Applicant served in Afghanistan because he wanted to do his patriotic duty and sacrifice for the United States (Tr. 125, 133-134). She was very proud of what he was doing in the war against terrorism (Tr. 129). While Applicant was in Afghanistan, she paid the bills and took charge of the family (Tr. 125). She drove her mother to appointments and did the grocery shopping (Tr. 127). Applicant gave her power of attorney because Applicant's spouse had mental problems (Tr. 126). Applicant did not discuss his duties in

³ Although the SOR did not list Applicant's relationship with his father-in-law as a potential security concern, Applicant's 2004 Linguist Screening disclosed this relationship.

Afghanistan (Tr. 128). He is not close to his brother or nephew in Afghanistan (Tr. 132). She described him as very honest, loyal, kind, gentle, affectionate and loving (Tr. 129-132). She speaks English and Farsi (Tr. 136). She did not remember talking to her father's relatives, who live in Afghanistan (Tr. 137). Although she rarely speaks to her mother's father, she spoke to him a couple nights before the hearing (Tr. 137).

Applicant has about 60 relatives who live in the United States, one sister who lives in the Netherlands (Tr. 150-152, 154, Ex. A), and one sister who lives in the United Kingdom (Tr. 230, Ex. A). He does not own any property or expect to inherit any property in Afghanistan (Tr. 231). He has a U.S. bank account consisting of several hundred thousand dollars and does not have any bank accounts in foreign countries (Tr. 233-234). He plans to purchase a house in the United States and to use some of the funds to pay for his children's educations (Tr. 234-235).

Applicant's 64-year-old brother, who lives in Afghanistan, is retired (Tr. 152). He is married and his spouse is a housewife (Tr. 152-153). They receive financial support from their children living in the United States and Canada (Tr. 157-158, 207-208). He has never worked for the Afghan military or government (Tr. 152-153). Applicant did not know whether his brother receives a pension from Afghanistan (Tr. 207). He had some contact with his brother for one year when he was assigned to the same city where his brother lives (Tr. 208). After he was moved to a different Afghanistan base, he was not able to visit his brother (Tr. 208-209). He has irregular contact by telephone with his brother about three to six times a year to ask about his health or family (Tr. 156). His Afghan identification card is attached to the record as Ex. K (Tr. 162-163). He did not discuss his duties in Afghanistan with his brother (Tr. 164-165). Applicant told his brother he was in Afghanistan on business (Tr. 165, 213-214). He sent his brother \$500 last year to defray some of the costs for his other brother's funeral (Tr. 208).

Applicant's nephew is a security guard or body guard for high-ranking Afghan officials (Tr. 153-154, 166). He does not have any contact with his nephew and did not visit him in Afghanistan (Tr. 157, 166, 210). Applicant obtained proof of his nephew's employment from his sister (Ex. L, Tr. 165-166).

Applicant's 75-year-old sister, who lives in Afghanistan, is a retired widow (Tr. 154, 161). His sister's daughter lives in the United States and provides financial support (Tr. 158, 210-211). His sister has never worked for the Afghan military or government (Tr. 154). He met his sister one time while he was in Afghanistan (Tr. 211). He has irregular contact by telephone with his sister about four to six times a year to ask about her health (Tr. 156). Her Afghan identification card is attached to the record as Ex. J (Ex. 159-161). Applicant did not discuss his duties in Afghanistan with his sister (Tr. 161-162). Applicant explained he was in Afghanistan on business (Tr. 162, 212-213).

One of Applicant's brothers (age 75) passed away in July 2007 while Applicant was working for the contractor in Afghanistan (Tr. 190-197, Ex. H, I). Applicant asked for permission to attend the funeral in Afghanistan (Tr. 190-197). The contractor granted permission and arranged for a flight from Applicant's location to the location of the funeral (Tr. 190, 192).

No one has ever contacted Applicant or his Applicant's relatives in Afghanistan to put pressure on Applicant to provide classified information (Tr. 198, 199). If anyone attempted to do so, Applicant would report the attempt to U.S. law enforcement authorities (Tr. 198-199). Even if their lives were threatened, he would report the attempt to U.S. authorities (Tr. 199).

Applicant helped the United States, France and Britain with translation and advice when he lived in Pakistan for two years while the war with the Soviets was occurring in Afghanistan (Tr. 200-202, 205). He volunteered to help the United States in Afghanistan because he considered the Taliban to be criminals out to destroy the Afghanistan (Tr. 200). Applicant knew the Afghan culture and the environment and believed he could help the United States fight the criminals (Tr. 200). He was happy that the United States had helped the Afghan people who had suffered so much for so many years and was proud to be part of that effort (Tr. 211-212).

Recommendations and Work Performance

Applicant's evaluation ending April 1, 2006, described him as an outstanding linguist, who quickly builds rapport with the person he is interviewing (Tr. 179, Ex. Y). His goal is to become a career interrogator (Tr. 187-188, Ex. Y). Applicant received two certificates of appreciation from his employer for his interrogation contributions to the U.S. Army in Afghanistan (Tr. 180, 217, Ex. D, E). One certificate noted his "exceptional interpreter support facilitating the collection of invaluable intelligence in support of the [unit omitted] and the global war on terror" (Ex. D). It also highlighted his dedication to duty and personal sacrifices (Ex. D).

A real estate agent and part time taxi driver, who is Applicant's "very close friend" and neighbor, has known Applicant for five and a half years (Tr. 41-46, 50). Their families frequently socialize together (Tr. 44-45). Applicant is very trustworthy, very nice, "very polite and gentle guy" (Tr. 46, 49). He is generous, friendly, honest and helpful (Tr. 47, 49). Applicant does not discuss what he did while in Afghanistan for the last few years (while holding a security clearance) (Tr. 51-52).

A driver for handicapped people and Applicant's friend lived in Applicant's neighborhood in Afghanistan in the 1980s (Tr. 57-59). He met Applicant about seven years ago, when he saw Applicant in a shopping center in the United States (Tr. 60, 69). He decided to move into Applicant's apartment complex about three years ago (Tr. 60, 69). They live on the same floor of the same building (Tr. 67). Their families frequently socialize together (Tr. 61-62). Applicant is his best friend and is like an older brother to him (Tr. 62). He described Applicant as a "nice guy, very respectable, very kind . . . patient with the kids" and as "the best person" (Tr. 64, 67). Applicant is honest and law abiding (Tr. 65). Applicant does not discuss his duties while he was in Afghanistan (Tr. 64).

The head teller at a bank, with a second job in a pharmacy was born in Afghanistan 41 years ago and came to the United States in 1996 (Tr. 76-77). Her father

was killed in Afghanistan and she received asylum as a refugee (Tr. 78-79). She is currently a U.S. citizen (Tr. 78). She lived in Applicant's building in the United States for two years (Tr. 80-81). She is a friend of Applicant's family (Tr. 80-82). She describes Applicant as honest a good father and husband (Tr. 82). He is friendly, helpful, honest and generous (Tr. 82-84). She knew Applicant went to Afghanistan; however, he did not discuss what he did there (Tr. 85). She knew Applicant had a brother in Afghanistan; however, Applicant did not talk about his brother except to say he is doing fine (Tr. 88).

Another friend who has known Applicant in Afghanistan before he came to the United States and in the United States described Applicant as honest, dedicated, ethical and loyal (Tr. 189, Ex. Z). Applicant is responsible and trustworthy (Ex. Z).

Applicant provided four training certificates (Ex. X) and a performance evaluation from his employer (Ex. Y). His rating indicates he either meets or exceeds expectations (Ex. Y). It was the only rating Applicant had received (Tr. 218).

Afghanistan

Afghanistan has been an independent nation since 1919. It was a monarchy until a military coup in 1973. Following a second military coup in 1978, a Marxist government emerged. In December 1979, the Soviet Union invaded and occupied Afghanistan, but freedom fighters known as mujahidin resisted the Soviet invasion. In February 1989, the Soviet Union withdrew pursuant to an agreement signed by Pakistan, Afghanistan, the United States, and the Soviet Union. The mujahidin were not a party to the agreement and refused to abide by it. The result was a civil war among several factions, including the Taliban. By the end of 1998, the Taliban controlled most of Afghanistan.

The Taliban committed atrocities against minority populations, and provided sanctuary to Osama Ben-Laden, Al Qa'ida, and other terrorist organizations. U.S. military forces, along with forces from a coalition partnership, forced the Taliban out of power by November 2001. With the assistance and support of the United States, a new democratic government took office in 2004.

Afghanistan's human rights record is generally poor, due to the continuing insurgency, the weak government, and ongoing recovery efforts from two decades of war. Abuses include extrajudicial killing, torture, and restrictions on individual rights and liberties. Killings by security forces, militias, terrorists and insurgents are a continuing problem. The weak government and internal instability have enabled hostile states, non-state actors, terrorists, and insurgents to continue operating in Afghanistan. "Afghanistan is a nexus of insurgency. A large part of the insurgent problem in the country is the Taliban, but there are other militant groups, and they often are facilitated by al Qa'ida. Mixed in with this is 'the effects of a narco-system that's been in this country for a long time . . . It's also mixed in with smuggling and criminality, and then there is a level of corruption that permeates this society. That's a formula for insecurity across Afghanistan."⁴

⁴Interview of Gen. David McKiernan, Commanding General, Afghanistan International Security Assistance Force, on Sept. 16, 2008, by Jim Garamone, American Forces Press Service, available at

Although there is no evidence that the Afghan government conducts intelligence operations against the United States, several terrorist groups conduct intelligence activities as effectively as capable state intelligence agencies.

“Violence is up in the country 30 percent over last year. Part of this is because the insurgents do not challenge NATO, U.S. or Afghan forces directly. Car bombs, roadside bombs, indirect fire and small-scale ambushes are their tactics now.”⁵ To date 554 U.S. military personnel have been killed in Operation Enduring Freedom in and around Afghanistan.⁶ The increased death toll in Afghanistan of U.S. military personnel is indicative of the enhanced dangers faced by those serving in Afghanistan. In calendar year 2007, 83 military personnel were killed in action in Afghanistan, and so far in calendar year 2008, 115 military personnel have been killed in action in Afghanistan.⁷ Attacks are not limited to U.S. military personnel. Terrorists target police, police recruits, government officials, civilians, and even school children and aid workers.

The U.S. has supported the emergence of a broad-based democratic government and is assisting the Afghan people with rebuilding their country and establishing a representative government that contributes to regional stability and respects human rights. In May 2005, the presidents of the two countries concluded a strategic partnership agreement committing both countries to a long-term relationship. On September 26, 2008, President Bush described Afghanistan as an ally in the war against terrorism and emphasized the progress and promise of future success in Afghanistan. President Bush lauded the efforts of Afghanistan, the United States and other countries in economic, education, and infrastructure development with a goal of a thriving democracy that will deny a safe haven to terrorists and extremists. The spectacular growth of the participation of women in Afghanistan society, education and the political process bodes well for Afghanistan’s future. Since 2001, the United States has provided \$31.9 billion for Afghanistan’s security and development. In September 2008, the United States announced a substantial increase in U.S. forces to be deployed to Afghanistan in the next several months.⁸ Secretary Gates noted on September 29, 2008:

In Afghanistan, as the president announced earlier this month, U.S. troop levels are rising, with the likelihood of more increases next year. Given its terrain, poverty, neighborhood, and tragic history, Afghanistan in many ways poses an even more complex and difficult long-term challenge than

<http://www.defenselink.mil/utility/printitem.aspx?print=http://www.defenselink.mil/news/newsarticle.aspx?id=51202> (AJ Ex. III).

⁵*Id.*

⁶Department of Defense casualty report as of October 30, 2008. Available at: <http://www.defenselink.mil/news/casualty.pdf> (AJ Ex. IVA).

⁷ Department of Defense chronological casualty report as of October 4, 2008. Available at <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/oefmonth.pdf> (AJ Ex. IV).

⁸ See n. 4, *supra*.

Iraq – one that, despite a large international effort, will require a significant American military and economic commitment for some time.⁹

In spite of efforts by the United States, the government of Afghanistan, and our other allies, Afghanistan continues to be a violent, unsafe, unstable country. Terrorists have targeted international non-governmental organizations, United Nations workers, and recipients of non-governmental assistance. Suicide bombing attacks continue to inflict large numbers of casualties. Recognizing these challenges, Secretary Gates recently emphasized, “To be blunt, to fail – or to be seen to fail – in either Iraq or Afghanistan would be a disastrous blow to our credibility, both among our friends and allies and among potential adversaries.”¹⁰

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant Applicant’s 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 criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned.” See Exec.

⁹ Secretary of Defense Robert Gates’ Speech to the National Defense University on Sept. 29, 2008, at 1. Available at <http://www.defenselink.mil/utility/printitem.aspx?print=http://www.defenselink.mil/speeches/speech.aspx?speechid=1279> (AJ Ex. V).

¹⁰ *Id.*

Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. 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 that may disqualify the Applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an Applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. 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). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Foreign Influence

AG ¶ 6 explains the security concern about "foreign contacts and interests" stating:

[I]f the individual has divided loyalties or foreign financial interests, [he or she] 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.

AG ¶ 7 indicates three conditions that could raise a security concern and may be disqualifying in this case:

(a) contact with a foreign family member, business or professional associate, friend, or other person 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;

(b) connections to a foreign person, group, government, or country 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, group, or country by providing that information;

* * *

(d) sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion; [and]

* * *

(i) conduct, especially while traveling outside the U.S., which may make the individual vulnerable to exploitation, pressure, or coercion by a foreign person, group, government, or country.

Applicant's sister, brother, nephew and father-in-law are citizens and residents of Afghanistan. Applicant visited his brother and sister while he was serving in Afghanistan on behalf of the U.S. Army. He occasionally has telephone conversations with some of these family members living in Afghanistan. His nephew's employment is linked with the Afghan government because of his employment as a bodyguard. Applicant's spouse is a citizen of Afghanistan and a U.S. resident alien. There is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse, such as his father-in-law. See ISCR Case No. 01-03120 (App. Bd. Feb. 20, 2002). Applicant lived in Afghanistan in support of the U.S. armed forces from July 2005 to July 2008.

Applicant's travel to Afghanistan was to perform his duties as a linguist and his attendance at his brother's funeral was a secondary ancillary benefit, as he was already in Afghanistan serving on military orders. Serving in support of the U.S. Army does not raise any independent security significance. See ISCR Case No. 02-26978 (App. Bd. Sep 21, 2005). Applicant's financial support to his brother to defray part of the funeral costs demonstrates his ties of affection and obligation to his family, and it has no independent security significance.

The mere possession of close family ties with a person in a foreign country is not, as a matter of law, disqualifying under Guideline B. However, if only one relative lives in a foreign country, and an Applicant has frequent, non-casual contacts with that relative,

this factor alone is sufficient to create the potential for foreign influence and could potentially result in the compromise of classified information. See ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006); ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

The nature of a nation's government, its relationship with the United States, 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, the country is known to conduct intelligence operations against the United States, or there is a serious problem in the country with crime or terrorism. The U.S. participation in the war in Afghanistan places a significant, but not insurmountable burden of persuasion on Applicant to demonstrate that his relationship with family members living in Afghanistan does not pose a security risk and he is not in a position to be forced to choose between loyalty to the United States and his family living in Afghanistan. With the ongoing war with terrorists in Afghanistan, it is conceivable that terrorists would target any Afghan citizen or former Afghan citizen living in Afghanistan or the United States in an attempt to gather valuable information from the United States.

There is evidence that terrorists seek classified information from the United States. Applicant's connections to his family members living in Afghanistan create a potential conflict of interest because these relationships are sufficiently close to raise a possible security concern about his desire to help these relatives living in Afghanistan by providing classified information.

The Government produced substantial evidence of Applicant's relationships and contacts with his spouse and family members living in Afghanistan to raise the issue of potential foreign pressure or attempted exploitation. There is clear evidence that Afghanistan remains a very dangerous place, and Applicant is exposed to death and serious injury from terrorists, criminals, Al Qa'ida, or the Taliban when serving with the Army in Afghanistan. AG ¶¶ 7(a), 7(b), 7(d) and 7(i) apply requiring further review and analysis.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns including:

(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.;

(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;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the cognizant security authority;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

AG ¶¶ 8(a) and 8(c) cannot be applied with respect to his family members living in Afghanistan. Applicant has an emotional bond with his family members living in Afghanistan, and through his wife with his father-in-law, who lives in Afghanistan. Applicant communicates with them regularly and frequently (as the Appeal Board defines those terms). Although Applicant's close relationships with his family members living in Afghanistan are an important positive reflection of his character, the same close relationships raise security concerns for possible foreign influence. See n. 11, *infra*.

There is no evidence that his family members living in Afghanistan have been political activists or that they have high profile jobs with the Afghan government, the military or any news media. There is no evidence that terrorists, criminals or the Afghan Government have approached or threatened Applicant's family members living in Afghanistan for any reason. There is no evidence that these family members living in Afghanistan currently engage in activities which would bring attention to them or that they or other terrorists or other anti-U.S. elements are even aware of Applicant's relationship with those family members. As such, there is a reduced possibility that these relatives would be targets for coercion or exploitation. *But see* n. 11, *infra* (discussing limited weight that can be given to the absence of such information).

Applicant deserves some credit due to the reduced possibility that terrorists will exploit Applicant through his relatives in Afghanistan because of the low profile they have in Afghan society. Applicant's close relationship with his relatives in Afghanistan, his frequent contacts with them, the nature of the terrorist threat in Afghanistan, and the role of the United States in fighting the terrorists in Afghanistan and Pakistan, all weigh against mitigating security concerns. See ADP Case No. 05-17812 at 2, 3 n.2 (App. Bd. Jun. 11, 2007) (finding contacts with siblings in PRC "once every two or three months" not to be casual and infrequent); ISCR Case No. 04-12500 at 2, 4 (App. Bd. Oct. 26, 2006) (finding contacts with applicant's parents and sisters a total of about 20 times per year not casual and infrequent); ISCR Case No. 04-09541 at 2-3 (App. Bd. Sep. 26,

2006) (finding contacts with applicant's siblings once every four or five months not casual and infrequent).¹¹

Although the United States and Afghanistan are allies in the war on terrorism and the U.S. is committed to the establishment of a free and independent government in Afghanistan, terrorists and insurgents continue to threaten the government of Afghanistan, the interests of the United States, and those who cooperate with the U.S. and the government of Afghanistan.

Applicant's deep relationship with his three children living in the United States and his strong connections to the United States developed over the last 26 years tends to mitigate foreign interest security concerns. Applicant has "such deep and longstanding relationships and loyalties in the U.S., [he] can be expected to resolve any conflict of interest in favor of the U.S. interest." His children are U.S. citizens, and they all reside in the United States. They are fully inculcated with U.S. values. His wife attempted to pass the U.S. citizenship examination, but was unable to do so. She has serious medical problems and has enjoyed the benefits of advanced U.S. medical therapy and treatments. He has substantial investments in the United States, and no property or investments in Afghanistan. He has many friends and colleagues in the United States. He is a loyal, dedicated U.S. citizen. He has provided letters and witness statements to corroborate his loyalty and trustworthiness. Applicant has worked for government contractors with dedication and distinction. For more than three years, he has risked his life to support the U.S. Army in Afghanistan. He has put himself in harm's way often, working alongside U.S. forces in numerous military and civil operations. He has made significant contributions to national security, fully aware of the risks to himself.

¹¹In ISCR Case No. 06-17838 at 4 (App. Bd. Jan. 28, 2008), the Appeal Board discussed the precedential value of the decisions predating the revision of the Adjudicative Guidelines indicated in n. 3, *supra*, and determined where the language of the Directive is unchanged or not substantively altered, the precedent remains valid. AG ¶ 8(c) apparently adopted the Appeal Board's interpretation of Foreign Influence Mitigating Condition 1 (FIMC 1) under the previous guidelines. The Appeal Board had determined that contacts with relatives living in a foreign country must be both casual and infrequent to apply FIMC 1. See ISCR Case No. 04-12500 at 4 (App. Bd. Oct. 26, 2006). Moreover, contacts with such family members are presumed to be "not casual." *Id.* In the analysis of countervailing evidence, it is legal error to give significant weight to any of the following facts or factors: applicant's ties to the United States (ISCR Case No. 02-13595 at 5 (App. Bd. May 10, 2005)); lack of prominence of relatives living in a foreign country (*Id.*); "family members' low-key and noncontroversial lifestyle, and the fact that the Iranian government has not contacted them about Applicant" (ISCR Case No. 04-12500 at 4 (App. Bd. Oct. 26, 2006)); one relative living in a foreign country may be sufficient to negate FIMC 1 (ISCR Case No. 03-02382 at 5 (App. Bd. Feb. 15, 2006)); a foreign relative's fragile health (ISCR Case No. 02-29403 at 4 (App. Bd. Dec. 14, 2004)), advanced age (ISCR Case No. 02-00305 at 7 (App. Bd. Feb. 12, 2003)), financial independence (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)), or lack of financial dependency upon applicant (ISCR Case No. 03-15205 at 4 (App. Bd. Jan. 21, 2005)); foreign relatives spend part of each year in the U.S. (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the lack of any connection between the foreign relative and the foreign government in question (ISCR Case No. 02-31154 at 6 (App. Bd. Sep. 22, 2005)); the absence of any attempt at exploitation in the past (ISCR Case No. 03-15205 at 4 (App. Bd. Jan. 21, 2005)); a foreign country's friendly relationship with the U.S., its stable, democratic government, or its extensive foreign military agreements with the United States (ISCR Case No. 02-22461 at 5-6 (App. Bd. Oct. 27, 2005)) and an applicant's "refusal to travel to Iran" and "meticulous work habits and practice of strictly following the rules relating to his work" (ISCR Case No. 03-15205 at 3 (App. Bd. Jan. 21, 2005)). Notwithstanding, I conclude that many of these attributes are pertinent to the analysis in this case under the whole person concept.

He strongly wants to return to his duties with U.S. troops. All these circumstances demonstrate that Applicant will recognize, resist, and report any attempts by a foreign power, terrorist group, or insurgent group at coercion or exploitation. See ISCR Case No. 07-00034 at 2 (App. Bd. Feb. 5, 2008). I conclude AG ¶ 8(b) is established.

Whole Person Concept

In all adjudications, the protection of our national security is the paramount concern. The adjudicative process is a careful weighing of a number of variables in considering the “whole person” concept. It recognizes that we should view a person by the totality of his or her acts, omissions, and motivations as well as various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances and applying sound judgment, mature thinking, and careful analysis. Under the whole person concept, the Administrative Judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1:

- (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) 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.

Under Directive ¶ E2.2.3, “The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration” of the guidelines and the whole person concept.

Applicant promised to report any foreign or terrorist contacts seeking information to law enforcement authorities. I found this promise to be sincere and credible. However, in ISCR Case No. 06-24575 at 4 (App. Bd. Nov. 9, 2007), the Appeal Board reversed an administrative judge's decision to grant a PRC Applicant's clearance because he gave too much weight to the Applicant's “strong ties to the U.S.” and determined there was insufficient evidentiary support for the conclusion that he “can be trusted to resolve any conflict of interest . . . in favor of the U.S.” The Applicant in ISCR Case No. 06-24575 said he would not act against the U.S. if faced with the choice. However, the Appeal Board gives such promises little weight in their review of the evidence,¹² stating:

¹² Judge White's dissenting opinion cogently explains why credibility determinations and ultimately the decision whether to grant or deny a clearance should be left to the judge who makes witness credibility determinations. *Id.* at 5-7. See also ISCR Case No. 04-06386 at 10-11 (App. Bd. Aug. 25, 2006) (Harvey, J., dissenting) (discussing limitations on Appeal Board's authority to reverse hearing-level judicial decisions and recommends remanding cases to resolve material, prejudicial error).

An Applicant's stated intention as to what he would do in the future is of relatively little weight, given the record in this case. See ISCR Case No. 03-09053 at (App. Bd. Mar. 29, 2006) ("An applicant's stated intention about what he or she might do in the future under some hypothetical set of circumstances is merely a statement of intention that is not entitled to much weight, unless there is record evidence that the applicant has acted in a similar manner in the past under similar circumstances.")

Id. at 4. See also ISCR Case No. 07-00029 at 4 (App. Bd. Dec. 7, 2007) (criticizing the administrative judge's reliance on PRC-Applicant's promise to choose the U.S. over PRC should a conflict arise, and reversing the administrative judge's decision to grant a clearance). I respect the Appeal Board's position and give little weight to Applicant's promise to report any such contacts that might occur to law enforcement.

A Guideline B decision concerning the Afghanistan must take into consideration the geopolitical situation in Afghanistan, as well as the dangers existing in Afghanistan.¹³ Afghanistan is a diplomatic and strategic partner of the United States. Both countries have mutual interests and are allies in the war against terrorists and the Taliban. The United States has spent billions of dollars and hundreds of U.S. soldiers have been killed assisting Afghanistan against terrorists and the Taliban.

One element increasing the foreign influence security concern is Applicant's frequent contacts with his family in Afghanistan, his spouse's Afghan citizenship, and his own duties in Afghanistan. He has a close relationship with his family members in Afghanistan, and they are vulnerable to terrorist or Taliban coercion and non-coercive measures because of where they live. Because terrorists and the Taliban violate International law, they are more likely to use improper and/or illegal means to obtain classified information through Applicant's family living in Afghanistan. Applicant shares the dangers of serving in Afghanistan with thousands of U.S. citizens, and thousands of those same U.S. citizens hold security clearances and are subject to coercion to obtain classified information. Under the circumstances of an on-going war involving U.S. forces those dangers are not determinative.

There are significant factors supporting approval of Applicant's access to classified information. Applicant left Afghanistan 29 years ago, and after two years in Pakistan, he and his wife moved to the United States in 1982. He did not return to Afghanistan from 1982 until July 2005, when he went there with the U.S. Army as a translator. He became a U.S. citizen in 1995. His three children are U.S. citizens. He has approximately 60 relatives who live in the United States. He has a large bank account in the United States and no investments in other countries. Applicant's closest relatives are his wife and children. All of them live in the United States. His wife has medical problems, and she receives excellent medical care in the United States, whereas such care would not be available in Afghanistan. Applicant is an excellent employee and U.S. citizen. Applicant was candid, sincere, and credible at the hearing.

¹³ See ISCR Case No. 04-02630 at 3 (App. Bd. May 23, 2007) (remanding because of insufficient discussion of geopolitical situation and suggesting expansion of whole person discussion).

He was careful during the hearing not to disclose sensitive or classified information about his experiences with the U.S. military forces. He compellingly explained why his loyalty is to the United States, rather than to the Afghanistan. Applicant sees the fight against terrorists, insurgents, and extremists as necessary to protect the quality of life of his family members in Afghanistan. He has repeatedly demonstrated his bravery, reliability, and trustworthiness. He has mentally and emotionally resolved the conflict between the safety of his family and himself from terrorists and his desire to help the U.S. military forces. He has repeatedly placed himself in harm's way to ensure that the terrorists will not prevail in the struggle for Afghanistan's future. He thoroughly developed the evidence showing his connections to the United States and to Afghanistan. He provided corroborating statements concerning his loyalty and trustworthiness, and favorable recommendations of employers and friends who knew him in the United States and Afghanistan.

After carefully weighing the evidence of his connections to his family living in Afghanistan, and to the United States, I conclude Applicant has carried his burden of fully mitigating the foreign influence security concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"¹⁴ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

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 APPLICANT |
| Subparagraphs 1.a to 1.d: | For Applicant |

Conclusion

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

Mark W. Harvey
Administrative Judge

¹⁴See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).